CHAPTER 9

SETTLEMENT OF DISPUTES BETWEEN STATES AND IMPROVEMENT OF BUSINESS ENVIRONMENT

SETTLEMENT OF DISPUTES BETWEEN STATES

1. BACKGROUND OF THE RULES

Regional trade agreements, including free trade agreements ("FTAs"), economic partnership agreements ("EPAs"), and international investment agreements ("IIAs") usually contain certain provisions for settlement of disputes between the state parties concerning the interpretation and application of the agreements' provisions. 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 thereby ensuring their effectiveness and making the interpretation of the provisions clear through the process of dispute settlement. All FTAs, EPAs and IIAs which Japan has entered into also contain, whether detailed or not, such provisions for the settlement of disputes between the parties. State-to-state dispute settlement procedures are not as frequent as investor-state disputes in EPAs/FTAs and IIAs.

The dispute settlement provisions in most of the agreements are similar to the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") in the WTO Agreement. They 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 examines the relevant matter and renders a binding decision (judgment) or makes a recommendation or ruling; and,

(iv) the respondent rectifies violations of the agreement or provides for compensation to the complainant in line with the relevant judgment, or, in many cases, a mechanism is adopted whereby discussions are resumed based on the recommendation.

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 businesses abroad. This Chapter will examine the mechanics of dispute settlement provisions in a number of EPAs/FTAs and IIAs 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 Figure III-8-1 below.

2. SUMMARY OF LEGAL DISCIPLINES

(1) 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 based on the categories of EPAs/FTAs and IIAs indicates a general tendency that such procedures in EPAs/FTAs contain relatively greater detail than those in IIAs. Furthermore, a number of specific dispute settlement provisions included in most EPAs/FTAs are not included in most IIAs. An important common element, generally appearing in both EPAs/FTAs and IIAs, 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 EPAs/FTAs and IIAs contain several different types of 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 available procedures. The following subsection groups the dispute settlement provisions found in EPAs/FTAs and IIAs.

(a) EPAs/FTAs

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 is the procedures adopted by the North American Free Trade Agreement ("NAFTA"), is an "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 and make a ruling in individual cases. All the EPAs/FTAs that Japan has entered into have adopted this type of dispute settlement procedure. Set forth below are typical examples of EPAs/FTAs 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;
- 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.
- CARIFORM-EU, Article 206

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

The third category is an intermediate entity between the first and second categories, 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 EPAs/FTAs 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);
- Cotonou Agreement (EU and ACP (African, Caribbean and Pacific countries)) (Article 98, Paragraphs 1 and 2);
- EFTA (European Free Trade Association) (Norway, Liechtenstein, Iceland and Switzerland) (Articles 47 and 48);
- EEA (European Economic Area: EU and Iceland, Liechtenstein and Norway) (Article 111, Paragraph 1)
- CACM (Central American Common Market) (El Salvador, Guatemala, Honduras, Nicaragua and Costa Rica) (Article 26);
- Andean Community (Bolivia, Colombia, Ecuador and Peru) (Article 47 and Article 24 of the Treaty establishing the Court of Justice);
- ASEAN (Association of South-East Asian Nations) (Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Viet Nam, Laos, Myanmar, Cambodia) (Article 8).[1]

In most of the agreements enumerated above, the disputed matter can be referred by the parties 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 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 designated 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).

The overall trend of dispute settlement procedures appears to be that countries (or other political entities) entering into EPAs/FTAs are increasingly inclined to adopt the "hybrid-type" procedure.

[1] While Article 8 of the aforementioned Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area adopts the council type of mechanism, the ASEAN Protocol also applies on the dispute arisen from the concerned agreement (ASEAN Protocol Article 1.1 and Appendix I (15), this ASEAN Protocol adopts the arbitral type of mechanism. Since the documents that explicitly indicate the abolishment of the original council type procedure cannot be found, under the understanding of co-existence of both mechanisms, it classified ASEAN as a hybrid type.

For example, with the exception of the NAFTA (which adopts an "arbitration-type" procedure), all of the agreements involving the United States have adopted a "hybrid-type" procedure. Also, the EU, which primarily adopted a "council-type" procedure up to and including the 1980s, has adopted a "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. The inclination to judicialize the dispute settlement procedure is also seen in Singapore and the Republic of Korea, which, like Japan, have been reinforcing initiatives towards the conclusion of EPAs/FTAs since around 2000.

