Chapter 7

OTHER ISSUES ENERGY, ENVIRONMENT, DISPUTE SETTLEMENT, etc.

<Energy>

(1) Background of the Rules

As Japan is not abundant in natural resources, it is critical for Japan to secure a stable supply of mineral resources and energy. Due to the recent hikes in prices of mineral resources, including crude oil, aluminum and copper, this issue is becoming even more significant. The following paragraphs will summarize Japanese policies and provisions concerning mineral resources and energy in FTAs/EPAs, and compare such policies and provisions with those of FTA/EPAs outside Japan.

(2) Japan's efforts in the past

No FTA/EPA signed by Japan has an independent chapter on mineral resources and energy. The only FTA/EPA with clauses referring to these subjects is the Japan- Philippines EPA, which expressly lists energy as an area of cooperation (Article 144) in the chapter on Cooperation (Chapter 14). Japan aims to enhance and strengthen its ties in the areas of energy and mineral resources to countries with which it is currently negotiating EPAs.

(i) Indonesia

Indonesia is Japan's major supplier of crude oil and coal as well as natural gas. For this reason, the Japan-Indonesia EPA negotiations specifically address energy and mineral resources. Based on the fact that energy and mineral resources are of strategic importance for sustainable development in the region, the framework agreement reached in November 2006 provides that Japan and Indonesia will: a) promote investment in energy and mineral resources; b) cooperate closely in order to enhance the stable supply of energy and resources; and c) further promote policy dialogue and cooperation regarding the foregoing. In addition, for the purpose of creating a better competitive environment, the issue of open competitive markets will be an agenda item in the energy and mineral resource committee to be created under the EPA.

(ii) Brunei

Brunei is the world's 9th largest exporter of liquefied natural gas ("LNG") and the 4th largest supplier of LNG to Japan. Negotiations between Brunei and Japan resulted in the signing of a major agreement in December 2006, which marks the beginning of efforts by the two countries to maintain and enhance their relationship in the area of energy to bring about the stable and beneficial relationship of the two countries.

(iii) Australia

The "Joint Study for Strengthening Ties between Japan and Australia (including feasibility or merits and demerits of FTA)" concluded in December 2006 states in paragraph 37 of its final report that Japan and Australia will consider a chapter on minerals and energy which will include the following commitments: (i) provisions concerning promotion of free markets (for example, prohibiting quotas on imports and exports); (ii) provisions concerning the liberalization and protection of investments which will improve the investment environment; (iii) measures to enhance transparency of policies and regulations in the area of minerals and resources; (iv) provisions for including the business sector in the negotiation structure and process for minerals and resources; and (v) provisions on revision of clauses applicable to the area of minerals and resources.

(3) Overview of Legal Disciplines

There are no substantive rules on minerals and resources in Japan's FTAs/EPAs. Therefore, as examples of internationally recognized rules on this topic, the provisions of NAFTA and the Energy Charter Treaty are discussed below.

1) NAFTA

NAFTA provides in Chapter 6 (Energy and Basic Petrochemicals) as follows:

(a) Principles (Article 601)

This article confirms: respect for the Constitutions of the member nations; desirability of strengthening the important role of trade in energy and basic petrochemical goods in the free trade arena; and the importance of having viable and internationally competitive energy and petrochemical sectors to further the individual national interests of the member nations.

(b) Definitions (Article 602)

Terms such as uranium ore, coal, coke, tar, naphtha, oil, bitumen oil, cogas, petroleum coke, a uranium compound, oxidation heavy hydrogen, ethane, and butane are classified under the Harmonized System using codes of 4 to 6 digits.

Annex 602.3 prescribes reservations and special provisions including the following: each party shall allow its state enterprises to negotiate performance clauses in their service contracts; the Mexican State reserves to itself strategic activities such as exploration and exploitation of crude oil and natural gas; and an enterprise of another party may acquire, establish, or operate an electricity generating facility for independent power production in Mexico.

(c) Import and Export Restrictions (Article 603)

This article confirms the incorporation of the provisions of GATT. In particular, minimum and maximum export price restrictions are prohibited, and other parties to NAFTA can resort to

negotiation in circumstances where a party adopts or maintains a restriction on import or export of an energy or basic petrochemical good in connection with a non-party. In addition, provisions to the same effect are included in Chapter 3 on Trade in Goods (Article 309).

(d) Export Taxes (Article 604)

The article provides that no party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on exports of any such good to the territory of all other parties; and any such good when destined for domestic consumption. In addition, Chapter 3 on Trade in Goods includes provisions to the same effect (Article 314; with basic foods such as eggs, salt and flour in Mexico excluded under Annex 314).

(e) Other Export Measures (Article 605)

The article provides that a party may adopt or maintain a restriction otherwise justified under Articles XI:2(a) or XX(g), (i) or (j) of GATT with respect to the export of an energy or basic petrochemical good to the territory of another party, only if:

i) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other party relative to the total supply of that good of the party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data is available prior to the imposition of the measure;

ii) the party does not impose a higher price for exports of an energy or basic petrochemical good to the other party than the price charged for such good when consumed domestically; and

iii) the restriction does not require the disruption of normal channels of supply to that other party or normal proportions among specific energy or basic petrochemical goods supplied to that other party, such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products.

The clauses are applicable only to the bilateral relationship of the United States and Canada, and thus are not applicable to Mexico (Annex 605). Article 315, which is applied to goods in general, also includes provisions to the same effect, with Mexico being exempt (Annex 315).

(f) Energy Regulatory Measures (Article 606)

This article states that each party shall strive to ensure that in the application of any energy regulatory measure, energy regulatory bodies within its territory will avoid disruption of contractual relationships to the maximum extent practicable.

2) Energy Charter Treaty (ECT)

The ECT, which has been in force since 1998, promotes market oriented reform and enterprise activities in the post Soviet and East European countries in the area of energy. The ECT was signed by Japan in 1995 and became effective in 2002 therein. It provides for free trade and transit of energy materials and products, as well as for protection of investments in the area of energy.

First, the ECT states that its provisions shall apply to trade in energy materials and products while any contracting party is not a party to GATT and related instruments (Article 29). The clause's objective is to facilitate the soft landing of post Soviet and Eastern Europe (e.g., Russia) into the GATT/WTO regime, and thus serves as a transitional measure. The energy materials and products are defined in ANNEX EM, and include items such as uranium ore, coal, coal gas, tar, petroleum, purified petroleum, natural gas, bitumen, asphalt, electrical energy, fire wood, and charcoal.

Second, Article 7 provides that each contracting party shall take the necessary measures to facilitate the transit of energy materials and products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such energy materials and products. Transit is defined in Item 10 of Article 7, and basically envisages transit of oil or natural gas via pipelines, or transit of electricity via electric transmission facilities running through more than three regions (countries).

The ECT also provides that: each contracting party shall work to promote competition (Article 6); each contracting party shall agree to promote access to and transfer of energy technology (Article 8); each contracting party shall strive to minimize in an economically efficient manner harmful environmental impacts occurring within or outside its area, and strive to stimulate public awareness and cooperation (Article 19); measures for dispute settlement (Part V); and provisional application for contracting parties (Article 45).

As of November 2006, the ECT has been signed by 46 countries and states. Russia and Australia have signed, but not yet ratified. There are also countries such as the U.S., Canada and China who choose to remain as observers (for more details, refer to http://www.encharter.org/).

(The ECT also addresses issues related to energy other than those mentioned above. Please refer to Section III, Chapter 5).

<Environment>

(1) Background of the Rules

Today, an increasing number of FTAs/EPAs include provisions concerning environmental issues. One main reason for this (as in the case of NAFTA), is the desire to respond to the concern that a failure of the counterparty country to comply with environmental (and labor) regulations may bring disadvantages to domestic industries, resulting in a race to the bottom for environmental regulations. This concern seems to strongly influence numerous investment agreements that include provisions confirming that it is inappropriate to invite investment (or encourage trade) by relaxing domestic environmental laws.

A second important reason for this trend is the view that when discrepancies exist between enterprises of counterparties to FTAs/EPAs with respect to compliance with environmental regulations, leveling off such discrepancies will improve and promote even-handed competition. Some multinational enterprises implement the world's highest level of environmental awareness regardless of the level required by environmental regulations of the countries in which they operate. In such cases, enhancing the level of the host countries' environmental regulations will serve to create better conditions for even-handed competition. The same situation may prevail in countries where the level of environmental regulations are high but enforcement is insufficient. When local enterprises do not fully comply with environmental regulations but foreign enterprises do comply (based on respect for compliance or corporate social responsibility), obtaining sufficient enforcement of environmental regulations is needed to bring about even-handed competitive conditions.

In addition, there might be cases where a trading partner of an FTA/EPA may ask for cooperation concerning technical assistance. In general, since it is often the case that countries with technologies and experiences to solve environmental problems no longer have serious environmental problems, and in contrast, those with serious environmental problems do not yet have such technologies and experiences, bilateral cooperation between these countries will lead to global wellbeing. It is thus important that Japan play an active role and contribute to environmental protection on a global scale, maximizing the experience and technologies that it has cultivated in the past and reducing the damage it might cause to the global environment. Furthermore, raising such cooperative measures from a bilateral ad-hoc level to an FTA/EPA level will even further advance Japan's role in this area.

Some intellectual property chapters of FTAs/EPAs provide that the parties sign or aim to sign specific treaties or agreements such as the Paris Convention or Union Internationale pour la Protection des Obtentions Végétales (UPOV). Likewise in the environmental area, it is foreseeable that FTAs/EPAs will provide that the parties thereto shall sign or strive to sign environment-related agreements such as the Framework Convention on Climate Change, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Convention on Biological Diversity, together with the list of cooperative measures as a package.

(2) Overview of Legal Disciplines

The FTA/EPAs entered into by Japan so far include the following rules on the environment:

(i) Japan-Singapore EPA

As a provision relating to environmental protection, the chapter on mutual recognition (Chapter 6) provides in Article 54 that nothing in such chapter shall be construed to limit the authority of a party to take environmental measures it considers appropriate pursuant to a mutual recognition

policy. Article 31 of the Implementation Agreement expressly provides that the environment is a cooperative area of science technology.

