

Is There a Way in the Labyrinth of Treaty Norms Leading to the Applicable Rule?: Investor-State Investment Settlement under the China-Korea FTA, China-Japan-Korea BIT and China-Korea BIT

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A. Introduction

With the signature of the Free Trade Agreement between the People's Republic of China and the Republic of Korea (CK FTA) in 2015 and subsequent ratification, there will be three sets of rules with respect to investment flow between China and Korea, i.e. the Agreement among the Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea on the Promotion and Protection of Investment (CKJ BIT, 2013), the Agreement of the

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Government between the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investment (CK BIT, 2007), as well as the investment chapter of the CK FTA.

A quick look at these rules will show that there are overlapping and even conflicts among them. While the agreements were designed to facilitate the investment flow between the countries concerned, the rules will pose intimidating barriers to the investors. And even for professional lawyers, this will be a labyrinth of treaty norms. A question arises in this regard: shall there be an integrated approach so that there will be a coherent canon of rules, which encompass a recognition of the rules in CK FTA, CJK BIT and CK BIT as mutually complimentary to each other, and *lex posterior derogat priori*.

The article is to be structured as follows: Part A is an introduction that highlights the issues; Part B is an examination of the major investments rules in the three sets of IIAs mentioned-above; Part C focuses on a discussion of how to determine the applicable rules among various treaties under the Vienna Convention and Part D concludes the article with a few remarks in the context of the IIAs.

B. Examination of Major Investment Rules

1. Definition and scope of investor-State investment disputes
 - a. Definition of "investment"

The definition of "investment" has a significant impact on the rest issues that may arise under a BIT or the investment chapter of an FTA, especially in regards to whether a dispute arising out of "investment" is within the scope of investor-state arbitration.

The CK BIT that entered into force in 2007 has a rather straightforward definition of "investment," which refers to "investments" as:

. . . every kind of asset, used as investment by investors of one Contracting Party within the territory of the other Contracting Party, in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment and shall include, in particular, though not exclusively:

- (a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights;
- (b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture;
- (c) claims to money or to any performance having an economic value associated with an investment;
- (d) intellectual property rights, including copyrights, trade marks, patents, industrial designs, technical

processes, know-how, trade secrets and trade names,
and goodwill;

(e) any right conferred by law or under contract and any
licenses and permits pursuant to law, including the right
to search for, extract, cultivate or exploit natural
resources.

Any alteration of the form in which assets are invested
shall not affect their classification as investment.¹

It is noteworthy that the CK BIT adopts an asset-based method to
define "investment." Unlike the CK BIT, an enterprise-based method was
adopted by the CJK BIT to define "investment." "Investment" is defined
to in the CJK BIT as:

every kind of asset that an investor owns or controls,
directly or indirectly, which has the characteristics of an
investment, such as the commitment of capital or other
resources, the expectation of gain or profit, or the
assumption of risk. Forms that investments may take
include:

- (i) an enterprise and a branch of an enterprise;
- (ii) shares, stocks or other forms of equity participation
in an enterprise, including rights derived therefrom;

¹ See CK FTA, at art. 1.

- (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to any performance under contract having a financial value associated with investment;
- (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
- (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.²

Generally speaking, defining “investment” with an enterprise-based

² *Id.* at art. 12.1; see CJK BIT, at art. 1.

method represents the latest trend of BITs when defining this term. It is not difficult to find that both BITs (i.e., the CK BIT and the CJK BIT) carry an open list of specific kinds of investments with the wording “any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges” and “shall include, in particular, though not exclusively.”

The CK FTA and the CJK BIT share the same definition of “investment.” Apparently, the CK FTA’s definition of “investment” is an exact copy of the one found in the CJK BIT. Both the CK FTA and CJK BIT are more sophisticated than the CK BIT as far as the definition of “investment” is at stake. There is an obvious discrepancy between them, *that is*, the former carries a longer list with an enterprise-based method, while the latter has a rather short list with an asset-based method. An enterprise-based method with a longer list, which intends to protect more investment activities between the contracting parties, is instrumental to fulfilling the main purpose of the investment rules to protect bilateral investment activities. In contrast, the CK BIT provides for an old-fashioned way of defining “investment.”

Apart from the method used in the definitions, there are some literal differences between the CK FTA, the CJK BIT and the CK BIT:

First, the CK BIT puts more emphasis on the restrictive conditions attached to the notion of “investment,” via the terms “*within the territory*” and “*in accordance with*

the applicable laws and regulations,” rather than the definition of “investment” itself. It only describes “investment” as *“every kind of asset, used as investment.”* In contrast, the CK FTA and the CJK BIT explain what could be defined as *“used,”* it enumerates different modalities of *“used”* as *“owns or controls, directly or indirectly.”* The CK FTA and the CJK BIT also provide more details as to the *“characteristics”* of an investment, *“such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”* The above mentioned two specific precisions cannot be found in the CK BIT, which demonstrates that the CK FTA and the CJK BIT are more delicately drafted agreements concerning the definition of “investment.”

What’s more, comparing the items specified in the aforementioned three agreements, the CJK BIT and the CK FTA add

(i) an enterprise and a branch of an enterprise and (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts as new modalities of “investment”; divide (b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture into (ii) shares, stocks or other forms of equity participation in an

enterprise, including rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom; enrich the modality of “intellectual property rights”; supplement “any other tangible and intangible property” to “movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights.”

All the above mentioned literal differences lend support to the conclusion that the definition of “investment” in the CJK BIT is more sophisticated and concrete, The same approach is adopted by the CK FTA and represents a more advanced way of defining “investment” in China’s International Investment Agreements (IIAs).

b. Scope of Investor-State investment disputes

When it comes to the scope of investor-state investment disputes, the aforementioned three agreements tackle this topic in nearly the same way, with only slight difference when it comes to the wording of the definition of investor-State investment dispute subject to international arbitration. The CK BIT presents a basic and general stance on the method of definition, which reads:

. . . an investment dispute is a dispute between one Contracting Party and an investor of the other

*Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.*³

The CJK BIT differs slightly from the CK BIT in that it defines “an investment dispute” as:

*A dispute between a Contracting Party and an investor of another Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to the investor or its investments in the territory of the former Contracting Party.*⁴ CJK BIT not only details the “an alleged breach of this Agreement” as “an alleged breach of any obligation of the former Contracting Party under this Agreement,” but specifies “an investment of an investor” as “the investor or its investments in the territory of another Contracting Party.”