(b) IIAs

IIAs generally include procedures for the settlement of state-to-state disputes. Most of them have adopted "arbitration-type" procedures, consisting of consultation and arbitration.

(2) PARTICULAR FEATURES OF SPECIFIC DISPUTE SETTLEMENT PROCEDURES

As stated above, the procedures for the settlement of state-to-state disputes in EPAs/FTAs and IIAs are similar to the WTO dispute settlement procedures (the degree of similarity of WTO dispute settlement procedures differs in each agreement), as all of them contain provisions relating to: (i) consultation between disputing parties; (ii) referral of matters to a dispute settlement body; (iii) the rendition of a binding decision by that dispute settlement body; and (iv) the rectification by the respondent of any violations determined to exist. However, the details of the relevant provisions vary between the agreements.

Set forth below is an analysis of the particulars of the agreements; a grouping of the dispute settlement provisions; and a comparison thereof with those agreements entered into by Japan. This comparison covers the procedural steps which are considered particularly important to ensure that the WTO dispute settlement procedures function properly and are effective with respect to the 28 EPAs/FTAs 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).

ANALYTICAL TOPICS OF EACH AGREEMENT

(a) subject matter of the dispute settlement procedures;

(b) mandatory obligation for prior consultation;

(c) rules relating to the dispute settlement procedures;

(d) timelines;

(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 in cases of non-compliance.

1. SCOPE OF THE SUBJECT MATTER OF DISPUTE SETTLEMENT PROCEDURES

(1) EPAs/FTAs

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

(i) certain EPAs/FTAs limit the scope of disputes that can be referred to the dispute settlement body to those concerning their interpretation or application of the agreement, (i.e., CACM, Article 26, Cotonou Agreement, Article 98, Paragraph 1; and ASEAN, Article 8, Paragraph 2); and,

(ii) in addition to permitting disputes concerning interpretation or application of the relevant agreement, other EPAs/FTAs permit for a wider scope of disputes that can be referred to the dispute settlement body, allowing parties to file claims 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)).

The EPAs entered into by Japan (excluding Japan - Switzerland EPA, Japan - Chile EPA, Japan - Australia EPA and CPTPP) fall under category (1), above. They include a provision that any party may claim against the other(s) before an arbitral panel if any benefit accruing to it 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.

In addition to the limitations described above, many EPAs/FTAs (excluding the Japan-Switzerland EPA and Japan-Chile EPA) 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. In the EPAs entered into by Japan, it is stipulated that the provisions related to dispute settlement procedures do not apply to some provisions.

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)).

(2) IIAs

In contrast to the EPAs/FTAs, there are no provisions in the IIAs that permit "non-violation" claims. With limited exceptions, no examined IIAs limit the scope of matters that can be referred to dispute settlement, although a small number of them provide that state-to-investor disputes which are pending in any international arbitration court at that point in time cannot be referred to any international arbitration court as a state-to-state dispute (see, Chile - Turkey BIT, Article 12, Paragraph 10, and South Africa - Turkey BIT Article 8, Paragraph 8).

2. Obligation to Conduct Prior Consultation

Most EPAs/FTAs obligate the disputing parties to conduct consultations amongst themselves before resorting to binding dispute settlement procedures. All the EPAs entered into by Japan include this obligation.

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

3. Rules Relating to Dispute Settlement Procedures

(1) EPAs/FTAs

In a dispute resolution proceeding, the panel (or arbitrator(s)) needs procedural rules by which it should be governed. The methods of setting procedural rules can be broadly classified into the following two categories:

(i) those that use procedural rules established by an existing institution. (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,

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

In most EPAs/FTAs the rules of procedure fall under (2) above. Such agreements can be further subcategorized into:

(a) those providing for common rules of procedure applicable to 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,

(b) those providing that each panel or arbitral panel shall, at its own discretion, establish 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).

Japan also utilizes (2) above. The EPAs that have clauses on procedural rules stipulate that the joint committee established on the basis of the EPA/FTA in question shall specify the procedural rules applying to all arbitration procedures (Japan - Mexico EPA, Article 159; Japan - Chile EPA, Article 187; Japan - Philippines EPA, Article 159; Japan - Australia EPA, Article 19.16; CPTPP, Article 28.13; and Japan - EU EPA, Article 21.30). Moreover, the other agreements, as well as stipulating the arbitration procedures within the agreement, (the ASEAN - Japan and Japan – Viet Nam agreements, for example), stipulate that the parties can, after discussion with the court of arbitration (arbitral tribunal), agree to adopt additional rules and procedures that do not violate the procedural provisions within the agreement in question.