(ii) Japan-Mexico EPA

The investment chapter (Chapter 7) includes provisions stating as follows: (i) a measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with the restriction on imposing or enforcing certain requirements on the other party (Article 65 1(f)); (ii) it is inappropriate to encourage investment by relaxing environmental measures (Article 74); and (iii) in investor-to-state investment arbitration, a tribunal may appoint one or more experts in the field of environmental matters to report to it in writing on any factual issue concerning matters of their expertise (Article 90). The chapter on Cooperation (Chapter 14) includes a provision that contracting parties should cooperate on issues of environment. Such cooperation includes information exchange, improvement of skills, and promotion of trade of environmental goods/services. Furthermore, the chapter on enforcement and implementation of the EPA (Chapter 16), provides that a public comment procedure shall not be required in an emergency case of protecting the environment (Article 161).

(iii) Japan-Malaysia EPA

This EPA includes only two environment-related provisions: (i) the investment chapter (Chapter 17) includes the provision that investments should not be invited by relaxing environmental measures (Article 90); and (ii) the cooperation chapter (Chapter 12) includes the provision that expressly states the environment is an area of cooperation (Article 140 (g)).

(iv) Japan-Philippines EPA

The chapter on Trade in Goods (Chapter 2) includes a provision on bilateral cooperation for the utilization of appropriate mechanisms in conformance with the importing party's environmental standards (Article 27). The chapter on Cooperation (Chapter 14) expressly identifies energy and environment as areas of cooperation (Article 144(d)). Furthermore, the chapter on Mutual Recognition (Chapter 6) states that nothing in the mutual recognition policy shall be construed to limit the authority of a party to take measures it considers appropriate for protecting the environment (Article 66), and the chapter on investment (Chapter 8) states that it is not appropriate to encourage investment by relaxing environmental measures (Article 102).

(3) Provisions on environment in FTAs/EPAs signed by other countries.

Some countries have signed FTAs/EPAs that take a more active and positive approach toward environmental protection.

(i) United States

Many trade agreements signed by the United States include chapters on the environment. The agreements in recent years in particular (such as the agreements with Singapore, Chile, Australia, Bahrain and Morocco) set forth an organizational framework to promote cooperation on environmental issues and to monitor the compliance of domestic environmental rules and regulations.

For example, the North American Agreement on Environmental Cooperation between the government of Canada, the government of the United Mexican States and the government of the United States of America provides, *inter alia*, that: (i) each party shall periodically prepare and make publicly available reports on the state of the environment (Article 2); (ii) each party shall ensure that

its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations (Article 3); (iii) each party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available (Article 4); and (iv) each party shall effectively enforce its environmental laws and regulations through appropriate governmental action.

In addition, the Commission for Environmental Cooperation was established, which is comprised of a Council, a Secretariat and a Joint Advisory Committee (Article 8). The Council shall prepare an annual report of the Commission in accordance with instructions therefrom (Article 12) as well as preparing a report in its own initiative (Article 13), and prepare a factual report based on information furnished by non-governmental organizations or individuals demonstrating negligence by effective enforcement of environmental rules and regulations. Such report shall be made publicly available upon the Council's decision (Article 15).

This agreement further provides that any contracting party may request consultations with any other party regarding whether there has been a persistent pattern of failure by that other party to effectively enforce its environmental law (Article 22). If the matter has not been resolved, the Council shall convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services (Article 24).

(ii) EU

Regional trade agreements signed by EU member states set the principles and scope of environmental cooperation as a cross-sectoral theme.

For example, the EU-Chile Association Agreement provides that the aim of environmental cooperation is to encourage conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the ecosystem in the interest of sustainable development. The agreement further provides that the following are particularly significant: the relationship between poverty and the environment; the environmental impact of economic activities; environmental problems and land-use management; projects to reinforce Chile's environmental structure and policies; exchanges of information, technology and experience in areas including environmental standards and models, training and education; environmental education and training to involve citizens more; and technical assistance and joint regional research programmes (Article 28).

(iii) Other Countries

Canada has signed agreements with Chile and Costa Rica following the NAFTA model. P4 (an EPA among Brunei, Chile, Singapore and New Zealand) includes the Environmental Cooperation Agreement among the parties to the Trans-Pacific Economic Partnership Agreement (as an annex).

(iv) Energy Charter Treaty ("ECT")

The Energy Charter Treaty, which is not FTA but an international agreement regulating transfer of energy resources and investment protection, provides that contracting parties shall strive to minimize in an economically efficient manner harmful environmental impacts. By confirming that the contracting parties agree that the polluter should, in principle, bear the cost of pollution, the ECT further provides that: contracting parties shall take into account environmental considerations throughout the formulation and implementation of their energy policies; promote market-oriented price formation and fuller reflection of environmental costs and benefits throughout the Energy Cycle; have particular regard for cooperation in the field of international environmental standards, improving

energy efficiency for developing and using renewable energy sources; promote public awareness of the environmental impacts of energy systems; and promote transparent assessment at an early stage (Article 19, Item 1).

The ECT provides that at the request of one or more contracting parties, disputes concerning the application or interpretation of provisions therein shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference with the aim of finding a solution (Article 19, Item 2).

Column: Labor related regulations of FTAs/EPAs

Labor issues should also be mentioned (in addition to mineral resources, energy and environment) as a non-trade issue of FTAs/EPAs.

1. Japan's efforts concerning FTAs/EPAs

The FTAs/EPAs entered by Japan so far do not include independent chapters on labor, but do include provisions on labor-related issues.

(1) Japan-Singapore EPA

In the chapter on Trade in Goods, it is provided that subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other party, or a disguised restriction on trade in goods between the parties, nothing therein shall be construed to prevent the adoption or enforcement by either party of measures relating to the products of prison labor (Article 19, item (e)). In addition, the chapter on investment provides that nothing therein shall be construed to prevent the adoption or enforcement by either party of measures relating to prison labor (Article 83, Item 1(d)).

(2) Japan-Mexico EPA

The chapter on Government Procurement states that nothing herein prevents taking measures relating to goods or services of prison labor (Article 126, Item 2(d)). Moreover, the field of cooperation shall include labor issues such as exchange of information on best practices of technical and vocational training and labor policy (Article 143 (a)).

(3) Japan Malaysia EPA

The chapter on Trade in Services shall not apply to measures affecting natural persons seeking access to the employment market of a country, or measures regarding employment on a permanent basis (Article 94, Item 2(d)).

(4) Japan-Philippines EPA

The chapter on investment includes a provision concerning investment and labor. The chapter provides that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws and that each party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights such as: the right of association; the right to bargain collectively; prohibition on the use of any form of forced or compulsory labor; labor protections for children and young people, including minimum wage for the

employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. When a party considers that the other party has offered such an encouragement, it may request consultations with the other party (Article 103).

2. Labor issues in FTAs of other countries

(1) United States

(i) NAFTA

The text of NAFTA does not include provisions concerning labor policies, but its preamble states that the agreement aims to create new employment opportunities and improve working conditions and living standards, as well as protect, enhance and enforce basic workers' rights.

(ii) North American Agreement on Labor Cooperation of NAFTA

In August 1993, the trilateral North American Agreement on Labor Cooperation, which was to complement NAFTA in light of labor protection, was concluded between the United States, Canada and Mexico. The agreement became effective in January 1994, as did NAFTA. The conclusion of the complementary agreement was as a result of the opposition against NAFTA by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) due to concerns that NAFTA would promote shifting of industrial plants and factories to Mexico (whose labor conditions, including payment, are less demanding than those of the US), and thus worsen already tough US employment conditions. An outline of the principal items of this agreement is as follows:

(a) Promotion of Labor Principles

The United States, Canada and Mexico shall, in accordance with their respective domestic laws, promote: i) freedom of association; ii) right to organize; iii) right to strike; iv) prohibition of forced labor; v) labor protection for children and young persons; vi) minimum employment standards; vii) elimination of employment discrimination; viii) equal pay for women and men; ix) prevention of occupational injuries and illnesses; x) compensation for occupational injuries and illness; and xi) protection of migrant workers.

(b) General Obligations Prescribed by the Agreement

The agreement sets forth the general obligations of the parties to: i) improve working conditions and living standards; ii) promote compliance and effective enforcement by each party with respect to its labor laws; iii) cooperate and coordinate to promote the principles of the agreement; and iv) encourage publication and exchange of information to enhance the mutual understanding of the statutes, institutions and legal frameworks governing labor in each country.

(c) Establishment of Commission for Labor Cooperation

Pursuant to the agreement, the Commission for Labor Cooperation will be established, which shall consist of the Ministerial Council, the Secretariat and the National Administrative Offices (NAO). The Ministerial Council oversees the implementation of the agreement and directs the work and activities of the Secretariat. The Secretariat will be established as a permanent body and give technical assistance to the Ministerial Council as well as prepare and submit periodic reports thereto. The NAO will be established in each member state, and serve as a point of contact and provides information.

(d) Resolution of Disputes

1) When a dispute arises concerning the issue of occupational safety and health, child labor or minimum wage technical standards, the NAO will exchange related information, followed by convening of the Ministerial Council upon the request of at least one member state, and the Evaluation Committee of Experts (ECE) will then resolve the dispute. The ECE will conduct research concerning the respective issues, prepare a report thereon and submit it to the Ministerial Council. In cases where the issue is of a structural nature and cannot be resolved in the Ministerial Council, an arbitration panel comprised of experts will be established upon the request of at least two member states.

2) When the arbitration panel determines, after the examination of a case, that the state complained against failed to effectively enforce labor standards or regulations, such state should within 60 days agree to adopt an action plan to solve the problem. If agreement is not reached within the prescribed period, the panel will evaluate the action plan or present a counter plan within 60 days.

3) In order to ensure implementation of the action plan, the arbitration panel may from time to time hold a meeting and impose a monetary contribution on a state complained against that does not implement the action plan. If the panel determines that such state has not made the required monetary contribution and continues to refrain from implementation of the action plan, the panel can stop the payment of benefits under NAFTA within a certain amount (maximum of USD 20,000,000) when the case relates to the United Sates and Mexico, or file a suit in a Canadian court to implement the payment and action plan when the case relates to Canada.

