# Investment Treaty Arbitration 2021

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Getting The Deal Through

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# Investment Treaty Arbitration

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Contributing editors

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Investment Treaty Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bangladesh, China, France, Israel, Lithuania, Mexico and Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Stephen Jagusch QC and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, for their continued assistance with this volume.

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# Contents





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# Japan

**Yoshimasa Furuta and Aoi Inoue**
Anderson Mōri & Tomotsune

## BACKGROUND

### Foreign investment

1 | What is the prevailing attitude towards foreign investment?

Until recently, Japan's level of inbound foreign direct investment (FDI) has been relatively low compared with the size of its economy. However, the Japanese government is keen to increase foreign investment and has intensified efforts to attract further investment from abroad. For example, the government has abolished the prior-notification approval requirement for foreign transactions and now allows post-factum reports, which is more favourable to foreign investors. The government has also implemented foreign investment promotion programmes.

2 | What are the main sectors for foreign investment in the state?

Sectors for inward foreign investment include chemicals and pharmaceuticals, electrical machinery and equipment, transport machinery and equipment, telecommunications, wholesale and retail, finance and insurance.

3 | Is there a net inflow or outflow of foreign direct investment?

Japan's inward FDI in 2018 (balance of payments basis, net, flow) increased by 26.7 per cent year-on-year to US$25.9 billion. Japan's inward FDI stock as of the end of 2018 was ¥30.7 trillion. (See Japan External Trade Organization Global Trade and Investment Report 2019.)

### Investment agreement legislation

4 | Describe domestic legislation governing investment agreements with the state or state-owned entities.

Article 29-3(1) of the Public Accounting Act (Act No. 35 of 1947) and article 234(2) of the Local Autonomy Act (Act No. 67 of 1947) require that when the Japanese government or local public bodies intend to enter into a sales contract, lease, contract for work or other contract, in principle, it must put the contract out to tender by issuing a public notice and having persons make offers. Entering into a contract without a public tender is only allowed in limited circumstances permitted by laws and regulations. With enterprises run by the local government, such as water supply enterprises and transportation enterprises, regulations under the Local Autonomy Act shall apply pursuant to the Local Public Enterprise Act (Act No. 292 of 1952). When the independent administrative agencies provided for in paragraph (1) article 2 of the Act on General Rules for Independent Administrative Agency (Act No. 103 of 1999) enter into a contract, a public tender by issuing a public notice and requesting applications is required, in principle.

## INTERNATIONAL LEGAL OBLIGATIONS

### Investment treaties

5 | Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

As of August 2020, Japan has entered into the following bilateral investment treaties (BITs), economic partnership agreements (EPAs, which have sections on investment) and free-trade agreements (FTAs), some of which explicitly allow parties to refer disputes to arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

### Bilateral investment treaties

- Egypt (signed on January 1977; entered into force on 14 January 1978);
- Sri Lanka (signed on March 1982; entered into force on 4 August 1982);
- China (signed on August 1988; entered into force on 14 May 1989);
- Turkey (signed on February 1992; entered into force on 12 March 1993);
- Hong Kong (signed on May 1997; entered into force on 18 June 1997);
- Pakistan (signed on March 1998; entered into force on 29 May 2002);
- Bangladesh (signed on November 1998; entered into force on 25 August 1999);
- Russia (signed on November 1998; entered into force on 27 May 2000);
- Mongolia (signed on February 2001; entered into force on 24 March 2002);
- Korea (signed on March 2002; entered into force on 1 January 2003);
- Vietnam (signed on November 2003; entered into force on 19 December 2004);
- Cambodia (signed on June 2007; entered into force on 31 July 2008);
- Laos (signed on January 2008; entered into force on 3 August 2008);
- Uzbekistan (signed on August 2008; entered into force on 24 September 2009);
- Peru (signed on November 2008; entered into force on 10 December 2009);
- Papua New Guinea (signed on April 2011; entered into force on 17 January 2014);
- Colombia (signed on September 2011; entered into force on 11 September 2015);
- Kuwait (signed on March 2012; entered into force on 24 January 2014);
- China and Korea (signed on May 2012; entered into force on 17 May 2014);
- Iraq (signed on June 2012; entered into force on 25 February 2014);