The CK FTA is not different from the CJK BIT in this regard. It only contains one minor change compared to the CJK BIT. Pursuant to CK

³ See CK BIT, at art. 9.1.

⁴ See CJK BIT, supra note 2, at art. 15.1.

FTA:

*. . . an investment dispute is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor or its covered investments in the territory of the former Party.*⁵ The CK FTA adds “covered” to “investments in the territory.”

2. Treatment of Foreign investors

a. National Treatment

Pursuant to the CK BIT, national treatment is phrased as such:

*Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to its own investors and their investments (hereinafter referred to as “national treatment”) with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as “investment and business activities”).*⁶

⁵ CK FTA, *supra* note 1 at art. 12.12.1.

Under the CJK BIT, the national treatment obligation is spelled out differently. The CJK BIT provides that:

[E]ach Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities.⁷

Similarly, the CK FTA reads:

Each Party shall in its territory accord to investors of the other Party and to covered investment treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities.⁸

These national treatment clauses differ in that under the CK BIT, the national treatment obligation is only *with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments*. It is clear that the national treatment obligation under the CK BIT is thus merely limited to the post-establishment phase, while it is vague under the CJK BIT or the CK FTA whether national treatment shall be accorded to the prospective investors in the

⁶ CK BIT, *supra* note 3 at art. 3.1.

⁷ CJK BIT, *supra* note 2 at art. 3.

⁸ CK FTA, *supra* note 1 at art. 12.3.

pre-establishment phase. The vagueness is indicated under Article 2.2 of CJK BIT and Article 12.2.2 of CK FTA, which basically state that each Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of the other Party. In contrast, the most-favored-nation treatment under both the CJK BIT and the CK FTA, which is clearly stated to be accorded to investors and covered investments "*with respect to investment activities and the matters relating to the admission of investment,*" applies to the pre-establishment phase.

b. Most-favored-nation Treatment

According to the CK BIT, each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favorable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as "most-favored-nation treatment") with respect to investments and business activities, including the admission of investment.⁹ However, it has the following exceptions: the benefit of any

⁹ See CK BIT, *supra* note 3 at art. 3.3.

treatment, preference or privilege by virtue of: (a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions; (b) any international agreement or arrangement relating wholly or mainly to taxation; (c) any arrangements for facilitating small scale frontier trade in border areas.¹⁰ Pursuant to the CJK BIT, each Contracting Party is required within its territory, to accord to investors of another Contracting Party and to their investments, treatment no less favorable than that it accords in like circumstances to investors of the third Contracting Party or of a non-Contracting Party and to their investments with respect to investment activities and the matters relating to the admission of investment.¹¹ The most-favored-nation treatment provision cannot be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and to their investments any preferential treatment resulting from its membership of: (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation; (b) any international agreement or arrangement for facilitating small scale trade in border areas; or (c) any bilateral and multilateral international agreements involving aviation, fishery and

¹⁰ *Id.* at art. 3.4.

¹¹ *See* CJK BIT, at art. 4.1.

maritime matters including salvage.¹²

The CK FTA provides for similar provisions on most-favored-nation treatment and its exceptions. According to the CK FTA each Party shall, within its territory, accord to investors of the other Party and to covered investments treatment no less favorable than that it accords in like circumstances to investors of any non-Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 12.2.¹³

The exceptions to the most-favored-nation treatment are limited to:

... any preferential treatment resulting from its membership of:

(a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation; (b) any international agreement or arrangement for facilitating small scale trade in border areas; or (c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.¹⁴

In this regard, the agreement adds that the treatment accorded to investors of any non-Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of any

¹² *Id.* at art. 4.2.

¹³ See CK FTA, at art. 12.4.1.

¹⁴ *Id.* at art. 12.4.2.

non-Party and to their investments by provisions concerning the settlement of investment disputes between a Party and investors of any non-Party that are provided for in other international agreements.¹⁵

c. Access to the Courts of Justice

The issue here is whether the hosting state shall provide fair and equitable opportunity to the foreign investor to seek recourse to its domestic courts for redress where a dispute arises between the investor and the host state concerning expropriation and other measures affecting the foreign investment. Both the obligation of national treatment and the obligation of most-favored-nation treatment apply with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defense of their rights.¹⁶ The CJK BIT provides that:

Each Contracting Party shall in its territory accord to investors of another Contracting Party treatment no less favorable than that it accords in like circumstances to its own investors, investors of the third Contracting Party or of a non-Contracting Party, with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit

¹⁵ *Id.* at art. 12.4.3.

¹⁶ *See* CK BIT, *supra* note 3, at art. 3.5.

and in defense of such investors' rights.¹⁷

Similarly, the CK FTA reads:

Each Party shall in its territory accord to investors of the other Party treatment no less favorable than that it accords in like circumstances to its own investors and investors of any non-Party, with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.¹⁸

d. Minimum Standard of Treatment

Pursuant to the CJK BIT, each Contracting Party shall accord to investments of investors of another Contracting Party fair and equitable treatment and full protection and security.¹⁹ This is called "minimum standard treatment" in most IIAs, although under the CJK BIT it is addressed under the title "General Standard of Treatment." In this regard, the minimum standard of treatment amounts to "fair and equitable treatment" and "full protection and security." The CJK BIT further defines the concepts of "fair and equitable treatment" and "full protection and security," which do not require treatment in addition to

¹⁷ See CJK BIT, *supra* note 2, at art. 6

¹⁸ See CK FTA, *supra* note 1, at art. 12.6.

¹⁹ See CJK BIT, *supra* note 2, at art. 5.

or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. Under the CJK BIT, fair and equitable treatment and full protection and security are narrower than or at most equivalent to the treatment accorded in accordance with generally accepted rules of international law.

Under the CK FTA, the minimum standard treatment obligation is differently phrased: “each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”²⁰ It is not difficult to find that the minimum standard of treatment is equated to the “treatment in accordance with customary international law,” which is broader than “fair and equitable treatment” and “full protection and security.”²¹

Under the CK FTA, “fair and equitable treatment” and “full protection and security” are more clearly explained: The obligation to provide “fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law”; and the obligation to provide “full protection and

²⁰ See CK FTA, *supra* note 1, at art. 12.5.1.