(2) IIAs

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

4. TIMELINES

(1) EPAs/FTAs

Even though the right to seek a binding ruling from a dispute settlement body is provided for under a relevant EPA/FTA, no effective resolution could be expected if a respondent was able to arbitrarily delay the relevant proceedings. Most of the EPAs/FTAs 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 EPAs/FTAs, however, no time limit in respect of proceedings is clearly established (See, for example, CACM, CARICOM, EC - Estonia FTA, and EC - Morocco FTA).

(2) IIAs

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

5. PRIORITY OF FORUM IN RELATION TO DISPUTE SETTLEMENT PROCEDURES OF OTHER AGREEMENTS

(1) EPAs/FTAs

As individual EPAs/FTAs and the WTO Agreement contain provisions stipulating rights and responsibilities that are substantively the same or similar, there are cases in which a situation can arise where it is possible to use both the dispute resolution procedures in the WTO Agreement and the dispute resolution procedures in the relevant EPA/FTA or IIA (a typical example is the US - Canada lumber dispute over antidumping and countervailing duty measures in respect of soft wood lumber originating in Canada).

Some EPAs/FTAs set forth the relationship with the dispute settlement procedures in other agreements in the event that such cases arise; the content of these can be broadly classified into three categories, as follows:

(1) priority is given to the dispute settlement procedures under the relevant FTA; or,

(2) priority is given to the dispute settlement procedures under the WTO Agreement (or GATT); or,

(3) the complainant may choose between the GATT/WTO dispute settlement procedures and the FTA dispute settlement procedures.

NAFTA is an example of (1). This agreement stipulates that, with regard to disputes arising from substantially equivalent provisions in NAFTA or GATT, in the event that a NAFTA signatory intends to bring an action against another NAFTA signatory under the WTO dispute resolution procedures, it should first notify any third NAFTA Party (not due to be a respondent) of its intention. If that third Party wishes to take action under the NAFTA dispute resolution procedures, those Parties shall consult about whether to deal with the issue under the WTO or NAFTA provisions. If no agreement is reached, the dispute shall, as a general rule, be conducted on the basis of the NAFTA dispute resolution procedures (Article 2005, Paragraph 2), it is stipulated that, with regard to disputes where the NAFTA provisions regarding "Relation to Environmental and Conservation Agreements," "Sanitary and Phytosanitary Measures" or "Standard-Related Measures" in NAFTA (Article 2005, Paragraphs 3 and 4) are applied, the dispute resolution procedures in NAFTA rather than those in the WTO Agreement shall be used, depending on the will of the respondent country.

Examples of (2) include the EC - Chile Association Agreement, which stipulates a comprehensive preference for the WTO procedure - when a case is disputable under the WTO Agreement, it shall be referred to the dispute settlement procedures under the WTO Agreement (Article 189, Paragraph 3 (c)). Also, the US - Jordan FTA provides that disputes regarding 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)).

Examples of (3) include FTAA (Chapter 23, Article 8, Paragraph 1) and the Korea - Singapore FTA (Article 20.3, Paragraph 1). However, where the dispute resolution procedure is left to the choice of the complainant, the relevant agreement usually provides that once either of the disputes settlement procedures is chosen, the selected procedure shall be used to the exclusion of the other (see, for example, the Korea - Singapore FTA, Article 20.3, Paragraph 2).

The EPAs entered into by Japan fall under category (3), 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 procedures has been chosen, no other procedure can be used in respect of that dispute. However, some of the EPAs entered into by Japan provide that the preceding procedure may be waived if the parties agree (Japan - Singapore EPA, Article 139, Paragraph 4; Japan - Philippines EPA, Article 149, Paragraph 4; and Japan - Thailand EPA, Article 159, Paragraph 4).

(2) IIAs

There appear to be no stipulations concerning the relationship between dispute settlement procedures under the IIA in question and dispute settlement procedures under other international agreements.