(iii) Other FTAs concluded by U.S.

The US-Jordan FTA provides in Article 6 that the parties thereto reaffirm their obligations as members of the International Labor Organization ("ILO"). The parties thereto shall strive to ensure: compliance with such labor principles and internationally recognized labor rights, such as the right of association; the right to organize and bargain collectively; prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health (Item 1). The parties thereto also recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other party (Item 2). Moreover, each party shall strive to ensure that its laws provide for labor standards consistent with internationally recognized labor rights (Item 3), and each party shall not fail to effectively enforce its labor laws (Item 4(a)) or to recognize that each party retains the right to exercise discretion with respect to making decisions regarding the allocation of resources (Item 4(b)). The Joint Committee shall consider any cooperation opportunity (Item5).

Other FTAs signed by the U.S. include provisions on labor to the same effect (e.g., U.S.-Singapore FTA, U.S.-Panama FTA, U.S.-Bahrain FTA, U.S.-Australia FTA, U.S.-Chile FTA, CAFTA-DR).

(2) EU

The EU deals with labor issues within the framework for cooperation in FTAs. For example, the EC-Chile Association Agreement (in force since 2003) recognizes the importance of social development along with economic development, and gives priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the ILO covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labor, and equal treatment between men and women (Article 44, Item 1). This agreement also provides that cooperation may cover any area of interest of the parties (Article 44, Item 2); and lists priority measures aimed at: reduction of poverty and the fight

against social exclusion; promoting the role of women in the economic and social development process; developing and modernizing labor relations, working conditions, social welfare and employment security; promoting vocational training and development of human resources; and promoting projects and programmes which generate opportunities for the creation of employment within micro, small and medium-sized enterprises (Item 4).

The EU-Egypt Association Agreement (in force since 2004) also reaffirms the importance of the fair treatment of workers legally residing and employed in the territory of the contracting party, and upon the request of a counter party, each party agrees to initiate talks on reciprocal bilateral agreements related to working conditions (Article 62). The agreement further provides that the parties thereto shall conduct regular dialogue on social matters, and that this dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration of the nationals legally residing in the territories of their host countries (Article 63).

<Settlement of Disputes between States>

(1) Background against Rules

Regional trade agreements, including free trade agreements ("FTAs"), economic partnership agreements ("EPAs"), and bilateral investment treaties ("BITs") usually contain certain provisions for settlement of disputes between the state parties concerning the interpretation and application thereof. Not only do such provisions provide the parties with the tools to settle disputes, but they also assume the important role of encouraging the parties of the relevant agreements to comply with the provisions thereof, thereby ensuring the effectiveness thereof. All FTAs, EPAs and BITs which Japan has entered into also contain, whether detailed or not, such provisions for the settlement of disputes between the parties.

The dispute settlement provisions in most of such agreements, similar to the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") in the WTO Agreement, share the following four common elements:

(i) if a dispute arises between the parties to a relevant agreement, they shall first conduct a consultation in respect of such dispute;

(ii) if such consultation fails to settle such dispute, the complainant may then refer the matter to the dispute settlement body to be established pursuant to the relevant agreement;

(iii) the dispute settlement body shall examine the relevant matter and render a binding decision on settlement of the dipute; and

(iv) the respondent shall rectify violations of the relevant agreement, if found by the dispute settlement body, or provide for compensation to the complainant.

Despite these common elements, the provisions for dispute settlement in such agreements significantly vary in their specific details, reflecting differences in political and economic factors underlying such agreements and the relationships of the parties thereto. Correctly understanding the meaning of such provisions and the relevant recent trends in respect thereof is important, not only to the Japanese government in reviewing its own international trade and foreign investment policy, but

also, to Japanese business enterprises actively developing their own businesses abroad. This Chapter will examine the mechanics of dispute settlement provisions in a number of FTAs/EPAs and BITs entered into by states with major market economies (such as the United States and the EU) and major emerging economies, and compare them with the mechanics of dispute resolution provisions existing in the EPAs entered into by Japan. The agreements examined herein are enumerated in Table 7-1 below.

(2) Summary of Legal Disciplines

(i) Nature and Types of Procedures Subject to Settlement in State-to-State Disputes

A comparison of the procedures for the settlement of state-to-state disputes between FTAs/EPAs and BITs indicates a general tendency on the part of such procedures in FTAs/EPAs to be in relatively greater detail than those in BITs. Furthermore, a number of specific dispute settlement provisions included in most FTAs/EPAs are not included in most BITs. An important common element, generally appearing in both FTAs/EPAs and BITs, however, is the provision of the right of a party to unilaterally request a binding ruling of a dispute settlement body on certain disputes. Such commonality is fundamental to dispute settlement procedures. In contrast, many FTAs/EPAs and BITs contain several different types of the provisions which "reference matters to a dispute settlement body"; such provisions differ from each other with respect to the organization of the dispute settlement body and the mechanics of referring matters to the dispute settlement body. In this context, the following subsection proposes a way of grouping of the dispute settlement provisions found in FTAs/EPAs and BITs.

(a) FTAs/EPAs

The procedures employed by a dispute settlement body in rendering a binding decision in FTAs and EPAs can be grouped into three major categories.

The first category, a typical example of which being the procedures adopted by the North American Free Trade Agreement ("NAFTA"), is the "arbitration-type" procedure. In an "arbitration-type" procedure, each party is granted a right to request a panel or a panel of arbitrators, which is either *ad hoc* established or selected to examine individual cases, for a ruling. All the FTAs/EPAs that Japan has entered into have adopted this type of the dispute settlement procedure. Set forth below are typical examples of FTAs/EPAs which have adopted this type of dispute settlement procedure and which are entered into by parties other than Japan, with the numbers of the relevant provisions specified:

- NAFTA – Articles 2004 and 2008;
- Free Trade Agreement on Americas ("FTAA") (third draft, covering 34 north and South American countries excluding Cuba) – Chapter 23, Article 11;
- Korea - Singapore FTA – Chapter 20, Article 20.6;
- Australia - Singapore FTA – Chapter 16, Article 4; and
- Thailand - New Zealand FTA – Chapter 17, Article 17.4.

The second category is the "council-type" dispute settlement procedure, wherein the disputed matter is referred to a body consisting of representatives of the contracting parties' governments (a Council, Commission, etc.), and the relevant council is established to examine the disputed matter and to make a decision or recommendation in respect thereof. Set forth below are typical examples of

FTAs/EPAs which have adopted this category of dispute settlement procedure:

- Bangkok Agreement (Bangladesh, India, Korea, Laos, Sri Lanka, China) (Article 16);
- SAARC (South Asian Association for Regional Cooperation) (India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, Maldives, Afghanistan) (Article 20);
- EEA (European Economic Area) (EU, Iceland, Lichtenstein, Norway) (Article 111, Paragraph 1, with certain exceptions); and
- EC - Norway FTA (Article 29).

The third category is the "hybrid-type" procedure, wherein, similar to the second "council" type, the disputed matter is first referred to a body consisting of representatives of the contracting parties' governments, but similar to the first "arbitration" type of dispute settlement procedure, for disputes which the body has failed to settle, certain quasi-judicial dispute settlement procedures (for example, an arbitration procedure), are available. Set forth below are typical examples of FTAs/EPAs which have adopted this category of dispute settlement procedure

- US - Jordan FTA (Article 17, Paragraph 1(b) and (c));
- EC - Morocco FTA (Article 86, Paragraphs 2 and 4);
- Europe Agreements (EU and Central or Eastern European countries) (Article 114, Paragraphs 2 and 4);
- Cotonou Agreement (EU and ACP (African, Caribbean and Pacific countries) (Article 98, Paragraphs 1 and 2);
- EFTA (European Free Trade Association) (Norway, Lichtenstein, Iceland and Switzerland) (Articles 47 and 48);
- CACM (Central American Common Market) (El Salvador, Guatemala, Honduras, Nicaragua, and Costa Rica) (Article 26);
- Andean Community (Bolivia, Columbia, Ecuador and Peru) (Article 47 and Article 24 of the Treaty establishing the Court of Justice);
- EEA, regarding a certain area (safeguard measures) (Article 111, Paragraph 4); and
- ASEAN (Association of South-East Asian Nations) (Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar, Cambodia) (Article 8).

In most of the agreements enumerated above, the disputed matter can be referred by the parties thereto to an arbitral body which is established on an *ad hoc* basis if the body consisting of representatives of the contracting parties' governments has failed to settle the disputed matter. In contrast, the Andean Community and the EEA (with respect to only those disputes concerning the rules of the Treaty establishing the European Economic Community or the Treaty establishing the European Coal and Steel Community, or the interpretation of the EEA provisions relevant to the measures adopted to implement such treaties) provide that the disputed matter which such council-type body has failed to settle can be referred to a permanent court that has been established within the relevant region. In this respect, the Andean Community has established a permanent court which addresses any dispute under such agreement, and the EEA has appointed the Court of Justice of the European Communities to address any dispute under such agreement (except for disputes between EFTA countries, which are referred to the EFTA Court).

As explained above, the dispute settlement provisions in FTAs/EPAs can be categorized into the following three types: the "arbitration-type", which uses a significantly judicial dispute settlement body consisting of arbitrators selected on an *ad hoc* basis; the "council-type", which uses a more politicized body consisting of representatives of the contracting parties' governments; and the "hybrid-type", which provides for arbitration by arbitrators to be employed for matters that could not be resolved by such a politicized body. The overall trend appears to indicate that countries (or other political entities) entering into FTAs/EPAs are increasingly inclined to adopt the "hybrid-type" procedure. For example, with the exception of the NAFTA (which adopts an "arbitration-type" procedure), all of the agreements involving the United States have adopted the "hybrid-type" procedure. Also, the EU, which adopted primarily the "council-type" procedure up to and including the 1980s, has adopted the "hybrid-type" procedure in most of the agreements which it has entered into in the 1990s and later.