²¹ See CK FTA, *supra* note 1, at art. 12.5.2.

security requires each Party to provide the level of police protection required under customary international law.²²

It is noteworthy that pursuant to both the CJK BIT and the CK FTA, a “determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of “fair and equitable treatment” and “full protection and security.”²³

Two unique points are equally noteworthy. One is that the CJK BIT solidifies the concession of the host state by requiring that each Contracting Party shall observe any written commitments in the form of an agreement or contract it may have entered into with regard to investments of investors of another Contracting Party.²⁴ The other is that unlike the CK BIT and the CJK BIT, the CK FTA specifically imposes an obligation of “non-discriminatory treatment with respect to measures it adopted or maintained relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.”²⁵

²² *Id.*

²³ See CJK BIT, *supra* note 2, at art. 5.1; CK FTA, *supra* note 1, art. 12.5.3.

²⁴ See CJK BIT, *supra* note 2, at art. 5.2.

²⁵ See CK FTA, *supra* note 1, at art. 12.5.4.

3. Expropriation and compensation

Whether and to what extent expropriation of foreign investment is permissible in the host state is an important issue that a BIT must address. Under the CK BIT, the rule concerning expropriation is spelled out as follows:

1. Neither Contracting Party shall expropriate, nationalize or take other similar measures, directly or indirectly, (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:
 - (a) for the public interests;
 - (b) in accordance with domestic law and international standard of due process of law;
 - (c) without discrimination;
 - (d) against compensation in accordance with paragraph.²⁶

In contrast, the CJK BIT has a far more sophisticated rule for expropriation:

1. No Contracting Party shall expropriate or

²⁶ See CK BIT, *supra* note 3, at art. 4.

nationalize investments in its territory of investors of another Contracting Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Agreement as “expropriation”) except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with its laws and international standard of due process of law; and
- (d) upon compensation pursuant to paragraphs 2, 3 and 4.²⁷

Similarly, the CK FTA provides in relation to expropriation that:

Neither Party shall expropriate or nationalize a covered investment or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Chapter as “expropriation”) except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with its laws and international standard of due process of law; and
- (d) upon compensation pursuant to paragraphs 2

²⁷ CJK BIT, *supra* note 2, at art. 11.1.

through 4.²⁸

Evidently, the CJK BIT and the CK FTA adopt a similar standard concerning expropriation. Compared with the CK BIT, both the CJK BIT and the CK FTA are more assertive towards “measures equivalent to expropriation,” while the CK BIT refers to “direct or indirect” expropriation.²⁹ Therefore, more government measures are subject to the disciplines under the CJK BIT and the CK FTA than under the CK BIT.

When a measure is established as being “equivalent to expropriation” is established, the next step is certainly the determination of compensation. When it comes to compensation, the CK BIT, the CJK BIT and the CK FTA adopt a similar standard similar to each other, i.e., “fair market value of the expropriated investments.”³⁰ In contrast, the CK BIT’s reference to “fair and reasonable compensation”³¹ is not as specifically operational as the CJK BIT and the CK FTA. Moreover, both the CJK BIT and the CK FTA provide that the fair market value shall not reflect any change in value occurring because the expropriation had

²⁸ See CK FTA, *supra* note 1, at art. 12.9.

²⁹ See CK FTA, *supra* note 1, at art. 12.9.1; CJK BIT, *supra* note 2, at art. 11; CK BIT, *supra* note 3, at art. 4.1

³⁰ See CJK BIT, *supra* note 2, at art. 11.2; and CK FTA, *supra* note 1, at art. 11.9.2.

³¹ See CK BIT, *supra* note 3, at art. 5.2.

become publicly known earlier.³²

There is an obvious difference between the CK BIT and the two other agreements in that pursuant to the CK BIT, “compensation shall be equivalent to the fair market value of the expropriated investment *immediately before the expropriation occurred* (emphasis added),”³³ while according to both the CJK BIT³⁴ and the CK FTA³⁵, “the compensation shall be equivalent to the fair market value of the expropriated investments *at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier* (emphasis added).”

The three IIAs require that the compensation shall be paid without delay and shall carry interest from the date of expropriation until the date of payment. In this regard, the main difference is that the CK BIT only prescribes “*appropriate interest*,” while the CJK BIT and the CK FTA mandates the payment of interest “*at commercially reasonable rate*.” The three IIAs all require that the payment of compensation shall be effectively realizable, freely transferable and freely convertible into the currency of the Contracting Party of the investors concerned and into freely usable currencies. However, while the CJK BIT and the CK FTA do

³² *Supra* note 30.

³³ See CK BIT, *supra* note 3, at art. 4.2.

³⁴ See CJK BIT, *supra* note 2, at art. 11.2.

³⁵ See CK FTA, *supra* note 3, at art. 12.9.2.

not impose restrictions on the “freely usable currencies,”³⁶ the CK BIT requires the currencies to be “as defined in the Articles of the Agreement of the International Monetary Fund.”³⁷

It is also noteworthy that all the three IIAs – the CK BIT, the CJK BIT and the CK FTA – mandate that “the investors affected shall have a right of access to the courts of justice or administrative tribunals” according to the legal procedure of the host state making the expropriation “for a prompt review of the investors’ case and the amount of compensation in accordance with the principles set out in this Article.”³⁸

4. Exclusion of disputes from the subject matters of international arbitration

a. Time of limitation

A comparison reveals that all the aforementioned three agreements employ time of limitation as a mean to exclude disputes from falling within the scope of international arbitration. The three agreements provide for a three-year time of limitation for arbitration, which suggests that no claim may be submitted to arbitration if more than three years

³⁶ See CJK BIT, *supra* note 2, at art. 11.3 and CK FTA, *supra* note 1, at art. 12.9.

³⁷ See CK BIT, *supra* note 3, at art. 4.2.

³⁸ See CK BIT, *supra* note 3, at art. 4.3; CJK BIT, *supra* note 2, at art. 11.4 and CK FTA, *supra* note 1, at art. 12.9.

have elapsed.³⁹

The only difference worth mentioning is that, unlike the CK BIT, both the CK FTA and the CJK BIT insert “*whichever is the earlier*” after “*the date on which the disputing investor first acquired, or should have first acquired,*” which adds clarity and specificity to the limitation. Needless to say, a shorter time limitation for arbitration means fewer cases will be brought to international arbitration. Behind the change lies a rather conservative approach towards international arbitration.

b. Intellectual property

The aforementioned three IIAs only prescribe intellectual property (“IP”) in the provisions concerning definition of investment and there is no IP content concerning investor-state investment disputes. According to Article 31 of Vienna Convention, the whole text of treaty should be taken into consideration when interpreting provisions. As IP is a form of investment listed in the definition of “investment,” IP disputes between investors and state could resort to arbitration in the case of no IP exclusion.

c. Prudent carve-out

A prudent carve-out clause in a BIT or investment chapter in an FTA

³⁹ See CK BIT, *supra* note 3, at art. 9.7; CKJ BIT, *supra* note 2, at art. 15.11 and CK FTA, *supra* note 1, at art. 12.12.11.

is a provision that explicitly specifies that the arbitral tribunal for international investment disputes between investors and countries does not have jurisdiction over prudential carve-out issues. The CK BIT does not have any clause concerning prudential measures, while the CJK BIT uses two clauses in Article 20 to reserve the right of “taking measures relating to financial services for prudential reasons.” Although the CJK BIT accords the Contracting Party the power to take financial measures for prudential reasons, it does not authorize Contracting Party to take measures that do not conform with the CJK BIT as a means of avoiding its obligation under the BIT.⁴⁰ In this regard, it is noted that CJK BIT does specify what measures are eligible. In the event of dispute thereafter, such issues shall be decided by the arbitration tribunal established by the Contracting Parties.