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- Saudi Arabia (signed on April 2013; entered into force on 7 April 2017);
- Mozambique (signed on June 2013; entered into force on 29 August 2014);
- Myanmar (signed on December 2013; entered into force on 7 August 2014);
- Kazakhstan (signed on October 2014; entered into force on 25 October 2015);
- Uruguay (signed on January 2015; entered into force on 14 April 2017);
- Ukraine (signed on February 2015; entered into force on 26 November 2015);
- Oman (signed on June 2015; entered into force on 21 July 2017);
- Iran (signed on February 2016; entered into force on 26 April 2017);
- Kenya (signed on August 2016; entered into force on 14 September 2017);
- Israel (signed on February 2017; entered into force on 5 October 2017);
- Armenia (signed on February 2018; entered into force on 15 May 2019);
- UAE (signed on April 2018; entered into force on 26 August 2020);
- Jordan (signed on November 2018; entered into force on 1 August 2020);
- Argentina (signed on December 2018; not yet in force);
- Morocco (signed on January 2020; not yet in force); and
- Cote d'Ivoire (signed on January 2020; not yet in force).

**Economic partnership agreements and free-trade agreements**

- Singapore (signed on January 2002; entered into force on November 2002);
- Mexico (signed on September 2004; entered into force on April 2005);
- Malaysia (signed on December 2005; entered into force on July 2006);
- Philippines* (signed on September 2006; entered into force on December 2008);
- Chile (signed on March 2007; entered into force on September 2007);
- Thailand (signed on April 2007; entered into force on November 2007);
- Brunei (signed on June 2007; entered into force on July 2008);
- Indonesia (signed on August 2007; entered into force on July 2008);
- Vietnam (signed on December 2008; entered into force on October 2009);
- Switzerland (signed on February 2009; entered into force on September 2009);
- India (signed on February 2011; entered into force on August 2011);
- Peru (signed on May 2011; entered into force on March 2012);
- Australia* (signed on July 2014; entered into force on January 2015);
- Mongolia (signed on February 2015; entered into force on June 2016); and
- EU** (signed on July 2018; entered into force on February 2019).

** The investment chapters of the Japan–Australia EPA and the Japan–Philippines EPA do not provide for investor-state dispute settlement.*

*** The Japan–EU EPA does not include the protection of investment since negotiations are still ongoing for a future investment agreement.*

In addition, 12 Pacific Rim countries, including Japan, signed the Trans-Pacific Strategic Economic Partnership Agreement (TPP) on 4 February 2016. While the United States withdrew its participation, the other signatories agreed in May 2017 to revive it and reached agreement in January 2018. In March 2018, the remaining 11 countries signed the revised version of the agreement, called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is also known as TPP11. CPTPP entered into force on 30 December 2018.

Japan is a member country of the Energy Charter Treaty, which Japan signed on 16 June 1995 and ratified on 23 July 2002. It entered into force on 21 October 2002.

6 | If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Not applicable.

7 | Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

Japan has entered into the protocol amending the implementing agreement between Japan and Singapore pursuant to article 7 of the Japan–Singapore EPA. In addition, Japan has entered into the protocol amending the Japan–Mexico EPA too.

8 | Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Not applicable.

9 | Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

While the Japan–China-Korea Trilateral Investment Agreement (2012) entered into force on 17 May 2014, the Japan–China BIT (1988) and the Japan–Korea BIT (2002) still continue to operate in parallel. On the other hand, the Japan–Mongolia BIT (2007) has been replaced by the investment chapter of the Japan–Mongolia EPA (2015).

**ICSID Convention**

10 | Is the state party to the ICSID Convention?

Yes. Japan signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention) on 23 September 1965 and ratified it on 17 August 1967. It came into force in Japan on 16 September 1967.

**Mauritius Convention**

11 | Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Japan has not signed the Mauritius Convention.

**Investment treaty programme**

12 | Does the state have an investment treaty programme?

Japanese policies and preferences in relation to investment treaties have changed over time. Since the late 1990s, when many key Japanese business groups began lobbying the government to conclude EPAs containing comprehensive investment chapters, the government actively sought and entered into BITs and FTAs (EPAs) with numerous countries, in addition to the Energy Charter Treaty signed in 1995 and ratified in 2002. In recent years, the Japanese government has expressed a renewed and intensified interest in concluding FTAs (EPAs) with other countries.