6. SELECTION OF PANELISTS AND ARBITRATORS

(1) EPAs/FTAs

The rules of procedure may include a provision involving the method for selecting panelists or arbitrators. The first issue in this regard is whether a roster of candidates is to be prepared and maintained. For example, 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 paragraph 4) and in respect of ordinary dispute settlement procedures (Article 2009). No such provision is found in the EPAs entered into by Japan except in CPTPP, where creation and maintenance of the chairpersons roster are mandatory while creation of a list of arbitrators is optional (Article 28.11).

In the Japan-EU EPA, it is required that the chairperson creates a roster of all arbitrators, and that the roster achieves an advance consensus in the joint committee after the agreement comes into effect (Article 21.9).

The second issue in this regard is the specific method to be employed in selecting panelists or arbitrators. Most EPAs/FTAs 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 case, the method of selecting the remaining one panelist or arbitrator differs, depending on the terms of the relevant EPA/FTA, as follows:

(1) some EPAs/FTAs 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 EPAs/FTAs 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 chosen by lot and,

(3) some EPAs/FTAs 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)).

In the dispute under NAFTA between, the United States and Mexico concerning the market access commitment of sugar, no panel examination has commenced to date, more than six years after the filing of the complaint, because the United States has 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 might appear to fall under category (2) above, the parties 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 or (ii) the third arbitrator may be chosen by lot.

(2) IIAs

IIAs generally provide that an arbitral tribunal shall consist of three (3) arbitrators, with each party selecting one arbitrator, and each selected arbitrator then mutually agreeing upon the third arbitrator (who shall be the chairperson).

7. METHOD OF DECISION-MAKING BY THE DISPUTE SETTLEMENT BODY

(1) EPAs/FTAs

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

(i) Consensus, but if no consensus is reached, a majority vote is used (see, for example, Korea - Singapore 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,

(ii) A (simple) majority vote is used from the outset (see, for example, EFTA Annex T, Article 1, Paragraph 7; CARICOM, Arbitration Procedure, Article 207, Paragraph 7; European Agreements Arbitration Procedures, Article 114, Paragraph 4; and EC - Morocco FTA, Article 86, Paragraph 4).

Among the EPAs entered into by Japan, all excluding Japan - Mexico EPA, Article 154, Paragraph 7 and TPP (Article 28.9), provide that the arbitral tribunal shall attempt to make its decisions by consensus, but also may make such decisions by majority vote should it fail to reach consensus.

(2) IIAs

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

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

8. Appellate Proceedings

(1) EPAs/FTAs

While it is desirable, for purposes of expeditious resolution of disputes, 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 in first instance, the need for a more discreet examination of certain matters may require that an appeal against an award be filed, if necessary.

The EPAs entered into by Japan have no provisions dealing with appellate procedures and expressly state that the award of the arbitral tribunal is "final". SAARC, however, explicitly provides for appellate procedures (Article 20, Paragraph 9). Other EPAs/FTAs explicitly provide that no award shall be subject to an appeal (see, for example, Korea - Singapore FTA, Article 20.13, Paragraph 1).

(2) IIAs

The IIAs contain no arrangements providing for appeals.

(i) Implementation Procedures in Respect of Arbitral Awards

As described above, most EPAs/FTAs and IIAs stipulate that the arbitral tribunal issues binding judgments and that an institution consisting of representatives of the contracting parties may also issue a binding judgment. Accordingly, when such an award is rendered (requiring the respondent either to take corrective measures or to make compensation, as the case may be), the respondent is obligated to implement it in good faith. EPAs/FTAs generally set forth provisions to ensure the implementation of the arbitral award by the respondent.

In contrast, only a small number of IIAs 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 equivalent to the level of benefit subject to the arbitral award if the arbitral award is not implemented (Article 13)).

(ii) Deadlines for Implementation

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

i. for some agreements, the limitation period is from the rendition of the final decision to the actual implementation thereof; and,

ii. 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 the 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, the Korea - Singapore FTA, Article 20.13, Paragraph 2(b); and Australia - Singapore FTA, Chapter 16, Article 9, Paragraph 1).

The EPAs entered into by Japan (excluding CPTPP) fall under type (2) above. Specifically, the respondent is required to notify the complainant of the period necessary to implement the award within a certain period of time from the date of the award. If the complainant is not satisfied with the time period notified by the respondent, either party may request that the arbitral tribunal determine such time period. Some provide that this shall occur after consulting with the parties; in others, no such prior consultation is necessary or without conducting such consultations.

(iii) Surveillance regarding 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 (excluding CPTPP) contains any specific provision in respect of surveillance regarding implementation.