In contrast, it is noteworthy that Japan's EPAs always include an "arbitration-type" procedure (see, for example, Japan - Malaysia EPA, Chapter 13; Japan - Mexico EPA, Chapter Section 15; Japan - Singapore EPA, Section 21; and Japan - Philippines EPA, Section 15), as well as a more detailed set of procedural provisions than other agreements entered into by other governments. Japan's preference for "judicial" dispute settlement procedures is shared by Singapore and Korea, both of which, similar to Japan, became increasingly active in negotiating and executing FTAs/EPAs since 2000 (see, for example, Chile - Korea FTA, Article 19.6, Paragraph 1; Korea - Singapore FTA, Section 20, Article 20.6; Singapore - New Zealand FTA, Article 61.1; Australia - Singapore FTA, Section 16, Article 4; and the Trans-Pacific Strategic Economic Partnership Agreement (Chile, Brunei, New Zealand and Singapore), Article 15.6, Paragraph 1).

(b) BITs

In general, BITs include provisions for the procedures for the settlement of state-to-state disputes. Most of them have adopted "arbitration-type" procedures, consisting of consultation and arbitration.

(ii) Particular Features of Specific Dispute Settlement Procedures

As stated above, the procedures for the settlement of state-to-state disputes in the FTAs/EPAs and BITs are similar to the WTO dispute settlement procedures, as all of them contain (i) consultation between disputing parties; (ii) referral of matters to a dispute settlement body; (iii) the rendition of a binding decision by such a dispute settlement body; and (iv) the rectification by the respondent of violations if any in the subject measure. However, the details of the relevant provisions vary between the agreements.

Set forth below is an analysis of the particularities of the agreements and a proposed grouping of the dispute settlement provisions, and a comparison thereof with those agreements entered into by Japan. Such comparison is in respect of the procedural steps enumerated below, which are considered particularly important to ensure that the WTO dispute settlement procedures function properly and are effective (with respect to the 28 FTAs/EPAs involving Japan or other countries subject to the analysis below, the specifics and procedural particulars thereof are summarized in the appendix to Section IV (State-to-state Dispute Settlement Procedures in Economic Partnership Agreements of Foreign Countries). See also the sequence of steps in the dispute settlement procedures of the EPAs entered into by Japan, as described in Chart 7-2.

Analytical Topics of Each Agreement

(a) subject matters of the dispute settlement procedures;

(b) mandatory obligation for prior consultation;

(c) rules applied to the dispute settlement procedures;

(d) time restraints;

(e) relationship with dispute settlement procedures under other agreements;

(f) selection of panelists or arbitrators;

(g) method of determination by the dispute settlement body;

(h) appellate process;

(i) effective implementation of arbitral awards; and

(j) retaliatory measures for non-compliance.

(a) Scope of the Subject Matter of Dispute Settlement Procedures

(i) FTAs/EPAs

The scope of the matters that can be referred to the relevant dispute settlement body established under the relevant FTA/EPA can be grouped as follows:

(1) certain FTAs/EPAs limit the scope of disputes that can be referred to the dispute settlement body established thereunder to those concerning the interpretation or application thereof, (for example, CACM, Article 26, EC - Norway FTA, Article 29; Cotonou Agreement, Article 98, Paragraph 1; and ASEAN, Article 8, Paragraph 2); and

(2) in addition to permitting the interpretation or application of the relevant agreement, other FTAs/EPAs permit for a wider scope of disputes that can be referred to the dispute settlement body established thereunder, allowing parties to claim in respect of measures which are not inconsistent with the provisions thereof, but effectively nullify or impair the benefits expected by such parties from such agreements (similar to "non-violation" claims under the WTO Agreement) (for example, CARICOM, Article 187; NAFTA, Article 2004 (with certain limitations); and Korea - Singapore FTA, Chapter 20, Article 20.2, Paragraph 1 (with certain limitations)).

All the EPAs entered into by Japan fall under category (1), above. They set forth the condition that any party thereto may claim against the other(s) before an arbitral panel if any benefit accruing to it thereunder is nullified or otherwise impaired as a result of either (i) the failure of the party complained against to carry out its obligations under such EPA, or (ii) measures taken by the respondent which are in conflict with the obligations thereof.

In addition to the limitations described above, many FTAs/EPAs exempt certain matters from the scope of the relevant dispute settlement procedure (with a view to setting aside such matters which are too sensitive to a party thereto or which a party thereto considers inappropriate to subject to a "judicial" dispute settlement. Among those EPAs entered into by Japan, for example, Japan - Malaysia EPA provides that those provisions concerning dispute settlement procedures shall not apply to technical regulations, standards and conformity assessment procedures, sanitary and phytosanitary

measures, cooperation in the field of intellectual property, controlling anti-competitive activities, or improvement of business environment and cooperation between the parties in respect thereof (Articles 67, 72, 128 (Paragraph 3), 133, and 144). The same applies to cooperation in the field of regulations controlling anti-competitive activities, and in sharing information on securities markets and security derivatives markets under the Japan – Singapore EPA (Article 105 and Article 107, Paragraph 3); certain measures concerning investment and the improvement of the business environment and bilateral cooperation (Article 138, Article 95, paragraphs 1 and 2 and Article 148, respectively) under the Japan - Mexico EPA; and cooperation in the field of intellectual property, regulations of anti-competitive activities; improvement of the business environment (Article 138), and bilateral cooperation (Article 119, Paragraph 4, Article 137 and Article 148, respectively) in the Japan - Philippines EPA.

Also, some agreements, in reflecting the special needs of the parties thereto, set forth special rules for dispute settlement procedures applicable only to certain subject areas (for example, NAFTA prescribes separate panel procedures only applicable to the issue of antidumping and countervailing duties (Chapter 19)).

(ii) BITs

We discovered no BIT among the examined agreements that permits "non-violation" claims, in contrast to the FTAs/EPAs. With limited exceptions, no BITs we have examined limit the scope of matters that can be referred to dispute settlement, although a small number of agreements provide that state-to-investor disputes which are currently pending in any international arbitration court cannot be referred to any international arbitration court as a state-to-state dispute (see ,for example, Chile - Turkey BIT, Article 12, Paragraph 10, and South Africa - Turkey BIT Article 8, Paragraph 8).

(b) Obligation to Conduct Prior Consultation

Most FTAs/EPAs obligate the disputing parties to conduct consultations amongst themselves before resorting to binding dispute settlement procedures. In this respect, all EPAs entered into by Japan set forth the same.

All examined BITs obligate the parties to seek an amicable solution (through consultation, for example) with respect to any dispute before initiating any quasi-judicial procedure.

(c) Rules Applicable to Dispute Settlement Procedures

(i) FTAs/EPAs

In a dispute resolution proceeding, the panel (or arbitrator(s)) needs detailed rules of procedures in order to examine the relevant matter. The rules of procedures articulated in the dispute settlement provisions fall under the following two categories:

(1) certain agreements require the rules of procedure to be determined by a third party entity (See, for example, EFTA Article 1, Paragraph 6 of Annex T, and the Cotonou Agreement, Article 98, Paragraph 2(c) (wherein the rules of procedures of the Permanent Court of Arbitration shall be used, unless otherwise agreed by the parties)); and

(2) certain other agreements require the rules of procedure to be determined separately.

Most FTAs/EPAs prescribe the rules of procedure described in (2) above. Such agreements can be further subcategorized into:

(i) those providing for the common rules of procedure applicable to any and all disputes

(See, for example, NAFTA Article 2012, Paragraph 1; FTAA Chapter 23, Article 16, Paragraph 1; US - Jordan FTA Article 17, Paragraph 3; and Korea - Singapore FTA Article 20.9, Paragraph 1), and

(ii) those providing that each panel or arbitral panel shall, at its own discretion, establish the rules of procedure on a case by case basis (See, for example, CARICOM, Arbitration Procedure, Article 200, Paragraph 1; Australia - Singapore FTA Chapter 16, Article 6, Paragraph 4; and Thailand - New Zealand FTA Article 17.7, Paragraph 11).

Of the EPAs entered into by Japan, Japan - Malaysia EPA (Article 150), Japan - Singapore EPA (Article 145), and Japan - Philippines EPA (Article 155) provide rules of procedure which are applicable to any and all disputes. In contrast, Japan - Mexico EPA (Article 159) provides that the rules governing arbitration procedures shall be determined by the joint committee established thereunder.

(ii) BITs

Most BITs provide that each panel (or arbitral panel) shall, in its own discretion, determine the rules of procedures on a case by case basis. Some BITs, however, provide that the rules of procedures shall be adopted from a third party (for example, some of the BITs entered into by the United States provide that the arbitration procedures articulated therein follow the applicable UNCITRAL rules).

(d) Timelines

(i) FTAs/EPAs

Even though the right to seek a binding ruling from a dispute settlement body is provided for under a relevant FTA/EPA, no effective resolution could ever be expected if a respondent is able to arbitrarily delay the relevant proceedings. Most of the FTAs/EPAs examined, including the EPAs entered into by Japan, set forth mandatory timelines to be met at each step of the dispute settlement process. In some FTAs/EPAs, however, no time limitation in respect of proceedings is clearly established (See, for example, CACM, CARICOM, EC - Estonia FTA, and EC - Morocco FTA).

(ii) BITs

In contrast to FTAs/EPAs, only a very limited number of BITs set forth the timelines in respect of the final arbitral award under the relevant dispute settlement process. Such include: US - Czech FTA , Canada - El Salvador FTA and South Africa - Turkey FTA .

(e) Priority of Forum in Relation to Dispute Settlement Procedures of Other Agreements

(i) FTAs/EPAs

The WTO Agreement, inter alia, sets forth dispute settlement procedures in respect of state-to-state disputes. Both of such procedures set forth thereunder and the dispute settlement procedures under any relevant FTA/EPA or BIT can be used in certain cases (a typical example is the US - Canada lumber dispute over antidumping and countervailing duty measures in respect of soft wood lumber originating in Canada).