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## REGULATION OF INBOUND FOREIGN INVESTMENT

### Government investment promotion programmes

13 Does the state have a foreign investment promotion programme?

The Japanese government, at a national and regional level, offers incentives to encourage and facilitate inward investment in Japan, and offers single contact points in various ministries and agencies that can comprehensively handle enquiries and provide support to foreign investors with respect to doing business in Japan. One such a promotion programme is the Incentive programme for the promotion of Japan as an Asian business centre.

This governmental incentive programme for foreign investment includes the Act on Special Measures for the Promotion of Research and Development Business, etc, by Specified Multinational Enterprises (Act No. 55 of 2012), which was enacted to encourage global companies to base their research and development activities or headquarters in Japan. Under this programme, new research and development operations conducted in Japan and certified by the competent minister may receive the following incentives:

- assistance for fundraising by the Small and Medium Business Investment & Consultation Co Ltd (also covering small and medium-sized stock companies with capital not less than ¥300 million);
- acceleration of examinations and proceedings for patent applications;
- shorter examination periods for prior notification for inward direct investment in regulated industries; and
- acceleration of entry examinations for the Certificate of Eligibility for Status of Residence applied for by foreign nationals who intend to work in Japan.

Local governments (prefectures and municipals) also have their own investment promotion programmes.

### Applicable domestic laws

14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

#### Foreign Exchange and Foreign Trade Act

The Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949) (FEFTA) is one of the key pieces of legislation in Japan that provides general regulations for foreign transactions including foreign direct investment (FDI) in Japan. The Minister of Finance and the Minister of Economy, Trade and Industry have jurisdiction over the FEFTA, although the Bank of Japan assists in some of the operations of the FEFTA (eg, accepting permit applications, notification forms and reports) (article 69 of the FEFTA).

Under the FEFTA, certain foreign transactions involving 'inward direct investment etc' by a foreign investor require notification to be given to the Japanese government. In the past, prior notification and approval from the relevant minister were required. However, the FEFTA was amended in April 1998 so that reports only need to be submitted to the Minister of Finance or other relevant ministers after a transaction had been conducted (the 'post-factum reporting requirement'). However, prior notification and approval are still required if the transaction involves:

- an industry involved in:
  - national security (such as armaments, aircraft, nuclear power, space development and explosives);
  - the maintenance of public policy (such as electricity and gas, heat supply, communications and broadcasting);
  - public security (such as the manufacture of biological products and security);
  - manufacturing involving advanced technologies; and
- an industry excluded from liberalisation upon notice being given to the OECD (such as agriculture, forestry and fishing, air and marine transportation, petroleum and leather).

Under FEFTA, the term 'foreign investor' means any one of the following persons who makes an inward direct investment:

1 an individual who is a non-resident;
2 a juridical person or other organisation either established pursuant to foreign laws and regulations or having its principal office in a foreign state;
3 a corporation of which the ratio of the sum of the number of voting rights directly held by those listed in (1) or (2) and the number of voting rights specified by Cabinet Order as those indirectly held through other corporations in the number of voting rights of all shareholders or members of the corporation is 50 per cent or higher; and
4 in addition (2) and (3), a juridical person or other organisation in which persons as listed in (1) occupy the majority of either the officers (meaning directors or other persons equivalent thereto) or the officers having the power of representation.

Under the FEFTA, the term 'inward direct investment, etc' means any of the following actions:

- acquisition of the shares or equity of an unlisted corporation (excluding acquisition through transfer from foreign investors);
- transfer of the shares or equity of a corporation other than listed corporations, etc, which have been held by a person prior to his or her becoming a non-resident (limited to transfers from an individual who is a non-resident to foreign investors);
- acquisition of the shares of, for example, a listed corporation, to the extent that the total shareholding in such a company (including shares held by those who have a certain relationship with the acquirer) reaches 10 per cent or more of the issued and outstanding shares;
- consent given for a substantial change of the business purpose of a corporation (for a business corporation, limited to the consent given by those holding one-third or more of the voting rights of all shareholders of the business corporation);
- establishment of, for example, branch offices in Japan or substantial change of the kind or business purpose of branch offices in Japan (limited to an establishment or change specified by Cabinet Order and conducted by investors listed in (1) or (2) of the definition of 'foreign investors');
- a loan of money exceeding the amount specified by Cabinet Order to a juridical person having its principal office in Japan, for which the period exceeds one year;
- acquisition of bonds offered to specified foreign investors;
- acquisition of investment securities issued by juridical persons established under special acts; and
- discretionary investment in shares in, for example, a listed company as specified by Cabinet Order.

