Investment Treaty Arbitration

In 25 jurisdictions worldwide

Contributing editors
Stephen Jagusch and Epaminontas Triantafilou

2015

GETTING THE DEAL THROUGH

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Contributing editors

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Background

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 the economy, with 2013 only seeing a small net inflow of foreign investment (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 9). The government has also implemented foreign investment promotion programmes (see question 8).

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?

In 2013, Japan saw a net inflow of foreign investment of US$2.358 billion, registering a net flow for the second consecutive year. In terms of sources of inflowing FDI, investments from North America underwent a reversal from a net outflow in 2012 to a net inflow in 2013. Inward FDI stock grew marginally by 0.9 per cent to 17.9758 trillion Japanese yen, although the ratio of inward FDI stock to nominal GDP remained mostly unchanged at 3.8 per cent (*JETRO Global Trade and Investment Report 2014*, Overseas Research Department, www.jetro.go.jp/en/reports/white_paper/trade_invest_2014_overview.pdf).

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

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 September 2014, Japan has entered into the following bilateral investment treaties (BITs, see table opposite), 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 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
Republic of 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	–
Kuwait	March 2012	24 January 2014
China and Republic of Korea	May 2012	17 May 2014
Iraq	June 2012	25 February 2014
Saudi Arabia	May 2013	–
Mozambique	June 2013	29 August 2014
Myanmar	December 2013	–

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
Switzerland	February 2009	September 2009
Vietnam	December 2008	October 2009
India	February 2011	August 2011
Peru	May 2011	March 2012
Australia	July 2014	–

In addition, 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 Is the state party to the ICSID Convention?

Yes, Japan signed the ICSID Convention on 23 September 1965 and ratified it on 17 August 1967. It came into force in Japan on 16 September 1967.

7 Does the state have an investment treaty programme?

Japanese policies and preferences in relation to investment treaties have varied over the years. 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

8 Does the state have a foreign investment promotion programme?

The Japanese government, both 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 inquiries 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:

- corporate tax breaks, including an income deduction of 20 per cent for five years (which is equivalent to a corporate tax reduction of around 7 per cent);
- tax breaks on income arising from the selling of shares acquired through the exercise of stock options granted by an overseas parent company (tax payable on such income is reduced by 20–50 per cent);
- fund raising assistance for small and medium-sized stock companies;
- acceleration of examinations and proceedings for patent applications;
- a 50 per cent reduction of certain fees for patents;
- 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.

Subsidy programme for projects promoting foreign direct investment, site location and regional development in Japan

This programme is intended to provide subsidies to certain businesses which establish new high-value-added sites such as regional headquarters or research and development operations in Japan. The goal of the programme is to attract and sustain high value-added business operations in Japan and achieve sustainable growth of the Japanese economy.

In addition to the national government, local governments (prefectures and municipals) also have their own unique investment promotion programmes. For more details visit Japan External Trade Organisation (JETRO) website: www.jetro.go.jp/en/invest/incentive_programs/.

9 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 (for example, 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 weapons, aircraft, nuclear power, space development and explosives), the maintenance of public order (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:

(i) an individual who is a non-resident;
(ii) a juridical person or other organisation either established pursuant to foreign laws and regulations, or having its principal office in a foreign state;
(iii) a corporation of which the ratio of the sum of the number of voting rights directly held by those listed in the above (i) or (ii) 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
(iv) in addition to what is listed in the above (ii) and (iii), a juridical person or other organisation in which persons as listed in the above (i) 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:

(i) acquisition of the shares or equity of an unlisted corporation (excluding acquisition through transfer from foreign investors);
(ii) 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);
(iii) 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;
(iv) 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);
(v) 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 item (i) or (ii) of the definition of 'foreign investors');
(vi) 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;
(vii) acquisition of bonds are offered to specified foreign investors;
(viii) acquisition of investment securities are issued by juridical persons established under special acts; and
(ix) discretionary investment in shares in, for example, a listed company as specified by Cabinet Order.

Restrictions on foreign investment in laws concerning individual business

In addition to the FEFTA, there are many specific restrictions which 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 Facility (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).

10 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.

11 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

12 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 thus the Japan–Cambodia BIT may be considered to be somewhat of a de facto model BIT for Japan.

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

Ratifications of treaties by the Japanese Diet are publically recorded and promulgated in the Japanese government's official gazette. In general, the Japanese government is not required to make diplomatic correspondence publically 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.

14 What is the typical scope of coverage of investment treaties?

The scope of coverage varies from treaty to treaty. However, as mentioned in question 12, 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, moveable and immoveable 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.

15 What substantive protections are typically available?

As stated in question 12, since 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.

Update and trends

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, Japan is currently participating in negotiations for the Trans-Pacific Strategic Economic Partnership Agreement (TPP), which is expected to include investor-state dispute settlement clauses addressing investment treaty arbitration. Further, many Japanese companies are particularly interested in BITs and FTAs (EPAs).

In terms of using investment treaty arbitration, at present only one Japanese-affiliated company has used an investment treaty arbitration, that being the case of *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 under the Netherlands-Czech Republic BIT. However, 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.

16 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. Very few of Japan's treaties give the investor the right to invoke arbitration outside the UNCITRAL or ICSID Rules.

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

Investment arbitration history

18 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.

19 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.

20 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.

21 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

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

Yes, Japan acceded to the New York Convention on 20 June 1961. The New York Convention became effective in Japan from 18 September 1961, with a reservation of reciprocity.

23 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.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

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

25 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.

As per 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 basically the same as the one used to set aside an arbitral award (article 44.1(8) of the Arbitration Act of Japan).

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If the seat of arbitration was within the 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.

Sovereign immunity

The Supreme Court of Japan ruled that, while sovereign activities shall be immune from liability, liabilities arising from non-sovereign activities, such as commercial transactions, of a foreign government will not be exempt (*Tokyo Sanyo Trading KK v Islamic Republic of Pakistan*, 60 Minshu 2542 (Sup Ct, 21 July 2006)).

New legislation with respect to the immunity of a foreign state, that being the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc (Act No. 24 of 2009), which came into effect on 1 April 2010, basically codifies the above Supreme Court ruling.

Article 17(1) of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc stipulates that in cases where consent to the execution of a temporary restraining order or a civil execution against property held by a foreign state, etc, has been given expressly by any of the following methods, the foreign state, etc shall not be immune from jurisdiction with regard to the proceedings of said execution of temporary restraining order or civil execution procedure:

- treaties or any other international agreements;
- agreements concerning arbitration;
- written contracts; or
- statements made during the course of said proceedings of the execution of the temporary restraining order or the civil execution, or written notices to the court or the other party (in the case of notices to the other party, limited to notices made subsequent to the occurrence of the dispute pertaining to the relationship of rights that was the cause of the petition for said execution of temporary restraining order or said civil execution).

Getting the Deal Through

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Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection & Privacy
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