(iv) Method of Implementation

Whether or not the relevant dispute settlement body has the authority to recommend methods of implementing 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:

i. it is left to the mutual agreement of the parties; and,

ii. the 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.)

Among the EPAs entered into by Japan, some 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); others do not have such provisions.

9. Retaliatory Measures in the Event of a Failure of Respondent to Implement an Award

The following types of 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:

i. one type is to authorize a retaliatory measure, i.e., to suspend a benefit provided to the respondent; and,

ii. the other type is to require the respondent to make a compensatory adjustment (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; the Korea - Singapore FTA, Article 20.14, Paragraph 2; and the 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). 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).

The EPAs entered into by Japan have adopted option (1) above.

3. *CHALLENGES IN STATE-TO-STATE DISPUTE SETTLEMENT PROCEDURES*

Japan has signed 17 EPAs and 29 IIAs which have entered into force. Thus far, no dispute settlement clause on state-to-state disputes has been invoked under any EPA/IIA entered into by Japan. However, if Japan enters into agreements with a wider range of countries, and as a result more business sectors actively develop businesses by virtue of preferential treatment granted, it would be increasingly likely that there will be disputes concerning the interpretation and/or application of the EPAs or IIA.

In such a situation, there is a possibility that a problem may arise (particularly in the case of EPAs), specifically, whether the dispute settlement procedures prescribed in the relevant EPA or IIA will apply or whether the WTO procedures will apply. This is because both the EPA and the WTO Agreement are aimed at promoting trade and economic activity, and there are cases in which the dispute relates to both agreements, such as cases where the EPA borrows the provisions of the WTO Agreement. Accordingly, the parties would need to carefully examine and determine the more advantageous forum for the settlement of disputes.

At this stage, it is possible that two cases with the same set of facts and between the same parties can be referred to both the forum prescribed under the EPAs/IIAs 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. For disputes to be identical under international law, the parties and the facts and causes of actions must be the same. Disputes involving an EPA/IIA and a WTO Agreement are not identical because different agreements are involved. In such cases, two or more forums may render conflicting judgments in the same case, resulting in confusion (see, for example, in the Argentina - Chicken AD (DS241) case, Argentina's measures were determined to be in violation of the AD Agreement, but the preceding Ad Hoc Tribunal of MERCOSUR rejected Brazil's claims), but there is no problem from a legal perspective, apart from special cases.

Of course, if two or more cases addressing issues that are closely connected are separately referred to more than one forum, even if they do not have exactly the same factual foundation, it may be desirable to have a coordinated resolution in a single dispute between the parties. For example, in the cases relating to sweeteners between the United States and Mexico (DS308), Mexico referred the alleged violation of US market access commitment on sugar originated in Mexico to a NAFTA panel, and the United States referred Mexico's imposition of retaliatory internal taxes on sweeteners originating in the United States (and drinks with such sweeteners) to 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 disputes.

However, the dispute settlement procedures in these respective agreements only relate to the interpretation and application of the agreements in question, so the emergence of cases in which "disputes" relating to multiple articles are handled separately using the respective procedures and the long time to achieve the resolution of the overall "dispute" is inevitable, as it stems from the pluralistic nature of international law; what Japan must consider is how to utilize the means of handling such situations. As described above, this issue is usually dealt with by establishing provisions on regarding the relationship with dispute settlement procedures under other agreements in each agreement. The relationship in terms of priority can generally be classified into the following three: (1) priority is given to the dispute settlement procedures under the relevant FTA; (2) priority is given to the dispute settlement procedures under the WTO Agreement; or (3) the complainant may choose between the two, but in order to avoid conflicting results on practically the same issue under different agreements, additional use of the other procedures is prohibited. In the EPAs/FTAs Japan concluded, (3) has been used. It will be vital to continue to pay closely attention to the competition between state-to-state dispute settlement procedures in the future.

4. DISPUTE RESOLUTION PROCEDURE PROVISIONS IN JAPAN'S EPA

As mentioned in (3), the number of EPAs entered into by Japan has increased to 17. Most recently, while concluding to agreements large in economic scale, such as CPTPP and Japan-EU EPA, provisions in dispute resolution have been expanded (see Figure III-8-2 below). Specifically, in case the parties cannot agree on a method to assign the third arbitrator as the panel chairperson, it was to be determined by drawing lots from candidates recommended by the parties. With this method, there is possibility that the selected candidate is advantageous to one country and disadvantageous to the other. In contrast, in the CPTPP and Japan-EU EPA, a register of candidates is created prior to dispute resolution, or two selected panelists discuss in the selection stage, so that the procedures become fair.