#### Restrictions on foreign investment laws concerning individual businesses

In addition to the FEFTA, there are many specific restrictions that apply to foreign investment in certain businesses. These restrictions are contained in various industry-specific legislation. Examples of such laws and regulations are:

- the Act on Nippon Telegraph and Telephone Corporation, etc. (Act No. 85 of 1984);


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- the Radio Act (Act No. 131 of 1950);
- the Broadcast Act (Act No. 132 of 1950);
- the Cargo Forwarder Service Act (Act No. 82 of 1989);
- the Civil Aeronautics Act (Act No. 231 of 1952);
- the Ship Act (Act No. 46 of 1899);
- the Act on Assurance of Security of International Ships and Port Facilities (Act No. 31 of 2004);
- the Banking Act (Act No. 59 of 1981);
- the Act on Regulation of Fishing Operations by Foreign Nationals (Act No. 60 of 1967); and
- the Mining Act (Act No. 289 of 1950).

**Relevant regulatory agency**

15 | Identify the state agency that regulates and promotes inbound foreign investment.

**Regulation of inbound foreign investment**

The government agency responsible for regulating an inbound foreign investment transaction will depend on the business to which the transaction relates. For example, the Ministry of Internal Affairs and Communications is the relevant authority for the Radio Act and Broadcast Act, while the Financial Services Agency is the authority for the Banking Act.

**Promotion of inbound foreign investment**

A number of government ministries and organisations play important roles in promoting inbound foreign investment. The Ministry of Foreign Affairs has a considerable role, both formally and informally, in leading negotiations for investment treaties. In addition, the Ministry of Economy, Trade and Industry also plays an important role in relation to current and foreseeable activities of the Japanese government or firms in relation to bilateral investment treaties (BITs) and free-trade agreements (FTAs) (economic partnership agreements (EPAs)). Japan External Trade Organization (JETRO) is a government-related body that works to promote mutual trade and investment between Japan and the rest of the world. Originally established in 1958 to promote Japanese exports abroad, JETRO's core focus has recently shifted towards promoting inbound foreign direct investment and helping small and medium-sized Japanese firms to maximise their potential in global exports.

JETRO has also established the Invest Japan Business Support Centre (IBSC), which provides comprehensive support in relation to foreign investments in Japan. More specifically, the IBSC has experts who provide information and advice to individual companies on entering the Japanese market, and consultations on establishing companies in Japan.

Further, each ministry and institution that has connections with foreign investment has set up its own contact point named 'Invest Japan', which provides various services to foreign investors, including:

- responding to requests for information on investment;
- providing information on applying for investment opportunities; and
- handling complaints about processing in the notification system in relation to investments.

**Relevant dispute agency**

16 | Identify the state agency that must be served with process in a dispute with a foreign investor.

Where a foreign investor files a civil lawsuit against the Japanese government in a Japanese court, the Minister of Justice will be served with process. Where a foreign investor files a civil lawsuit against a municipal government in a Japanese court, the relevant governor or mayor will be served with process.

## INVESTMENT TREATY PRACTICE

**Model BIT**

17 | Does the state have a model BIT?

Japan does not have a model of standard terms or language that it uses in its investment treaties. Accordingly, as to what types of protection are available and what conditions have to be satisfied under the investment treaty, the provisions of the relevant treaty must be carefully examined. However, the terms of the Japan–Cambodia BIT (2007) have been often adopted in subsequent bilateral investment treaties (BITs) and, therefore, the Japan–Cambodia BIT may be considered to be somewhat of a de facto model BIT for Japan.

**Preparatory materials**

18 | Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Ratifications of treaties by the Japanese Diet are publicly recorded and promulgated in the Japanese government's Official Gazette. In general, the Japanese government is not required to make diplomatic correspondence publicly available. However, the Ministry of Foreign Affairs generally discloses diplomatic correspondence voluntarily after 30 years have passed since the correspondence was made. Such disclosures can be found on the Ministry of Foreign Affairs website.

Further, governmental documents and records of importance are transferred from various government ministries and agencies, as historical materials, and preserved and made available to the public by the National Archives of Japan.

**Scope and coverage**

19 | What is the typical scope of coverage of investment treaties?

The scope of coverage varies from treaty to treaty. However, the Japan–Cambodia BIT (2007) is often considered to be a de facto model BIT for Japan.