Under the CK FTA, the prudent carve-out clause is incorporated into a Services-Investment Linkage clause.⁴¹ Unlike the CJK BIT, the CK FTA specifies the obligations which cannot be compromised by “*any measure affecting the supply of financial service by a financial service supplier of a Party through commercial presence in the territory of the other Party,*”⁴² thus providing more predictability and transparency as to which measures are eligible as prudential carve-out measures.

⁴⁰ See CJK BIT, *supra* note 2, at art. 20.2

⁴¹ See CK FTA, *supra* note 1, at art. 12.18.

⁴² See CK FTA, *supra* note 1, at art. 12.18.2.

5. Pre-set consultation, fork-in-the-road provision and exhaustion of local remedies

Pre-set consultation refers to the situation where an investor is required to resort to consultation for the purpose of resolving the investment dispute between itself and the host state; only a failure of the attempt will entitle the investor to resort to international arbitration. The CK BIT requires a pre-set consultation before the investor of one Contracting Party can resort to other means of resolution of disputes between it and the government of the other Contracting Party. *“In the event of an investment dispute, the investment dispute shall, if possible, be settled by consultation or negotiation.”*⁴³

While both the CJK BIT and the CK FTA have a sophisticated clause concerning pre-set consultation, they also share the same wording:

*Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute and the Party that is a party to the investment dispute.*⁴⁴

The difference between the CJK BIT and the CK FTA lies in that the former adds that:

⁴³ See CK BIT, *supra* note 3, at art. 9.2.

⁴⁴ See CK FTA, *supra* note 1, at art. 12.12.2 and CJK BIT, *supra* note 2, at art. 15.2.

*A written request for consultation shall be submitted to the disputing Contracting Party by the disputing investor before the submission of the investment dispute to the arbitration.*⁴⁵

Then the CJK BIT lists the specific requirements for the written request by four conditions and three notices. Therefore, the idea of pre-set consultation stays the same in the aforementioned three agreements, and the CJK BIT carries a more specific modality requirement for the pre-set consultation. The specific requirement of pre-set consultation sets more obstacles when foreign investor when they intend to submit a claim to international arbitration.

The change is reflective of the general attitude towards international arbitration. This attitude is partly a result of the recent legitimacy crisis of investor-State arbitration and China is among the counties who take a more conservative attitude towards investor-State arbitration.

A fork-in-the-road provision means that both domestic courts' jurisdiction and international tribunal's jurisdiction over an investor-State investment dispute is final and one-way, and investors can not turn around as long as their choices are made, while exhaustion of local remedies means domestic judicial or administrative procedure is a pre-condition for international arbitration.

⁴⁵ See CJK BIT, *supra* note 2, at art. 15.2.

The aforementioned three agreements all contain fork-in-the-road provisions⁴⁶, which means that the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other court or tribunal for a resolution.

Besides fork-in-the-road provision, both three agreements require of prior domestic administrative review procedure before international arbitration⁴⁷ with a soft wording as “*the disputing Contracting Party may require the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration.*”

While the three agreements specify that a four-month period for the domestic administrative review procedure, both the CJK BIT and the CK FTA require the disputing state to “*require the investor concerned to go through the domestic administrative review*” “without delay.” Equally noteworthy is that a note is inserted to emphasize the right to arbitration of the investor regardless of the decision made under the domestic administrative review procedure.⁴⁸

⁴⁶ See CK FTA, *supra* note 1, at art. 12.12.5; CJK BIT, *supra* note 2, at art. 15.3; and CK BIT, *supra* note 3, at art. 9.4.

⁴⁷ See CK FTA, *supra* note 1, at art. 12.12.7; CJK BIT, *supra* note 2, at art. 15.7; and CK BIT, *supra* note 3, at art. 9.3.

⁴⁸ *Id.*

6. Investor-State Investment Dispute Arbitration

a. Arbitration institution and arbitration rules

The CK FTA and the CJK BIT have the same provision concerning arbitration institutions and arbitration rules: which said investors can submit disputes to either a competent domestic court or an arbitration tribunal that arbitrates under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any arbitration rules agreed upon by the disputing Party.⁴⁹

Under the CK BIT, the arbitration institutions include tribunals established under the ICSID Convention and an ad hoc arbitration tribunal established under the UNCITRAL Arbitration Rules or any other arbitration rules agreed upon by both parties.⁵⁰

A comparison shows that the ICSID Additional Facility Rules are only available under the CK FTA and the CJK BIT, while the arbitration institution can be the same in the three IIAs. The additional arbitration rules available to the parties make the arbitration procedure more specific and less indistinct.

b. Applicable law in arbitration

Only the CK BIT mentions the application law in arbitration:

⁴⁹ See CK FTA, *supra* note 1, at art. 12.12.3 and CJK BIT, *supra* note 2, at art. 15.2.

⁵⁰ See CK BIT, *supra* note 3, at art. 9.3.

*The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the principles of international law accepted by both Contracting Parties.*⁵¹

According to the CK BIT, applicable law in arbitration is the domestic law of contracting party with its conflict laws, as well as the principle of international law accepted by both contracting parties. Both CJK BIT and CK FTA do not contain such kind of clause in their texts.

c. Remedies available in arbitral awards

The CK BIT provides in arbitral awards for no remedy. Under the CJK BIT and the CK FTA, “*monetary damages and applicable interest*” and “*restitution of property*”⁵² are two kinds of remedies available in arbitral awards.

In lieu of restitution, monetary damages and any applicable interest paid by contracting party could also become available remedies. This evolution provides better protection to foreign investors, which conforms to the general purpose of the preamble of IIAs. Thus, China shows its will to provide better protection to investors, based on the fact that Chinese

⁵¹ See CK FTA, *supra* note 3, at art. 9.6.