Moreover, in old agreements, the number of days for panel arbitration draft was often 90 days, but in the CPTPP and Japan-EU EPA they are 120 and 150 days. This provision is realistic enough even in comparison with the reality of dispute resolution procedures in WTO.

In addition, in case dispute resolution procedures are actually held, not only selecting panelists, operational administrative support is also important. Regarding this, the provisions of Japan-EU EPA allow an operational administrative support from external organizations, so that the dispute resolution procedures to really work through allowing receiving support from arbitration organizations with extensive experience.

Figure III-8-1 Regional Trade Agreements Examined in this Chapter, including Free Trade Agreements ("FTAs"), Economic Partnership Agreements (EPAs), and International Investment Agreements ("IIAs")

Refer to pages 590 to 592 of the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA.

Figure III-8-2 Important Provisions of Dispute Procedures in CPTPP and Japan-EU EPA)

	CPTPP	Japan-EU EPA
Operational Support by third party	×	○
Presenting arbitration proposal	Within 150 days from the date of appointment of the last member of the panel	Within 120 days after establishment of panel
When the third arbitrator/chairman could not be appointed by the parties	Stage 1: When selection is not possible in the period until the second member of the panel is appointed or within 35 days from the arrival date of the panel establishment request, the panel of two members, who are already appointed, mutually appoint the chairman from the registry. Stage 2: If the two panel members, who are already appointed, cannot agree to the chairman's appointment within 43 days from the date of the request for the establishment of the panel, the two panel members will appoint the chairman with the respondent party. Stage 3: If the chairperson cannot be appointed within 55 days from the date of request for the installation of the panel, the respondent party will elect the chairman by random sampling from the registry within 60 days from the date of request for an establishment of the panel.	When requested by the other party, the co-chairman of the joint committee of declaring countries will select the panel head by lottery from the small list of names of the panel heads that is prepared in accordance with the provisions of the article within five days after the date of arrival of the request.
Third arbitrator/chairman's list	○	○

IMPROVEMENT OF THE BUSINESS ENVIRONMENT

1. BACKGROUND TO THE RULES

As a result of the expansion of international activities such as the advance of Japanese companies into overseas markets, the various problems faced by Japanese companies – including their local subsidiaries – in doing business internationally are becoming more diverse (developing industrial infrastructure in various countries, improving transparency in administrative procedures and decision-making, as well as in judicial decisions, simplifying and streamlining administrative procedures, increasing safety and protecting intellectual property rights, etc.). Given this situation, it is important to make appropriate requests to key figures in the governments of partner countries for improvements in areas where companies are facing issues relating to the business environment in the partner country in question.

When engaging in comprehensive discussions relating to such issues concerning the improvement on the business environment, there have hitherto been few cases in which a specific consultative body has been established, so the response has either been for individual companies or industry groups to discuss individual issues with the government of the partner country in question, or to take up the matter within various intergovernmental discussion forums. In discussions between governments, for a number of years there have been various bilateral consultative bodies relating to the economy that have held meetings both regularly and on an ad hoc basis (such as dialogue concerning regulatory reform and regular meetings between relevant ministries and agencies in the two countries); in addition, talks have taken place in a timely fashion when the opportunity has presented itself, but with particular regard to countries that did not have an adequately developed existing forum, there was a desire to establish a forum for close bilateral consultations between key figures in the governments in question, focusing on the trade and investment environment, in order to improve the business environment in the partner country. Moreover, procedures have developed within the WTO and other organizations for resolving issues legally, as a forum that can be used at any stage as a forum for settling individual disputes, but there are limits, in that these cannot be used in relation to cases where compliance with the agreement is not the problem. For example, procedures for seeking the rectification of governmental measures by the government of the partner country through the good offices of the Japanese government include the WTO dispute settlement procedures and the dispute resolution procedures in economic partnership agreements (EPAs); moreover, in cases where companies are seeking compensation for damages incurred as a result of actions by governments, it is possible to use the arbitration procedures stipulated in investment contracts, as well as domestic courts in the country in question, but these can only be used in cases where the problem is compliance with the agreement in question.