FTAs/EPAs set forth the priority between dispute settlement procedures prescribed thereunder and dispute settlement procedures prescribed under the WTO Agreement, as follows:

(1) priority is given to the dispute settlement procedures under the relevant FTA (see, for example, NAFTA, which provides, in regard to any dispute arising from NAFTA or GATT or any related agreement, that if the respondent claims that its action is subject to the provisions on "Relation to Environmental and Conservation Agreements", "Sanitary and Phytosanitary Measures" or "Standard-Related Measures," and requests that for the matter be considered under the NAFTA, the complainant may have recourse solely to the dispute settlement procedures under NAFTA (Article 2005, Paragraphs 3 and 4)); or

(2) priority is given to the dispute settlement procedures under the WTO Agreement (or GATT) (See, for example, the EC - Chile FTA, which stipulates that when a case is disputable under the WTO Agreement, such case shall be referred to the dispute settlement procedures (Article 189, Paragraph 4(c)) under the WTO Agreement. Also, US - Jordan FTA provides that disputes over trade in services or intellectual property can be referable to the panel procedures under that FTA only if they are not subject to resolution under the WTO dispute settlement procedures (Article 17, Paragraphs 4(a) and (b)).); or

(3) the complainant may choose between the GATT/WTO dispute settlement procedures and the FTA dispute settlement procedures (ee, for example, FTAA (Chapter 23, Article 8, Paragraph 1) and Korea - Singapore FTA (Article 20.3, Paragraph 1). However, where the dispute resolution procedure is left to the choice of the complainant, it is usually provided in the relevant agreement that once either of the disputes settlement procedures is chosen, such dispute resolution procedure selected shall be used to the exclusion of the other (see, for example, Korea - Singapore FTA, Article 20.3, Paragraph 2).

EPAs entered into by Japan fall under category (3) above in that they impose no limitation on the right of the complainant to have recourse to the dispute settlement procedures available under any other international agreement, but explicitly provide that once either of the dispute settlement procedure has been chosen, no other procedure can be used in respect of that dispute (however, Japan - Singapore EPA (Article 139) and Japan - Philippines EPA (Article 149) provide that another procedure may be used in place of the preceding procedure if the parties mutually agree).

(ii) BITs

No BIT, among those examined, addresses the issue of priority in dispute resolution procedures

(f) Selection of Panelists and Arbitrators

(i) FTAs/EPAs

The rules of procedure may include a provision involving the selection method in respect of panelists or arbitrators. The first issue in this regard is whether a roster of candidates is to be prepared and maintained (for example, FTAA (Chapter 23, Article 12), CARICOM (Article 205, Paragraph 1), and MERCOSUR all provide that such a roster be prepared. NAFTA also provides that such a roster be prepared and maintained for panelists (for example, arbitrators) reviewing AD and CVD measures (Annexes 1901.2 and 1905) and in respect of ordinary dispute settlement procedures (Article 2009)). No such provision is found in the EPAs entered into by Japan.

The second issue in this regard is the specific method to be employed in selecting panelists or arbitrators. Most FTAs/EPAs provide that for panels or arbitrations consisting of three (3) panelists or arbitrators, as the case may be, each of the parties may appoint one such panelist/arbitrator, and that for panels or arbitrations consisting of five (5) panelists or arbitrators, as the case may be, each of the parties may appoint two such panelists/arbitrators. In each such case, the method of selecting the

remaining one panelist or arbitrator differs, depending on the terms of the relevant FTA/EPA, as follows:

(1) some FTAs/EPAs provide that the remaining panelist/arbitrator shall be selected by the mutual agreement of the panelists/arbitrators already appointed (for example, US - Jordan FTA, Article 17, Paragraph 1(c));

(2) some FTAs/EPAs provide that the remaining panelist/arbitrator shall be selected by the mutual agreement of the disputing parties (for example, NAFTA Article 2011, Paragraphs 1(b) and 2(b)), and that, if no agreement is reached on the remaining panelist/arbitrator, he/she shall be choosen by lot); and

(3) some FTAs/EPAs provide that the remaining panelist/arbitrator shall be selected by the mutual agreement of the panelists already appointed, and if no agreement is reached, the selection of the remaining panelist/arbitrator shall be determined by a third party (for example, the President of the International Court of Justice, in Thailand - New Zealand FTA, Article 17.5, Paragraphs 1 and 3; and the Secretary-General of the Permanent Court of Arbitration, Cotonou Agreement, Article 98, Paragraph 2(b)).

With respect to panel selection, in the dispute under NAFTA between, as applicable, the United States and Mexico concerning the market access commitment of sugar, no panel examination has commenced to date, six years after the filing of the complaint, because the United States has successfully delayed the panelist selection procedure. This suggests that panel selection procedures requiring the mutual agreement of the disputing parties may generate a problem with respect to the effectiveness of the dispute resolution process.

Japan's EPAs could fall under category (2) above, in that each of the two of the three arbitrators required thereunder is appointed by each party, and the parties thereto are required to propose a certain number of candidates for the third panelist (who shall be the chairperson), and negotiate this matter. However, they differ from category (2) above in that, if no agreement has been reached on the selection of the chairperson by and between the parties prior to the mandatory deadlines thereunder: (i) the Secretariat-General of the WTO may be requested to appoint the third arbitrator (see, for example, Japan - Malaysia EPA, Article 148, Paragraph4), or (ii) the third arbitrator may be chosen by lot (see, for example, Japan - Mexico EPA, Article 153, Paragraph 6, Japan - Singapore EPA, Article 143, Paragraph 4(d), and Japan - Philippines EPA, Article 153, Paragraph 5).

(ii) BITs

It is generally provided in BITs that an arbitral tribunal shall consist of a total of three (3) arbitrators, with each party selecting one such arbitrator, and each selected arbitrator then mutually agreeing upon the third arbitrator (who shall be the chairperson).

(g) Method of Decision-making by the Dispute Settlement Body

(i) FTAs/EPAs

In FTAs/EPAs, the following types of methods are used in the decision-making process by either the panel or the council body consisting of representatives of the contracting parties:

(1) Consensus, but if no consensus is reached, a majority vote is used (see, for example, Korea - Australia FTA, Annex 20A, Paragraph 20; Australia - Singapore FTA, Chapter 16, Article 6, Paragraph 3; and Thailand - New Zealand FTA, Article 17.6, Paragraph 3); and

(2) A (simple) majority vote is used from the outset (see, for example, EEA Protocol, Article 33-4; EFTA Annex T, Article 1, Paragraph 7; FTAA, Chapter 23, Article 24,

Paragraph 3; CARICOM, Arbitration Procedure, Article 207, Paragraph 7; European Agreements Arbitration Procedures, Article 114, Paragraph 4; and EC - Morocco FTA, Article 86, Paragraph 4).

Among EPAs entered into by Japan, Japan - Malaysia EPA (Article 150, Paragraph 9), Japan - Singapore EPA (Article 144, Paragraph 8) and Japan - Philippines EPA (Article 154, Paragraph 8) provide that the arbitral tribunal shall attempt to make its decisions by consensus, but may also make such decisions by majority vote should it fail to reach consensus. In contrast, Japan - Mexico EPA provides that the arbitral tribunal shall make decisions by majority vote (Article 154, Paragraph 7).

(ii) BITs

BITs often contain no particular provision on the method by which the arbitral tribunal is to render its decision, including the rendering of its arbitral award. This is presumably linked to the fact that most, if not all, of the BITs examined provide that the rules of procedure shall be determined by the arbitral tribunal on an *ad hoc* basis.

Other BITs provide that the arbitral tribunal may make decisions by majority vote.

(h) Appellate Proceedings

(i) FTAs/EPAs

While it is desirable for either the relevant arbitral tribunal or the relevant council body consisting of representatives of the contracting parties to render a final and conclusive decision over disputes for the expeditious resolution thereof at first instance, the need for a more discreet examination of certain matters may require that an appeal against an award be filed, if necessary.

Most FTAs/EPAs, including those to which Japan is a party, have no provisions dealing with appellate procedures. EPAs entered into by Japan expressly state that the award of the arbitral tribunal is "final" (see, for example, Japan - Malaysia EPA, Article 150, Paragraph 10; Japan - Singapore EPA, Article 144, Paragraph 2; Japan - Mexico EPA, Article 154, Paragraph 8; and Japan - Philippines EPA, Article 154, Paragraph 2). SAARC, however, explicitly provides for appellate procedures, and FTAA is under consideration. Other FTAs/EPAs explicitly provide that no award shall be subject to an appeal (see, for example, Korea - Singapore FTA, Article 20.13, Paragraph 1).

(ii) BITs

No BITs examined specifically address the issue of whether or not an appeal is permissible thereunder.

(i) Implementation Procedures in Respect of Arbitral Awards

As described above, most FTAs/EPAs and BITs stipulate that either the relevant arbitral tribunal or the relevant council body consisting of representative of the contracting parties is authorized to render an award binding on the parties. Accordingly, when such an award is rendered (such award being a requirement of the respondent to take corrective measures or to make compensation, as the case may be), the respondent is obligated to implement it in good faith. FTAs/EPAs generally set forth provisions to ensure the implementation of the arbitral award by the respondent.

In contrast, only a small number of BITs include provisions to ensure the implementation of the relevant award (for example, Canada - El Salvador BIT provides that the complainant may either receive compensation from the responding party, or if the respondent has not implemented the arbitral

award, suspend the provision of a benefit thereunder equivalent to the level of benefit subject to the arbitral award if the arbitral award is not implemented (Article 13)).

(i) Deadlines for Implementation

The following types of deadlines are found in provisions concerning the implementation of the award for both FTAs/EPAs and BITs:

(1) for some agreements, the limitation period is from the rendition of the final decision to the actual implementation thereof (in this regard, FTAA, Chapter 23, Article 31, Paragraph 2 is drafted on the premise that the final decision may alternatively set out the implementation period); and

(2) for other agreements, the limitation period is from the rendition of the final decision to the deadline for the parties to reach agreement on such implementation. That is, if the parties fail to reach agreement within such specified time period, the complainant may request that the panel hearing the original dispute settlement set out the deadlines for the implementation of the award (see for example, Korea - Singapore FTA, Article 20.13, Paragraph 2(b); and Australia - Singapore FTA, Chapter 16, Article 9, Paragraph 1).