⁵² See CJK BIT, *supra* note 2, at art. 15.9.2; CK FTA, *supra* note 1, at art. 12.12.9.b(ii).

investors are becoming increasingly active in overseas investment activities.

7. Denial of benefits

The “denial of benefits” clause intends to prevent foreign investors from abusing IIAs so as to maximize their interest via “treaty shopping”⁵³. As treaty shopping becomes increasingly popular among international investors, many countries tend to have in place a denial of benefits clause in their IIAs to avoid damages caused to host country’s sovereignty. The CK BIT does not contain a denial of benefits clause, while the CJK BIT provides in this regard that:

1. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party:

⁵³ The term “treaty shopping” or “nationality planning” refers to a conduct where a foreign investor routes their investment through a third country in order to benefit from a favorable investment treaty that such third country has with their actual or planned host state. See Skinner, M., Miles, C., A., and Luttrell, S., Access and Advantage In Investor-State Arbitration: The Law And Practice Of Treaty Shopping, 3 JWELB 260 at p260-261 (2010).

(a) does not maintain normal economic relations with the non-Contracting Party; or

(b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party or of the denying Contracting Party, and the enterprise has no substantial business activities in the territory of the latter Contracting Party.

Note: For the purposes of this Article, the term "non-Contracting Parties" shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade

*Organization as of the date of entry into force of this Agreement.*⁵⁴

The CK FTA contains a similar denial of benefits clause, which reads:

1. *A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the denying Party:*

(a) does not maintain normal economic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. *A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party or of the denying Party, and the enterprise has no substantial business activities in the territory of the latter Party.*⁵⁵

⁵⁴ CJK BIT, *supra* note 2, at art. 22.

C. Determination of the Applicable Rule among Various Treaties:
under the Vienna Convention

Given the possible labyrinth of norms contained in the various valid treaties between the same Contracting Parties, there are several ways of determining and applying the appropriate rule:

- Making a concrete act of individual application in accordance with the conflict-of-convention clause/ conflict of convention provision(s), if applicable; or
- Laying down a subsidiary rule concerning the application of the rules.

In both cases, applying the rule requires the determination of the applicable rule in the first place.

The Vienna Convention on the Law of Treaties (Vienna Convention), which provides a set of rules for determining the applicable rule between various treaties, illustrates the above methods.⁵⁶ Article 30 of the Vienna

⁵⁵ CK FTA, *supra* note 1, at art. 12.15.

⁵⁶ The ICSID practices show that arbitration tribunals almost invariably start by invoking the Vienna Convention on the Law of Treaties (VCLT) when interpreting treaties. In referring to the rules of interpretation contained in the VCLT, tribunals sometimes point out that these rules reflect customary international law. Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on, 24-25 (2010).

Convention, entitled "*Application of successive treaties relating to the same subject-matter*," states:

1. *Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.*

2. *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*

3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*

4. *When the parties to the later treaty do not include all the parties to the earlier one:*

(a) Asas between States parties to both treaties the same rule applies as in paragraph 3;

(b) Asas between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to articleArticle 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

The Vienna Convention leaves the applicable rule to be determined by the Contracting Parties; the treaty that the Contracting Parties have chosen to prevail among the conflicting treaties between them is the one that shall prevail.⁵⁷ The following conflict-of-conventions clause can be found in the CJK BIT. Article 25 of the CJK BIT, entitled "Relation to Other Agreements" states that:

Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement,

⁵⁷ Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 115 U.N.T.S. 331.

*so long as such a bilateral agreement is in force.*⁵⁸

It is further noted and confirmed that, when an issue arises between an investor of a Contracting Party and another Contracting Party, nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral investment agreement between those two Contracting Parties which is considered by the investor to be more favorable than this Agreement.⁵⁹

In light of this conflict-of-conventions clause, a foreign investor may invoke a CJK BIT provision to assert his rights. He may also choose to invoke a different provision in the CK BIT to assert his rights. Article 30 of the Vienna Convention does not affect his right to invoke either provision.

However, a problem arises when a foreign investor does not invoke either provision as the legal basis for his claim. In that context, the question arises: which provision, either the provision contained in the CK BIT or in the CJK BIT, should prevail? The question also arises equally when it comes to the issue of determining which treaty provision should prevail between the CK FTA and the CK BIT, and between the CK FTA and the CJK BIT,

⁵⁸ CJK BIT, *supra* note 2, at art. 25.

⁵⁹ See Note following Article 25 of CJK BIT, *supra* note 2.

The Vienna Convention provides a set of rules for interpreting treaties.⁶⁰ Among the principles contained in Article 31 of the Vienna Convention, an interpretation that looks at the treaty's object and purpose is particularly popular. In the context of BITs, this often leads to an interpretation that is favorable to investors. For instance, the Tribunal in *Noble Ventures v. Romania* said:

The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favor of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II (2)(c) [an umbrella clause] of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions.⁶¹

⁶⁰ According to Article 31, treaties have to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Treaty. Article 32 further notes that recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to conform the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (*effet utile*), which, too plays an important role in interpreting treaties.

⁶¹ Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON, 129, 131 (2010).

The most frequent way to find a treaty's object and purpose was to look at the preamble. The Tribunal in *Siemens v. Argentina* said in this respect:

The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.⁶²

The ICSID practices therefore lend themselves to the following

⁶² *Id.* at 131-132.

conclusion: where the provisions in the CK BIT, the CJK BIT and the CK FTA are different, whichever is in the interest of investment flow and instrumental to the protection of foreign investment shall prevail.

D. Concluding Remarks

The similarities and differences in the CK BIT, the CJK BIT and the CK FTA offer various possibilities for how to determine the applicable rules. Article 30 of the Vienna Convention provides a partial solution: the conflict-of-conventions clause, which can be found in the consecutive agreements in question, may be referred to in order to determine the applicable rule. Among the aforesaid three agreements, unfortunately, there is a conflict-of-conventions rule in the CJK BIT regarding its relation to the CK BIT. At the simplest level, it seems plausible that the foreign investor would be allowed to choose the applicable treaty provision among the three sets of investment rules. A closer look will reveal, however, that even this seemingly simple method has narrow limits. First, both the CJK BIT and the CK FTA contain a denial of benefits clause to exclude treaty shopping. Second,; if the investor invokes neither the CK BIT provision nor the CJK BIT provision to determine his rights and obligations, the issue of determining the applicable treaty rule still remains.

The Vienna Convention offers further rules for the application of successive treaties relating to the same subject-matter and

interpretations of treaty rules.