As a result of such considerations, in order to establish opportunities for the governments and companies of both countries to participate in intensive discussions concerning systems relating to trade and investment and their implementation status in the partner country, most Japanese EPAs contain a chapter on the “improvement on the business environment”, which provides for the establishment of a “business environment improvement subcommittee”[2] as a forum for discussions aimed at the development and improvement on the business environment in the partner country.

Both the private sector and government officials can participate in this subcommittee, through which it is possible for the governments concerned to raise issues in a coordinated fashion, including the problems faced by Japanese companies, including problems that it would be difficult for a single company to raise, as well as problems faced by the industry as a whole or all companies that expand into the partner country in question.

With regard to frameworks under the economic partnership agreements between Japan and Mexico, Japan and Malaysia, Japan and Thailand, Japan and Chile, Japan and the Philippines, Japan and India, Japan and Peru, and Japan and Australia, the subcommittees have already begun to meet

[2] The names of the subcommittees vary among the EPAs: “Committee for the Improvement of the Business Environment” in the Japan-Mexico EPA, “Sub-Committee on Promotion of a Closer Economic Relationship” in the Japan-Switzerland EPA, “Sub-Committee on Trade in Goods” in the Japan-Peru EPA, etc., and “Sub-Committee on Promotion of a Closer Economic Relationship” in the Japan-Australia EPA. In this report, they are collectively referred to as “business environment improvement subcommittee”.

and requests on the part of both governments in relation to the government of the partner country have been put forward (however, in the framework under the Japan – Thailand EPA, only Japanese requests to the Thai government have been raised and discussed). The matters that can be taken up by the subcommittees cover a wide range of requests relating to trade, investment and the activities of local subsidiaries, and the requests made by Japan to its partner countries cover a broad array of topics, such as requests for improvements to the infrastructure development environment, including improved power supply quality and measures to rectify the lack of gas supply, as well as improvements in customs and tax procedures, measures to deal with counterfeit items, and speeding up visa, work permit and basic certification procedures, not to mention requests for improvements to measures to be taken where unfair trading is suspected. When an enterprise submits to arbitration based on the investment agreement, the international investment arbitration involves costs and risks (expenses, time, and relations with partner country). Considering this, it is important that relief can be actually received based on the investment treaty, by having problems of consistency with the investment treaty raised in forums for improvement on the business environment. As well as compiling minutes based on consensus between both parties, the subcommittee undertakes practical matters relating to obtaining a commitment to following up at the next meeting concerning progress in responding to matters requested of the counterpart country and checking on this.

2. OVERVIEW OF THE SYSTEM

In most of the Japanese EPAs that have achieved some results in terms of the holding of subcommittee meetings, the chapter on the improvement on the business environment provides for establishing a “business environment improvement subcommittee”, which is a discussion mechanism for talks between the governments of the signatory countries on a wide range of issues relating to the improvement on the business environment, in order to cooperate in working on issues concerning the development of the business environment. The detailed provisions concerning the functions of each subcommittee differ according to the EPA in question, but in general, they are as follows:

(i) To carry out discussions regarding the improvement on the business environment;

(ii) To report the findings of the subcommittee to each country and make recommendations;

(iii) To carry out a review of the implementation of the subcommittee’s recommendations in each country, where appropriate;

(iv) To publicize the subcommittee’s recommendations, where appropriate;

(v) To report its recommendations and its findings concerning the implementation and operation of provisions concerning the improvement on the business environment, as well as other matters to the joint committee established under the agreement.

The participants in this subcommittee consist of representatives of the governments of the two countries, but it is also possible to invite participation by representatives of industry groups, if both sides agree, and a major feature of these subcommittees is that they provide an opportunity for representatives of companies associated with the issues under discussion to directly discuss these matters with representatives of the government of the partner country. These subcommittee meetings are held as needed, in response to requests by one or other of the countries, followed by coordination and agreement among the parties concerned. Moreover, a liaison office or contact point within each government is established under this framework, so even when the business environment improvement subcommittee is not in session, companies can submit queries and requests concerning legislation and regulations in the partner country.

The agreements prescribe that the role of the liaison office is to accept queries and requests from companies, convey these to the relevant government department, furnish a response, and convey this response to the party who submitted the request. In the same way, in this framework, a contact point for queries exists within the partner country, which is characterized by the fact that it conveys requests, etc. to the appropriate authorities within the government and obtains responses from those authorities via the liaison office. Moreover, the liaison office is charged with reporting its findings to the subcommittee, as well as exchanging information with the relevant departments within the government of its own country. It is envisaged that, based on these findings, the governments of each country will select which issues to raise in the subcommittee.