**Investment**

Under the Japan–Cambodia BIT, 'investment' is defined as being every kind of asset owned or controlled, directly or indirectly, by an investor (and includes amounts derived from investments, such as profit, interest, capital gains, dividends, royalties and fees) such as:

- an enterprise;
- shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
- bonds, debentures, loans and other forms of debt, including rights derived therefrom;
- rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- claims to money and to any performance under contract having a financial value;
- intellectual property rights;
- rights conferred pursuant to laws and regulations or contracts; and
- any other tangible and intangible, movable and immovable property, and any related property rights.

**Investor**

'Investors' are defined under the Japan–Cambodia BIT as:

- natural persons having the nationality of a contracting party (ie, a contracting nation to the BIT); or
- enterprises of a contracting party (excluding a branch of an enterprise of a non-contracting party, which is located in the area of a contracting party).



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Under the Japan–Cambodia BIT, 'an enterprise of a contracting party' means any legal person or any other entity duly constituted or organised under the applicable laws and regulations of that contracting party, whether or not for profit, and whether or not it is private or government-owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, organisation, company or branch.

Under the Japan–Cambodia BIT, an enterprise is 'owned' by an investor if more than 50 per cent of the equity interest in it is owned by the investor, and 'controlled' by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

**Denial of benefits**

Some of Japan's BITs and free-trade agreements (FTAs) (economic partnership agreements (EPAs)) include denial of benefits clauses. Under such provisions, either party may deny the benefits of the treaty to an enterprise of the other contracting party and to its investments if the enterprise is owned or controlled by an investor of a non-contracting party and:

- the denying party does not maintain diplomatic relations with the non-contracting party;
- the enterprise has no substantial business activities in the area of the other contracting party; or
- the denying party 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 were accorded to the enterprise or to its investments.

**Protections**

20 | What substantive protections are typically available?

As Japan does not have a model of standard terms or language that it uses in its investment treaties, each BIT must be individually examined as to what types of protection are available and what conditions have to be satisfied under the investment treaty. However, the following substantive protections are typically available:

- national treatment;
- most favoured nation treatment;
- fair and equitable treatment;
- full protection and security;
- obligation observance clause (umbrella clause);
- expropriation;
- protection from civil disturbance or strife;
- performance requirements; and
- guarantee of capital transfers.

**Dispute resolution**

21 | What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Almost all of Japan's BITs and FTAs (EPAs) provide for arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention). The Japan–Russia BIT (1998) and most of the subsequent BITs and FTAs (EPAs) also allow investors to choose arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Few of Japan's treaties give the investor the right to invoke arbitration outside the UNCITRAL or International Centre for Settlement of Investment Disputes (ICSID) Rules.

**Confidentiality**

22 | Does the state have an established practice of requiring confidentiality in investment arbitration?

In general, there are no specific provisions in the investment treaties regarding confidentiality in investment arbitration.

Further, because there has been no case of Japan becoming a respondent country in investment arbitration, there is no established practice of requiring confidentiality.

**Insurance**

23 | Does the state have an investment insurance agency or programme?

In April 2001, Nippon Export and Investment Insurance (NEXI), an incorporated administrative agency, was created as a 100 per cent state-owned agency to efficiently manage the trade and investment insurance programme in unity with the government. On 1 April 2017, NEXI duly completed its transformation from an incorporated administrative agency into special stock company wholly owned by the government. NEXI's investment insurance is not contingent on the existence of an investment treaty between Japan and the host state (target of the investment).

## INVESTMENT ARBITRATION HISTORY

**Number of arbitrations**

24 | How many known investment treaty arbitrations has the state been involved in?

Japan has not been a respondent country in any investment treaty arbitration.

**Industries and sectors**

25 | Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Japan has not been a respondent country in any investment treaty arbitration.

**Selecting arbitrator**

26 | Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Japan has not been a respondent country in any investment treaty arbitration.

**Defence**

27 | Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Japan has not been a respondent country in any investment treaty arbitration.



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## ENFORCEMENT OF AWARDS AGAINST THE STATE

### Enforcement agreements

28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Japan acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) on 20 June 1961. The New York Convention became effective in Japan from 18 September 1961, with a reservation of reciprocity.

### Award compliance

29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

Japan has not been a respondent country in any investment treaty arbitration.