EPAs entered into by Japan fall under type (2) above. Specifically, the respondent is required to duly notify the complainant of the period necessary to implement the award within a certain period of time (for example, 20 days under Japan - Malaysia EPA, Article 152, Paragraph 2; 20 days under Japan - Singapore EPA, Article 147, Paragraph 1; 20 days under Japan - Mexico EPA, Article 156, Paragraph 2, and 45 days under Japan - Philippines EPA, Article 157, Paragraph 1). If the complainant is not satisfied with the time period notified by the respondent, either party may request that the arbitral tribunal, after conducting consultations with the parties, determine such time period (see, for example, Japan - Malaysia EPA, Article 152, paragraph 2; Japan - Singapore EPA, Article 147, Paragraphs 1(c) and 4(b); and Japan Philippines EPA Article 157, Paragraph 1), or without conducting such consultations (see, for example, Japan - Mexico EPA, Article 156, Paragraph 2).

(ii) Surveillance over Implementation

Few agreements specifically provide for a surveillance mechanism to ensure that the respondent has in fact implemented the final decision of the panel or the council body consisting of representatives of the contracting parties, as the case may be. The ASEAN Protocol, which governs dispute settlement, requires that the respondent report to the ASEAN Senior Economic Officials' Meeting on its own implementation of final decisions rendered by the panel or the council body, as the case may be (Article 15, Paragraph 4).

No EPA entered into by Japan contains any specific provision in respect of surveillance over implementation.

(iii) Method of Implementation

Whether or not the relevant dispute settlement body has the authority to recommend methods of implementing a relevant binding decisions (see, for example, Article 19, Paragraph 1 of the DSU of the WTO Agreement) is an important issue. In this respect, agreements can be categorized as follows:

(1) it is left to the mutual agreement of the parties; and

(2) the relevant agreement provides that the panel is authorized to make recommendations on the implementation method (for example, US - Jordan FTA, Article 17, Paragraph 1(d) provides that the panel may make recommendations on the method of correcting violations

found in the arbitral award pursuant to a request of a party.)

Japan - Malaysia EPA (Article 149, Paragraph 1(d)), Japan - Singapore EPA (Article 144, Paragraph 1(d)) and Japan - Philippines EPA (Article 154, Paragraph 1(d)) provide that the arbitral tribunal may include in its award suggested options of implementation by the respondent for the countries to consider, in accordance with (2) above. In contrast, no such provision is found in Japan - Mexico EPA.

(j) Retaliatory Measures in the Event of a Failure of Respondent Party to Implement an Award

The following retaliatory measures are permitted if the respondent fails to take actions required by the relevant award, the final report, or otherwise agreed upon by the parties based on the final report:

(1) one type is to authorize a retaliatory measure, which suspends a benefit provided to the respondent; and

(2) the other type is to require a compensatory adjustment to be made by the respondent (see, for example, EFTA Annex T, Article 3, Paragraph 1(a); however, subparagraph (b) thereof effectively permits, the complainant to choose between the option (1) above and this option (2)).

With respect to option (1) above, some agreements permit the complainant to take unilateral retaliatory measures against the respondent (See, for example, NAFTA, Article 2019, Paragraph 1; Korea - Singapore FTA, Article 20.14, Paragraph 2; and Thailand - New Zealand FTA, Article 17.11, Paragraph 1, (wherein the respondent party has the right to dispute the level of such unilateral retaliatory measures in arbitration)) and others permit the complainant to take retaliatory measures only after the panel or council body consisting of representatives of the contracting parties' governments, as the case may be, so authorizes (see, for example, SAARC, Article 20, Paragraph 11; Bangkok Agreement, Article 16; and Australia - Singapore FTA, Chapter 16, Article 10, Paragraph 2).

Japan - Malaysia EPA (Article 152, Paragraphs 4 and 5), Japan - Singapore EPA (Article 147, Paragraphs 4(c) and 5), Japan - Mexico EPA (Article 156, Paragraphs 4 and 5), and Japan - Philippines EPA (Article 157, Paragraphs 2 and 5) have adopted option (1) above, providing that the complainant may notify the respondent that it may unilaterally suspend the benefit to the respondent granted under the EPA if the arbitral tribunal finds that the respondent actually fails to take implementation measures.

(3) Challenges in State-to-state Dispute Settlement Procedures

Japan has entered into only 3 EPAs and 11 BITs which have entered into force, each a relatively small number in comparison with other developed countries. Nevertheless, it is believed that the number of regional or bilateral agreements between Japan and other countries will increase, as indicated by the recent movement toward economic integration in East Asia.

Thus far, no dispute settlement clause on state-to-state disputes has been invoked under any EPA/BIT entered into by Japan. However, if Japan agrees on such agreements with a wider range of countries, and as a result, more business sectors actively develop businesses by virtue of preferential treatment granted thereunder, it would be increasingly likely that there will be disputes concerning the interpretation and/or application of the EPAs or BIT.

In such a situation, several issues will actually arise, specifically, the issue of whether the dispute settlement procedures prescribed in the relevant EPA or BIT will apply or whether the WTO procedures will apply. Also, the scope of subjects covered by EPAs/BITs and those covered by the WTO Agreementare currently overlapping because both are aimed at promoting trade and other economic activities. Accordingly, the parties would need to carefully examine and determine the more advantageous forum for the settlement of disputes.

At this stage, it is undeniably possible that two cases on the same set of facts and between the same parties can be referred to both the forums prescribed under the EPAs/BITs and the WTO Agreement, generating difficult legal questions.

The relevant procedural rules under customary international law (such as *res judicata* and the avoidance of a multiplicity of proceedings) are applicable to cases whose disputes are identical. The parties to disputes, and the facts and causes of actions in respect thereof must be the same in order for disputes to be identical under international law. Accordingly, such rules cannot be applicable to cases involving both one dispute under the EPA/BIT and another under the WTO Agreement, which are different agreements. In such case, two or more forums may render conflicting judgments for each case, resulting in confusion (See, for example, Argentina - Chicken AD), and further, possibly producing different rulings in respect of very similar legal principles.

Further, if two or more cases addressing issues that are closely connected with each other are separately referred to in more than one forum, even if they do not address exactly the same factual foundation, from a broader perspective, it may be necessary to produce a coordinated resolution thereof in the form of a single dispute between the parties. For example, in the cases relating to sweeteners between the United States and Mexico, Mexico referred the alleged violation of US market access commitment on sugar originated in Mexico to the NAFTA panel, and the United States referred Mexico's imposition of retaliatory internal taxes on sweeteners originated in the United States (and drinks with such sweeteners) to the a WTO panel. It has been suggested that these matters should have been addressed in a single forum because of the close relationship between the two dipustes.

It is thus urgently necessary to be attentive to such intertwined dispute settlement proceedings over state-to-state disputes, which may take place in respect of Japan.

＜Chart 7-1＞ Regional Trade Agreements Examined in this Chapter, including Free Trade Agreements ("FTAs"), Economic Partnership Agreements (EPAs, and Bilateral Investment Treaties ("BITs")

[FTA/EPA]

	Full Name (Abbreviation in bracket)	Reference in this Report
1.	North American Free Trade Agreement (NAFTA)	NAFTA
2.	Free Trade Agreement of Americas (FTAA) ― Third Draft Agreement	FTAA
3.	Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free-Trade-Area	US－Jordan FTA
4.	1980 Treaty of Montevideo ― Instrument Establishing the Latin American Integration Association (LAIA)	LAIA
5.	Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR	MERCOSUR
6.	General Treaty on Central American Economic Integration between Guatemala, El Salvador, Honduras and Nicaragua Signed at Managua, on 13 December 1960 (CACM)	CACM
7.	Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy	CARICOM
8.	Agreement on Trade, Economic and Technical Cooperation between the Caribbean Community (CARICOM) and the Government of the Republic of Colombia	CARICOM－Columbia FTA
9.	Andean Community ― DECISION 563: Official Codified Text of the Andean Subregional Integration Agreement (Cartagena Agreement), and Treaty Creating the Court of Justice of the Cartagena Agreement	Andean Community
10.	Agreement on the European Economic Area	EEA
11.	AGREEMENT between the European Economic Community and the Kingdom of Norway	EC－Norway FTA
12.	EURO-MEDITERRANEAN AGREEMENT establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part	EC－Morocco FTA
13.	EUROPE AGREEMENT establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part	Europe Agreement
14.	Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on June 23, 2000	Cotonou Agreement
15.	Convention Establishing the European Free Trade Association (Annex to the Agreement Amending the Convention Establishing the European Free Trade Association) (EFTA)	EFTA
16.	Agreement on Free Trade between the Government of the Republic of Kyrgyzstan and the Government of the Russian Federation	Russia - Kyrgyzstan FTA
17.	Central European Free Trade Agreement (CEFTA)	CEFTA
18.	The United Economic Agreement between the Countries the Gulf Cooperation Council (GCC)	GCC
19.	Agreement on South Asian Free Trade Area (SAFTA)	SAARC
20.	First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)	Bangkok Agreement
21.	Framework Agreement on Comprehensive Economic Co-Operation	ASEAN－China