Article 30 of the Vienna Convention provides that the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty when all the parties to the earlier treaty are also parties to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59.⁶³ Article 30.4(a) also stipulates that when the parties to the later treaty do not include all the parties to the earlier one as between States parties to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.⁶⁴ It can be inferred from the paragraphs that *lex posterior derogat priori* when the provisions of an earlier treaty are incompatible with those of the latter treaty. This rule applies to the issue of determining the applicable rules between the CK BIT, the CJK BIT, and the investment chapter of the CK FTA.

Faced with conflicts between the various rules, a tribunal mandated with the jurisdiction to settle an investor-state dispute needs to ask itself the following questions:

1. Is treaty-shopping allowed in the three instruments?
2. *Lex posterior derogat priori*?

⁶³ See Vienna Convention, *supra* note 57, at art. 30.3.

⁶⁴ See Vienna Convention, *supra* note 57, at art. 30.4(a).

Since Article 25 of the CJK BIT serves as the conflict-of-conventions rule to determine the applicable rule between the CK BIT and the CJK BIT, the foreign investor shall be allowed to choose the applicable law to support his claims.; Where he does not make such a choice, *lex posterior derogat priori* shall apply.

When it comes to determining of the applicable rule among the CK BIT, the CJK BIT and the CK FTA, the denial of benefits clauses rule out the possibility that the foreign investor chooses the applicable rule.⁶⁵

Where no choice is allowed concerning the applicable rules, the author again suggests that *lex posterior derogat priori* shall apply. The Vienna Convention and the *travaux préparatoires* resonate in this regard. Article 31 of the Vienna Convention concerning treaty interpretation suggests that the object and purpose of the treaty should be taken into consideration as secondary criteria. As the Feasibility Study Report of the CK FTA, the important *travaux préparatoires*,⁶⁶ further exhibits, the CK

⁶⁵ Huang Shixi (黄世席), *Guoji Touzi Zhongcai Zhongdi Tiaoxuan Tiaoyue Wenti* (国际投资仲裁中的挑选条约问题) [The Treaty-Shopping in International Investment Arbitrations], *Fa Xue* (法学) [LAW SCIENCE], Legal Science, No.1., 2014 at 62.

⁶⁶ According to Article 32 of the Vienna Convention VCLT, the materials reflecting the preparatory work to a treaty only figure as supplementary means of interpretation. They are to be used only to confirm a meaning resulting from the primary means of interpretation contained in Article 31 or to determine the meaning if the primary means leave the meaning ambiguous or obscure, or lead to a result that is manifestly absurd or unreasonable. In practice, resort to *travaux préparatoires* seems to be determined less by their position among the canons of interpretation than by their availability even if they are inclined to do so.

FTA was in line with the gradual process of investment liberalization vis-à-vis the CK BIT or the CJK BIT. Against this backdrop, it is fair to argue that where there is a contradiction between the provisions of the investment chapter of the CK FTA and the CK BIT or between the provisions of the investment chapter of the CK FTA and the CJK BIT, the object and purpose of promoting gradual investment liberalization should be taken into account. In other words, the latter treaty—the CK FTA—shall be given priority where no applicable rule can be chosen by the foreign investor.

All these considerations boil down to one conclusion: an integrated approach is necessary in order to have a coherent canon of rules. That is to say, where the provisions in the CK BIT, the CJK BIT, and the CK FTA are different, whichever is in the interest of investment flows and instrumental to the protection of foreign investments shall prevail. Similarly, while following *lex posterior derogat priori*, the tribunal shall endeavor to view the IIAs as mutually complementary, which requires the chronological application of the rules in the CK FTA, CJK BIT, and the CK BIT where a latter agreement fails to provide for the rule for the investment activity in question.

APPENDIX

Clause	CK FTA	CJK BIT 2012	CK BIT 2007
<p>Definition of "investment"</p>	<p>Article 12.1 Investment means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include: (i) an enterprise and a branch of an enterprise; (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom; (iv) rights under contracts, including turnkey, construction,</p>	<p>Article 1 Investment means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include: (a) an enterprise and a branch of an enterprise; (b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (c) bonds, debentures, loans and other forms of debt, including rights derived therefrom; (d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (e) claims to</p>	<p>Article 1 "Investments" means every kind of asset, used as investment by investors of one Contracting Party within the territory of the other Contracting Party, in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment and shall include, in particular, though not exclusively: (a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights; (b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or</p>

	<p>management, production or revenue-sharing contracts; (v) claims to money and claims to any performance under contract having a financial value associated with investment; (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information; (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and</p>	<p>money and claims to any performance under contract having a financial value associated with investment; (f) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information; (g) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and (h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;</p>	<p>joint venture; (c) claims to money or to any performance having an economic value associated with an investment; (d) intellectual property rights, including copyrights, trade marks, patents, industrial designs, technical processes, know-how, trade secrets and trade names, and goodwill; (e) any right conferred by law or under contract and any licences and permits pursuant to law, including the right to search for, extract, cultivate or exploit natural resources. Any alteration of the form in which assets are invested shall not affect their classification as investment.</p>
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	<p>(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges. Investments also include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.</p>		
National treatment	<p>Article 12.3 1. Each Party shall in its territory accord to investors of the other Party and to covered investment treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities. 2. Paragraph 1</p>	<p>Article 3 1. Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities.</p>	<p>Article 3.1 Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their</p>

	<p>shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Chapter maintained by each Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Treatment granted to covered investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made.</p> <p>3. Each Party shall take, where applicable, all appropriate steps to progressively remove all the</p>	<p>2. Paragraph 1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Agreement maintained by each Contracting Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Treatment granted to investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made.</p> <p>3. Each Contracting Party shall take, where applicable, all appropriate steps to progressively remove all the non-conforming measures referred to in paragraph 2.</p>	<p>investments (hereinafter referred to as "national treatment") with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment and business activities").</p>
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	non-conforming measures referred to in paragraph 2.	Note: The People's Republic of China confirms that its measures referred to in paragraph 2 shall not be inconsistent with paragraph 2 of Article 3 of, and paragraph 3 of the Protocol to, the Agreement between the People's Republic of China and Japan Concerning the Encouragement and Reciprocal Protection of Investment, signed at Beijing, August 27, 1988.	
Most-favoured-nation treatment	Article 12.4 Each Party shall in its territory accord to investors of the other Party and to covered investments treatment no less favorable than that it accords in like circumstances to investors of any non-Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of	Article 4 Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to investors of the third Contracting Party or of a non-Contracting Party and to their investments with respect to investment activities and the matters relating to the admission of investment in	Article 3 3.Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors

