Investment Treaty Arbitration 2020

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Getting The Deal Through

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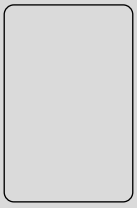

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Quinn Emanuel Urquhart & Sullivan LLP

Lexology Getting The Deal Through is delighted to publish the seventh 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 a new chapter on Austria.

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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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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 (see question 3). 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 (see question 14). The government has also implemented foreign investment promotion programmes (see question 13).

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 2017 (balance of payments basis, net, flow) declined by 52.1% year-on-year to US$18.8 billion. Japan's inward FDI stock as of the end of 2017 was ¥28.6 trillion, marking a ¥322.7 billion increase from the end of the previous year. By region, FDI from the United States, Asia and Europe amounted to US$5.8 billion, US$5.7 billion and US$4.5 billion, respectively. From the US, investments from US investment funds were active. From Asia, despite the reactionary drop from the large-scale deal (Hon Hai / Foxconn Technology Group's acquisition of Sharp) in the previous year, the same level was maintained from 2015. (JETRO Global Trade and Investment Report 2018 Global Economy Connected via Digitalization Overview, see: www.jetro.go.jp/ext_images/en/reports/white_paper/trade_invest_2018_overview.pdf.)

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 2019, Japan has entered into the following bilateral investment treaties (BITs, see table), 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).

BITs

Party	Date of signature	Date of entry into force
Egypt	January 1977	14 January 1978
Sri Lanka	March 1982	4 August 1982
China	August 1988	14 May 1989
Turkey	February 1992	12 March 1993
Hong Kong	May 1997	18 June 1997
Pakistan	March 1998	29 May 2002
Bangladesh	November 1998	25 August 1999
Russia	November 1998	27 May 2000
Mongolia	February 2001	24 March 2002
Korea	March 2002	1 January 2003
Vietnam	November 2003	19 December 2004
Cambodia	June 2007	31 July 2008
Laos	January 2008	3 August 2008
Uzbekistan	August 2008	24 September 2009
Peru	November 2008	10 December 2009
Papua New Guinea	April 2011	17 January 2014
Colombia	September 2011	11 September 2015
Kuwait	March 2012	24 January 2014
China and Korea	May 2012	17 May 2014
Iraq	June 2012	25 February 2014
Saudi Arabia	April 2013	7 April 2017

BITs		
Party	Date of signature	Date of entry into force
Mozambique	June 2013	29 August 2014
Myanmar	December 2013	7 August 2014
Kazakhstan	October 2014	25 October 2015
Uruguay	January 2015	14 April 2017
Ukraine	February 2015	26 November 2015
Oman	June 2015	21 July 2017
Iran	February 2016	26 April 2017
Kenya	August 2016	14 September 2017
Israel	February 2017	5 October 2017
Armenia	February 2018	15 May 2019
UAE	April 2018	–
Jordan	November 2018	–
Argentina	December 2018	–

EPAs and FTAs		
Party	Date of signature	Date of entry into force
Singapore	January 2002	November 2002
Mexico	September 2004	April 2005
Malaysia	December 2005	July 2006
Philippines	September 2006	December 2008
Chile	March 2007	September 2007
Thailand	April 2007	November 2007
Brunei	June 2007	July 2008
Indonesia	August 2007	July 2008
Vietnam	December 2008	October 2009
Switzerland	February 2009	September 2009
India	February 2011	August 2011
Peru	May 2011	March 2012
Australia	July 2014	January 2015
Mongolia	February 2015	June 2016
EU	July 2018	February 2019

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)?

No. Japan has not yet 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.

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. Two examples of such promotion programmes are outlined below.

Incentive programme for the promotion of Japan as an Asian business centre

One example of a 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;
- a 50 per cent reduction of examination fees and patent fees for patent inventions;
- 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.

In addition to the national government, local governments (prefectures and municipals) also have their own unique investment promotion programmes (see: www.jetro.go.jp/en/invest/incentive_programs/).

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 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 was 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 minister after a transaction had been conducted ('post-factum reporting requirement'), unless the transaction involves an industry relating to 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 industries excluded from liberalisation upon notice being given to the OECD (such as agriculture, forestry and fishing, air and marine transportation, petroleum and leather). In those specific industries, prior notification and approval is still required.

Under the FEFTA, the term 'foreign investor' means any one of the following persons who makes, for example, 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 points 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 to what is listed in points (2) and (3), a juridical person or other organisation in which persons as listed in point (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 an act that falls under any of the following:

- 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 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 those listed in points (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 in 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 include the Act on Nippon Telegraph and Telephone Corporation, etc (Act No. 85 of 1984), 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 BITs and FTAs (EPAs). 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 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 at: www.mofa.go.jp/mofaj/public/kiroku_kokai.html.

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, as mentioned in question 17, 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).

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 FTAs (EPAs) include a denial of benefits clause. 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 stated in question 17, because 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 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 UNCITRAL Arbitration Rules. Few of Japan's treaties give the investor the right to invoke arbitration outside the UNCITRAL or 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?

There has been no case of Japan becoming a respondent country in investment treaty arbitration.

Industries and sectors

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

There has been no case of Japan becoming a respondent country in 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?

There has been no case of Japan becoming a respondent country in 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.

There has been no case of Japan becoming a respondent country in investment treaty arbitration.

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?

Yes. 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?

There has been no case of Japan becoming a respondent country in 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?

There has been no case of Japan becoming a respondent country in 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 BITs and FTAs (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 contains 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 it 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; namely, the case of *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 under the Netherlands-Czech Republic BIT, the case of *JGC Corporation v Kingdom of Spain* (ICSID Case No. ARB/15/27), the case of *Eurus Energy Holdings Corporation and Eurus Energy Europe BV v Kingdom of Spain* (ICSID Case No. ARB/16/4), the case of *Nissan Motor Co, Ltd v India*, UNCITRAL, under the India-Japan EPA and *Itochu Corporation v Kingdom of Spain* (ICSID Case No. ARB/18/25). 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.

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