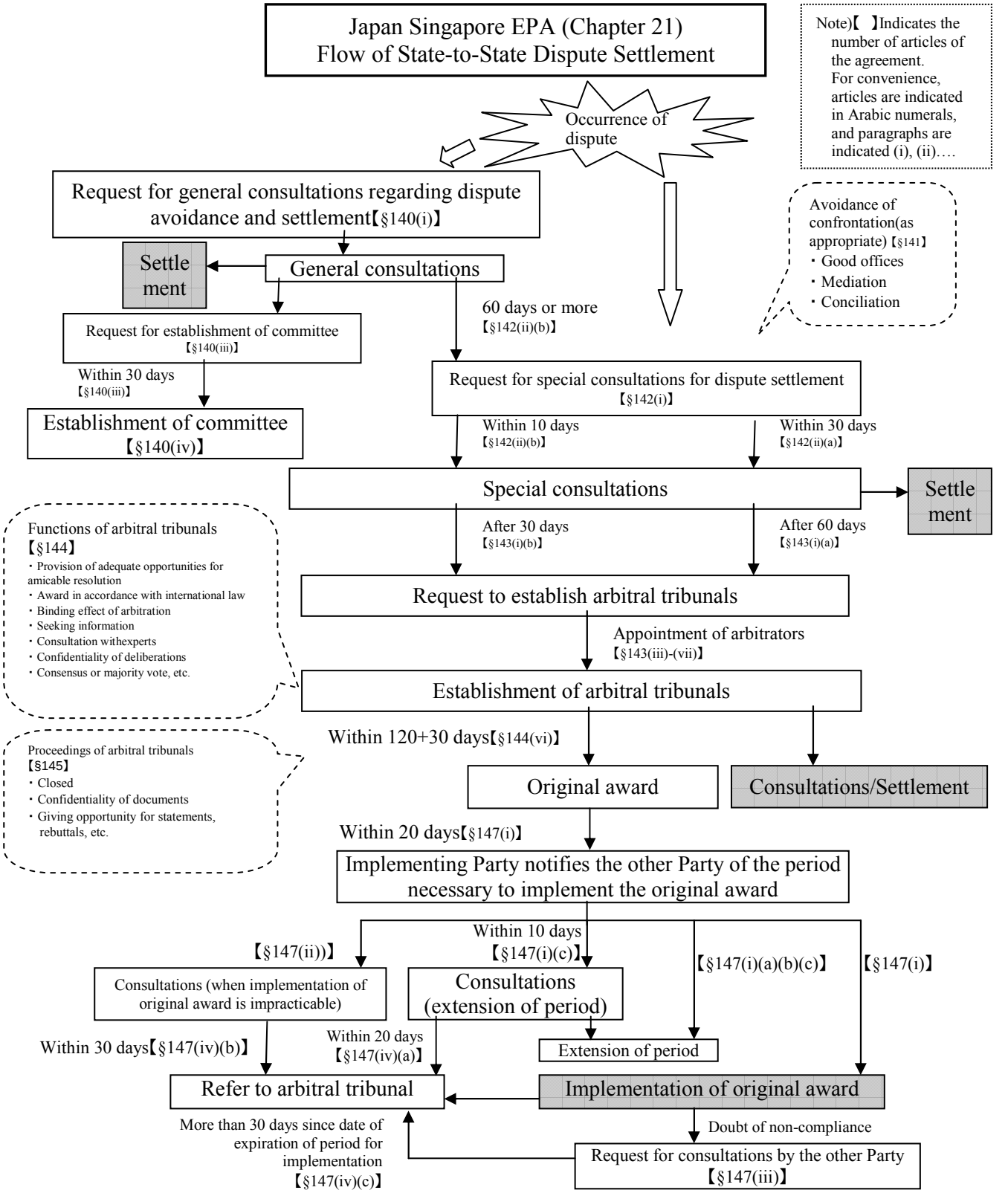
	between the Association of South East Asian Nations and the People's Republic of China	Agreement
22.	Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Singapore	Korea - Singpore FTA
23.	Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (AFTA)	ASEAN
24.	Singapore-Australia Free Trade Agreement (SAFTA)	Australia - Singapore FTA
25.	Thailand-New Zealand Closer Economic Partnership Agreement	Thailand - New Zealand FTA
26.	Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	ANZCERTA
27.	South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)	SPARTECA
28.	East African Community Free Trade Agreement	EAC

[BIT]

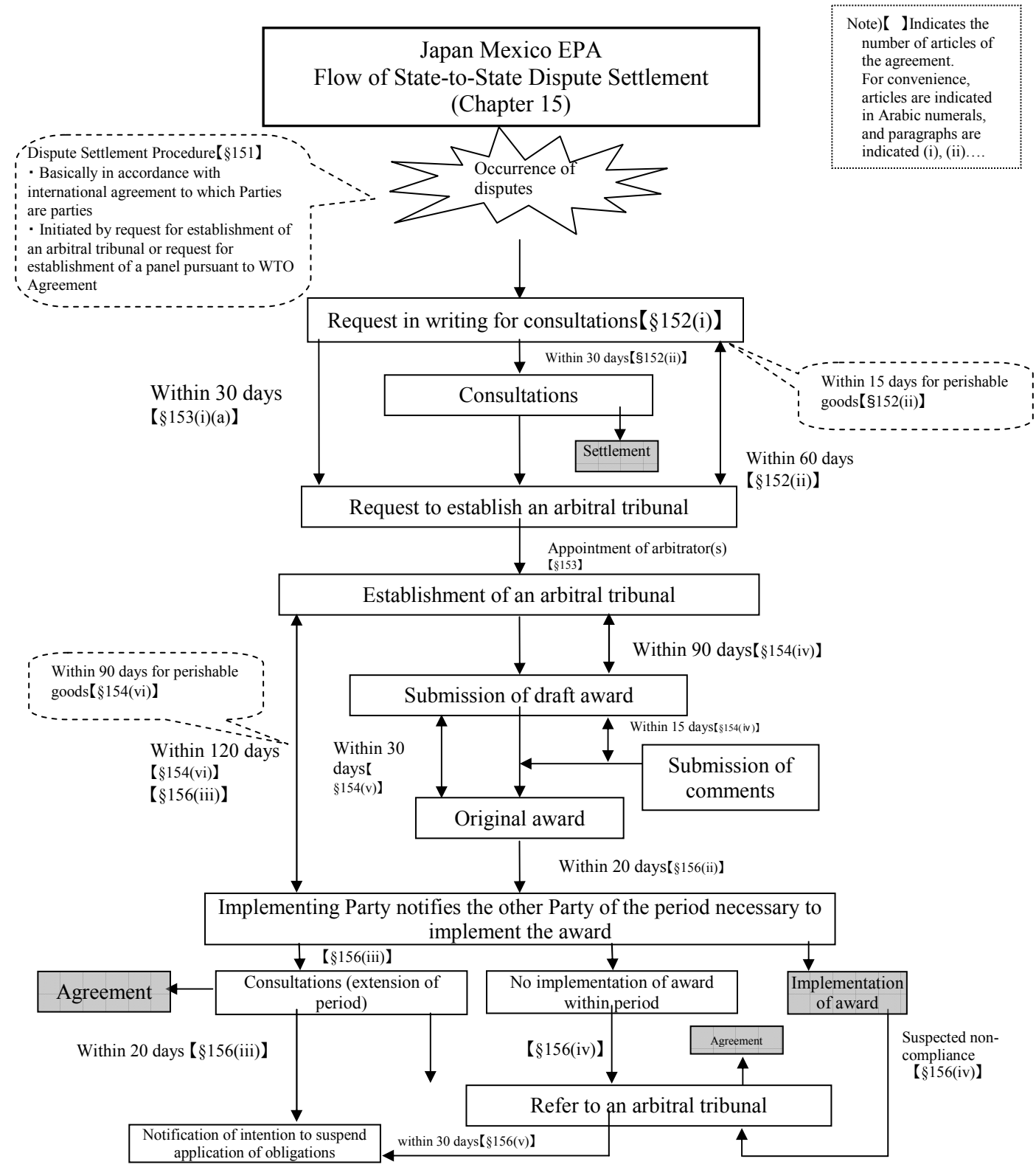
	Contracting Parties	Date of Siging	Abbreviations in this Report
1.	United States and Czech	Signed October 22, 1991, the original agreement with Czech Slovakia. 2003, agreed on the Protocol with Czech	Original Agreement: US－Czech Slovakia BIT Protocol: US - Czech BIT
2.	United States and Uruguay	November 2005	US－Uruguay BIT
3.	France and Hong Kong	November 30, 1995	France - Hong Kong BIT
4.	France and Malta	August 11, 1976	France - Malta BIT
5.	Germany and Poland	November 10, 1989	Germany - Poland BIT
6.	Germany and China	December 1, 2003	Germany - China BIT
7.	United Kingdom and Turkey	March 15, 1991	UK - Turkey BIT
8.	United Kingdom and Vanuatsu	December 22, 2003	UK - Vanuatsu BIT
9.	Canada and El Salvador	June 6, 1999	Canada - El Salvador BIT
10.	Australia and Sri Lanka	November 12, 2002	Australia - Sri Lanka BIT
11.	Mexico and Czech	April 4, 2002	Mexico - Chile BIT
12.	Chile and Turkey	August 21, 1998	Chile - Turkey BIT
13.	Korea and Sweden	August 30, 1995	Korea - Sweden BIT
14.	Korea and Mauritania	December 15, 2004	Korea - Mauritania BIT
15.	China and Iceland	March 31, 1994	China - Iceland BIT
16.	Russia and Norway	October 14, 1995	Russia - Norway BIT
17.	India and Hungary	November 3, 2003	India - Hungary BIT
18.	Thailand and Germany	June 24, 2002	Thailand - Germany BIT
19.	Belarus and Finland	March 2006	Belarus - Finland BIT
20.	Saudi Arabia and Korea	April 4, 2002	Saudi Arabia - Korea BIT
21.	Republic of Sough Africa and Turkey	June 23, 2000	South Africa - Turkey BIT