### Unfavourable awards

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Japan has not been a respondent country in any investment treaty arbitration.

### Provisions hindering enforcement

31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

As the New York Convention has a direct effect in Japan, parties can simply follow the procedural requirements stated in the New York Convention. As required in the New York Convention, parties must prepare a Japanese translation of the award if it is written in a foreign language.

In accordance with article 45.2(9) of the Arbitration Act of Japan (Act No. 138 of 2003), Japanese courts will consider if the enforcement of the award will be in conformity with the laws of Japan, regardless of whether it is procedural law or substantive law. This standard is simply the same as the one used to set aside an arbitral award (article 44.1(8) of the Arbitration Act of Japan).

If the seat of arbitration is within Japanese territory, parties may request the competent Japanese court to set aside an arbitral award on the following basis:

- the arbitration agreement is not valid;
- the party making the application was not given notice as required under Japanese law during the proceedings to appoint arbitrators or during the arbitral proceedings;
- the party making the application was unable to defend itself in the proceedings;
- the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings;
- the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of Japanese law (or the parties have otherwise reached an agreement on matters concerning the provisions of the law that is not in accordance with public policy);
- the claims in the arbitral proceedings relate to disputes that cannot constitute the subject of an arbitration agreement under Japanese law; or
- the content of the arbitral award is in conflict with the public policy or the good morals of Japan (article 44.1).

Regarding a party's inability to defend itself in proceedings, a recent court decision articulated that 'unable to defend' shall mean that there was a material procedural violation in the arbitration proceedings (ie, the opportunity to defend was not given to the party throughout the proceedings). With respect to public policy and good morals, the same court also said that merely claiming that the factual findings or ruling of the arbitration tribunal were unreasonable should not be regarded as a valid basis for setting aside the award (with regard to *American International Underwriters Ltd, 1304 Hanrei Taimuzu 292* (Tokyo D Ct, 28 July 2009)).

It is generally considered that Japanese courts look favourably upon enforcing arbitral awards.

## UPDATE AND TRENDS

### Key developments of the past year

32 Are there any emerging trends or hot topics in your jurisdiction?

Recently, the Japanese government has been very active in promoting signing bilateral investment treaties (BITs) and free-trade agreements (FTAs) (economic partnership agreements (EPAs)), and is now engaged in negotiations with several countries. In addition, 12 Pacific Rim countries, including Japan, signed the Trans-Pacific Strategic Economic Partnership Agreement (TPP) on 4 February 2016. The TPP contained investor-state dispute settlement clauses addressing investment treaty arbitration. While the United States withdrew its participation, the other signatories agreed in May 2017 to revive the TPP and reached agreement in January 2018. In March 2018, the 11 countries signed the revised version of the agreement, called Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP11. CPTPP entered into force on 30 December 2018.

Further, many Japanese companies are particularly interested in BITs and FTAs (EPAs). In terms of using investment treaty arbitration, at present, several Japanese-affiliated companies have used an investment treaty arbitration:

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- *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 under the Netherlands–Czech Republic BIT;
- *JGC Corporation v Kingdom of Spain* (ICSID Case No. ARB/15/27);
- *Eurus Energy Holdings Corporation and Eurus Energy Europe BV v Kingdom of Spain* (ICSID Case No. ARB/16/4);
- *Nissan Motor Co, Ltd v India*, UNCITRAL, under the Japan–India EPA;
- *Itochu Corporation v Kingdom of Spain* (ICSID Case No. ARB/18/25); and
- *SMM Cerro Verde Netherlands BV v Republic of Peru* (ICSID Case No. ARB/20/14).

It is expected that, as the number of BITs and FTAs (EPAs) involving Japan increases, Japanese companies will become increasingly involved in cases regarding investment treaty arbitration.

**Coronavirus**

33 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In Japan, as of 25 May 2020, the Declaration of a State of Emergency has been lifted in all prefectures. However, border enforcement measures continue to prevent the spread of covid-19. For the time being, foreigners who have stayed in any of the listed 159 countries and regions within 14 days prior to the application for landing are denied permission to enter Japan, unless special exceptional circumstances are found. Also, quarantine measures, suspension of visa validity and suspension of visa exemption measures are taken. (For more details of these border enforcement measures, please see the Ministry of Foreign Affairs website.) It is still necessary to continue to closely monitor the covid-19 situation and its impact on government programmes, laws or regulations.



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