	<p>Article 12.2.</p> <p>2. Paragraph 1 shall not be construed so as to oblige a Party to extend to investors and investments of the other Party any preferential treatment resulting from its membership of:</p> <p>(a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation;</p> <p>(b) any international agreement or arrangement for facilitating small scale trade in border areas; or</p> <p>(c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.</p> <p>3. It is understood that the treatment</p>	<p>accordance with paragraph 2 of Article 2.</p> <p>2. Paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and to their investments any preferential treatment resulting from its membership of:</p> <p>(a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation;</p> <p>(b) any international agreement or arrangement for facilitating small scale trade in border areas; or</p> <p>(c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.</p> <p>3. It is understood that the treatment accorded to</p>	<p>and investments and associated activities by the investors of any third State(hereinafter referred to as "most-favoured-nation treatment") with respect to investments and business activities, including the admission of investment.</p> <p>4. The provisions of Paragraph 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:</p> <p>(a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions;</p> <p>(b) any international</p>
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	<p>accorded to investors of any non-Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of any non-Party and to their investments by provisions concerning the settlement of investment disputes between a Party and investors of any non-Party that are provided for in other international agreements.</p>	<p>investors of the third Contracting Party or any non-Contracting Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of the third Contracting Party or any non-Contracting Party and to their investments by provisions concerning the settlement of investment disputes between a Contracting Party and investors of the third Contracting Party or between a Contracting Party and investors of any non-Contracting Party that are provided for in other international agreements. Note: For the purposes of this Article, the term "non-Contracting Parties" shall not include any separate customs territory within the meaning of the General Agreement on</p>	<p>agreement or arrangement relating wholly or mainly to taxation; (c) any arrangements for facilitating small scale frontier trade in border areas. 5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.</p>
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		Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.	
Access to the Courts of Justice	Article 12.6 Each Party shall in its territory accord to investors of the other Party treatment no less favorable than that it accords in like circumstances to its own investors and investors of any non-Party, with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.	Article 6 Each Contracting Party shall in its territory accord to investors of another Contracting Party treatment no less favorable than that it accords in like circumstances to its own investors, investors of the third Contracting Party or of a non-Contracting Party, with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.	Article 3.5 Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.
Minimum Standard of Treatment	Article 12.5 Each Party shall accord to covered investments treatment in accordance with customary international	Article 5 General Treatment of Investments 1. Each Contracting Party shall accord to investments of investors of another	Not applicable

	<p>law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.</p> <p>The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</p> <p>(a) "fair and equitable treatment" 6 includes the obligation not to</p>	<p>Contracting Party fair and equitable treatment and full protection and security. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this paragraph.</p>	
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	<p>deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law; and</p> <p>(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p> <p>4. Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses</p>		
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	<p>suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.</p> <p>5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:</p> <p>(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or</p> <p>(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, the latter Party shall provide the investor restitution, compensation, or both, as</p>		
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	<p>appropriate, for such loss. Any compensation shall be in accordance with Article 12.9, mutatis mutandis. 6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 12.3.</p>		
<p>Scope of Investor-State investment disputes</p>	<p>Article 12.12.1 An investment dispute is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor or its covered investments in the territory of the former Party.</p>	<p>Article 15.1 An investment dispute is a dispute between a Contracting Party and an investor of another Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to the investor or its investments in the territory of the former Contracting Party.</p>	<p>Article 9 An investment dispute is a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.</p>
<p>Expropriation</p>	<p>Article 12.9 1. Neither Party shall expropriate or nationalize a</p>	<p>Article 11 1. No Contracting Party shall expropriate or</p>	<p>Article 4 1. Neither Contracting Party shall</p>

	<p>covered investment or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Chapter as "expropriation") except:</p> <p>(a) for a public purpose;</p> <p>(b) on a non-discriminatory basis;</p> <p>(c) in accordance with its laws and international standard of due process of law; and</p> <p>(d) upon compensation pursuant to paragraphs 2 through 4.</p> <p>2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair</p>	<p>nationalize investments in its territory of investors of another Contracting Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Agreement as "expropriation") except:</p> <p>(a) for a public purpose;</p> <p>(b) on a non-discriminatory basis;</p> <p>(c) in accordance with its laws and international standard of due process of law; and</p> <p>(d) upon compensation pursuant to paragraphs 2, 3 and 4.</p> <p>2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair</p>	<p>expropriate, nationalize or take other similar measures, directly or indirectly, (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:</p> <p>(a) for the public interests;</p> <p>(b) in accordance with domestic law and international standard of due process of law;</p> <p>(c) without discrimination;</p> <p>(d) against compensation in accordance with paragraph 2.</p> <p>2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market</p>
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	<p>market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.</p> <p>3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time from the time of expropriation to the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Party of the investors concerned, and into freely usable currencies.</p> <p>4. Without prejudice to the</p>	<p>market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.</p> <p>3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time from the time of expropriation to the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Contracting Party of the investors concerned, and into freely usable currencies.</p> <p>4. Without prejudice to the provisions of Article 15, the investors affected by expropriation shall have a right of access to the courts of justice or</p>	<p>value shall not reflect any change in value occurring because the expropriation had become publicly known earlier. The compensation shall be paid without delay and shall carry appropriate interest from the date of expropriation until the date of payment. It shall be effectively realisable, freely transferable and freely convertible into the currency of the Contracting Party of the investors concerned and into freely usable currencies as defined in the Articles of the Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.</p> <p>3. Without prejudice to the provisions of Article 9, the</p>
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	<p>provisions of Article 12.12, the investors affected by expropriation shall have a right of access to the courts of justice or the administrative tribunals or agencies of the Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.</p>	<p>the administrative tribunals or agencies of the Contracting Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.</p>	<p>investors affected shall have a right of access to the courts of justice or administrative tribunals according to its legal procedure of the Contracting Party making the expropriation for a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.</p>
<p>Time of limitation</p>	<p>Article 12. 12.11 No claim may be submitted to the arbitration set out ..., if more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred the loss or damage.</p>	<p>Article 15.11 ..., no claim may be submitted to the arbitration set out in that paragraph, if more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred the loss or damage referred to in</p>	<p>Article 9.7 An investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.</p>