（Source）UNCTAD

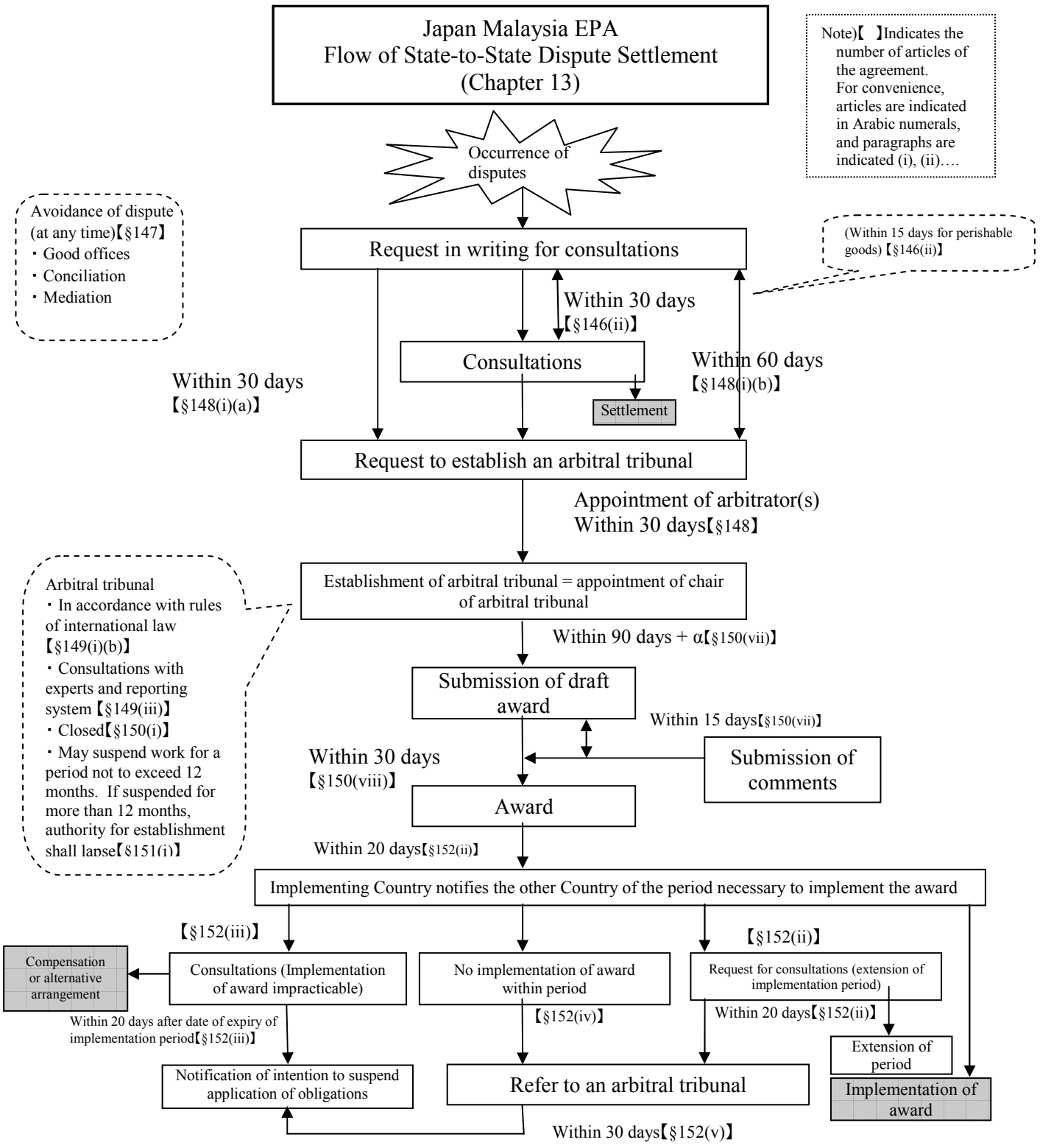
<Chart 7-2> Dispute Settlement Procedures of FTAs/EPAs Executed by Japan



If the other Party considers that the measures taken do not comply with the original award, it may request consultations.【§147(iii)】
If the arbitral tribunal confirms that the implementing Party has failed to comply with the original award, the other Party may, within 30 days from the date of such confirmation, notify the implementing Party that it intends to suspend the application to the implementing Party of the obligations of the other Party under this Agreement or the Implementing Agreement. 【§147(v)】
If the implementing Party has failed to implement the alternative arrangement, the other Party may, within 30 days from the date of the expiration of such implementation period, notify the implementing Party that it intends to suspend the application to the implementing Party of the obligations of the other Party under this Agreement or the Implementing Agreement. 【§147(vi)】
If the implementing Party considers that the requirements in Article 147, paragraph 5, 6 or 7 have not been met, it may request consultations with the other Party. The other Party shall enter into consultations within 10 days after the date of receipt of the request. If the Parties fail to resolve matters within 30 days after the date of receipt of the request for consultations pursuant to this paragraph, either Party may refer the matter to an arbitral tribunal.【§147(viii)】

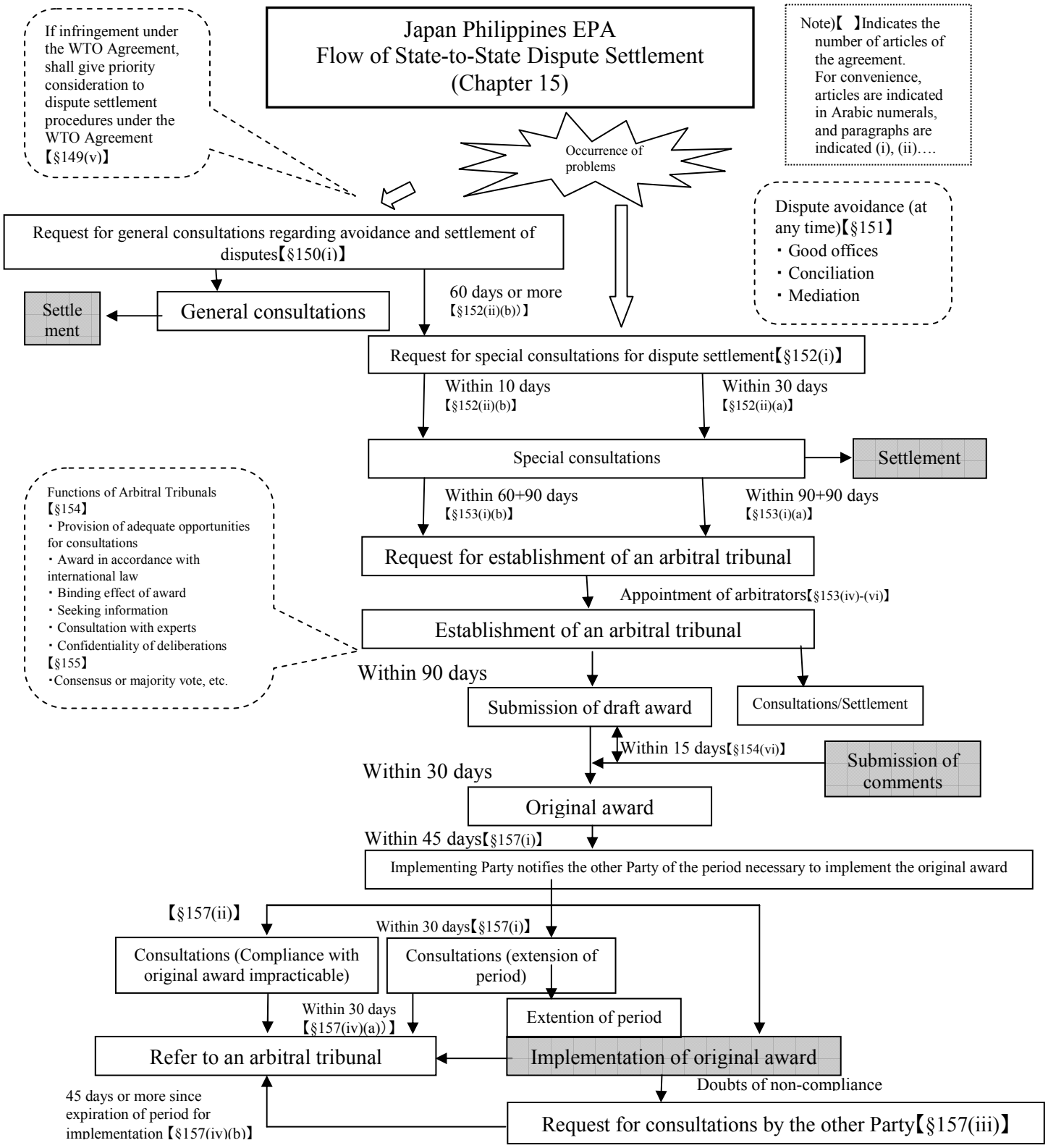


Suspension of the application of concessions or other obligations may only be implemented at least 30 days after the date or the notification. Such suspension shall: (a) not be effected if, in respect of the dispute to which the suspension relates, consultations, or proceedings before an arbitral tribunal are in progress; (b) be temporary, and be discontinued when the Parties reach a mutually satisfactory resolution or where compliance with the award is effected; (c) be restricted to the same level of nullification or impairment that is attributable to the failure to comply with the award; and (d) be restricted to the same sector or sectors to which the nullification or impairment relates, unless it is not practicable or effective to suspend the application of concessions or other obligations in such sector or sectors.【§156(vi)】
If the suspension of the application of concessions or other obligations set out in Article 156, paragraph 3, 5 or 6 have not been met, the Party may refer the matter to an arbitral tribunal.【§156(vii)】



Suspension of the application of concessions or other obligations under Article 152, paragraphs 3 and 5 may only be implemented at least 30 days after the date of notification. Such suspension shall: (a) not be effected if, in respect of the dispute to which the suspension relates, consultations, or proceedings before an arbitral tribunal are in progress; (b) be temporary, and be discontinued when the Countries reach a mutually satisfactory resolution or where compliance with the original award is effected; (c) be restricted to the same level of nullification or impairment that is attributable to the failure to comply with the original award; and (d) be restricted to the same sector or sectors to which the nullification or impairment relates, unless it is not practicable or effective to suspend the application of concessions or obligations in such sector or sectors.【§152(vi)】

If the Country complained against considers that the requirement set out in Article 152, paragraphs 3, 5 or 6 have not been met, it may request consultations with the complaining Country. The complaining Country shall enter into consultations within 10 days after the date of receipt of the request. If the Countries fail to resolve the matter within 30 days after the date of receipt of the request for consultations, the Country complained against may refer the matter to an arbitral tribunal.【§152(vii)】



If no satisfactory compensation has been agreed within 45 days after the date of expiry of the implementation period of the original award, the other Party may notify suspension of the application to the implementing Party of the obligations of the other Party under this Agreement.【§157(ii)】
If the measures to comply with the original award do not comply with the original award, the other Party may request consultations.【§157(iii)】
If the arbitral tribunal [to which the matter is referred] pursuant to §157(iv)(b) confirms that [the implementing party] has failed to comply with the original award, the other Party may, within 30 days after the date of such confirmation, notify the implementing Party that it intends to suspend the application of the obligations under this Agreement.【§157(v)】
If the implementing Party considers that the requirements in §157(ii), (v) or (vi) have not been met, it may request consultations with the other Party. The other Party shall enter into consultations within 10 days after the date of receipt of the request. If the Parties fail to resolve matters within 30 days after the date of receipt of the request for such consultations, either Party may refer the matter to an arbitral tribunal.【§157(vii)】