		paragraph 1.	
Prudential measure	<p>Article 12.18.2 Articles 12.5 (Minimum Standard of Treatment), 12.9 (Expropriation and Compensation), 12.10 (Transfers), 12.11 (Subrogation), 12.12 (Settlement of Investment Disputes between a Party and an Investor of the other Party), 12.13 (Special Formalities and Information Requirements), 12.15 (Denial of Benefits) and Annexes 12-A (Customary International Law), 12-B (Expropriation), 12-C (Transfers) of this Agreement shall apply, mutatis mutandis, to any measure affecting the supply of financial service by a financial service supplier of a Party through commercial presence in the territory of the other Party</p>	<p>Article 20 1. Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking measures relating to financial services for prudential reasons, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise supplying financial services, or to ensure the integrity and stability of the financial system. 2. Where the measures referred to in paragraph 1 do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Contracting Party's obligations under this Agreement.</p>	Not applicable

	pursuant to the Chapter 9 (Financial Services), only to the extent that they relate to a covered investment.		
Pre-set consultation	<p>Article 12.12.2 Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute (hereinafter referred to in this Article as "disputing investor") and the Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Party").</p> <p>Article 12.12.6 no claim may be submitted to the arbitration set out in paragraph 3 unless the disputing investor gives the disputing Party written waiver of any</p>	<p>Article 15.2 Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute (hereinafter referred to in this Article as "disputing investor") and the Contracting Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Contracting Party"). A written request for consultation shall be submitted to the disputing Contracting Party by the disputing investor before the submission of the investment dispute to the arbitration set out</p>	<p>Article 9.2 In the event of an investment dispute, the investment dispute shall, if possible, be settled by consultation or negotiation.</p>

	right to initiate before any competent court of the disputing Party with respect to any measure of the disputing Party alleged to constitute a breach referred to in paragraph 1.	in paragraph	
Fork-in-the-road clause	Article 12.12.5 Once the disputing investor has submitted an investment dispute to the competent court of the disputing Party or to one of the arbitrations set out in paragraph 3, the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other arbitrations set out in paragraph 3.	Article 15.5 Once the disputing investor has submitted an investment dispute to the competent court of the disputing Contracting Party or to one of the arbitrations set out in paragraph 3, the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other arbitrations set out in paragraph 3.	Article 9.4 Once the investor has submitted the dispute to the competent court of the State where the investment was made, to the ICSID, or to the ad hoc arbitration tribunal referred to in Paragraph 3 of this Article, the choice of one of the three procedures shall be final.
Exhaustion of local remedies	Article 12.12.7 When the disputing investor submits a written request for consultation to the disputing Party under	Article 15.7 When the disputing investor submits a written request for consultation to the disputing Contracting Party	Article 9.3 Provided that the Contracting Party involved in the dispute may require the investor concerned to go

	<p>paragraph 2, the disputing Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Party before the submission to the arbitration set out in paragraph 3.</p> <p>The domestic administrative review procedure shall not exceed four months from the date on which an application for the review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3. The investor may file an application for</p>	<p>under paragraph 2, the disputing Contracting Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration set out in paragraph 3.</p> <p>The domestic administrative review procedure shall not exceed four months from the date on which an application for the review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3. The investor may file an application for the review unless the four months consultation period as provided in paragraph 3 has</p>	<p>through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to international arbitration. The domestic administrative review procedures shall not exceed four months from the date an application for the review is first filed including the time required for documentation. If the procedures are not completed by the end of the four months, it shall be considered that the procedures are complete and the investor may proceed to an international arbitration. The investor may file an application for the review during the four months consultation or negotiation</p>
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	<p>the review unless the four months consultation period as provided in paragraph 3 has elapsed.</p> <p>Note: It is understood that any decision made under the domestic administrative review procedure shall not prevent the disputing investor from submitting the investment dispute to the arbitration set out in paragraph 3.</p>	<p>elapsed.</p> <p>Note: It is understood that any decision made under the domestic administrative review procedure shall not prevent the disputing investor from submitting the investment dispute to the arbitration set out in paragraph 3.</p>	<p>period as provided in paragraph 2 of this Article.</p> <p>Each Contracting Party hereby gives its consent for submission by the investor concerned of the investment dispute for settlement by binding international arbitration.</p>
<p>Arbitration institution and arbitration rules</p>	<p>Article 12.12.3, The investment dispute shall on the request of the disputing investor be submitted to either: (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available; (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are</p>	<p>Article 15.3 The investment dispute shall at the request of the disputing investor be submitted to either: (a) a competent court of the disputing Contracting Party; (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available; (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility</p>	<p>Article 9.3 In case of international arbitration, the dispute shall be submitted, at the option of the investor, to: (a) International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at</p>

	<p>available; (d) arbitration under the UNCITRAL Arbitration Rules; or (e) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules, provided that, for the purposes of subparagraphs (b) through (e): (i) the investment dispute cannot be settled through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Party; and (ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.</p>	<p>Rules are available; (d) arbitration under the UNCITRAL Arbitration Rules; or (e) if agreed with the disputing Contracting Party, any arbitration in accordance with other arbitration rules, provided that, for the purposes of subparagraphs (b) through (e): (i) the investment dispute cannot be settled through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Contracting Party; and (ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.</p>	<p>Washington on March 18, 1965; or (b) an ad hoc arbitration tribunal established under UNCITRAL Arbitration Rules or any other arbitration rules agreed upon by both parties;</p>
Applicable law in arbitration	Not applicable	Not applicable	Article 9.6 The arbitration

			award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the principles of international law accepted by both Contracting Parties.
Remedies available in arbitral award	Article 12.12.9(b) one or both of the following remedies, only if the disputing investor's loss or damage is attributed to such breach: (i) 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.	Article 15.9 (b) one or both of the following remedies, only if the disputing investor's loss or damage is attributed to such breach: (i) monetary damages and applicable interest; and (ii) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest, in lieu of restitution.	Not applicable
Denial of benefits	Article 12.15 1. A Party may deny the benefits of this	Article 22 1. A Contracting Party may deny the benefits of this	Not applicable

	<p>Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the denying Party:</p> <p>(a) does not maintain normal economic relations with the non-Party; or</p> <p>(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.</p> <p>2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its</p>	<p>Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party:</p> <p>(a) does not maintain normal economic relations with the non-Contracting Party; or</p> <p>(b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.</p> <p>2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an</p>	
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	<p>investments if the enterprise is owned or controlled by an investor of a non-Party or of the denying Party, and the enterprise has no substantial business activities in the territory of the latter Party</p> <p>For the purposes of this Article, the term "non-Party" shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.</p>	<p>enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party or of the denying Contracting Party, and the enterprise has no substantial business activities in the territory of the latter Contracting Party.</p> <p>Note: For the purposes of this Article, the term "non- Contracting Parties" shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.</p>	
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