In addition to this, in the EPAs between Japan and Malaysia, Japan and Viet Nam, Japan and Switzerland, and Japan and Peru, it is stipulated that the liaison office can designate a liaison facilitation institution to accept requests from companies and convey them to the liaison offices of each country, in order to facilitate smooth communication between companies and liaison offices. An overview of these frameworks relating to the improvement on the business environment prescribed in the chapter on business environment improvement is shown in the diagram below:

Figure III-9-2 The Mechanism Relating to Improving the Business Environment (Example of the Japan – Malaysia EPA)

*There are cases where the content differs, depending on the partner country or region.

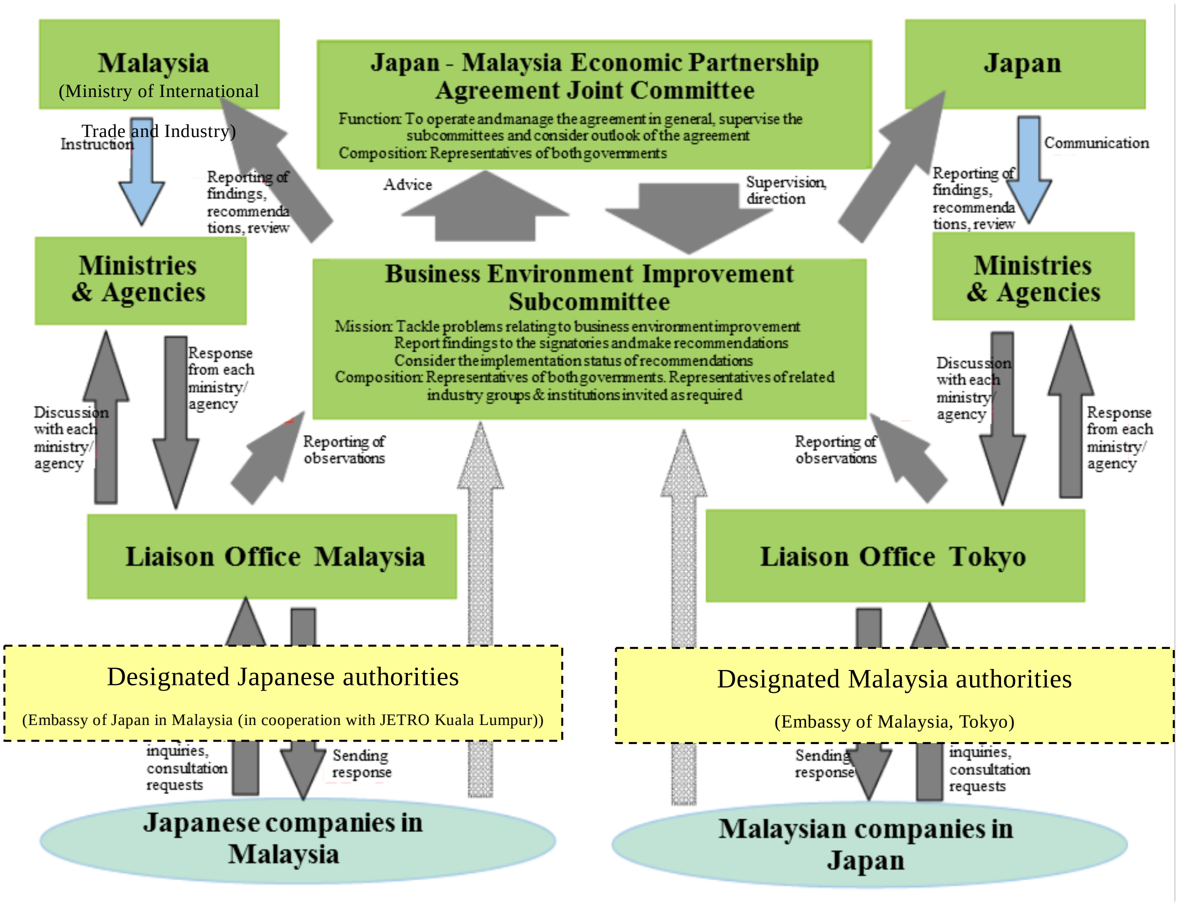
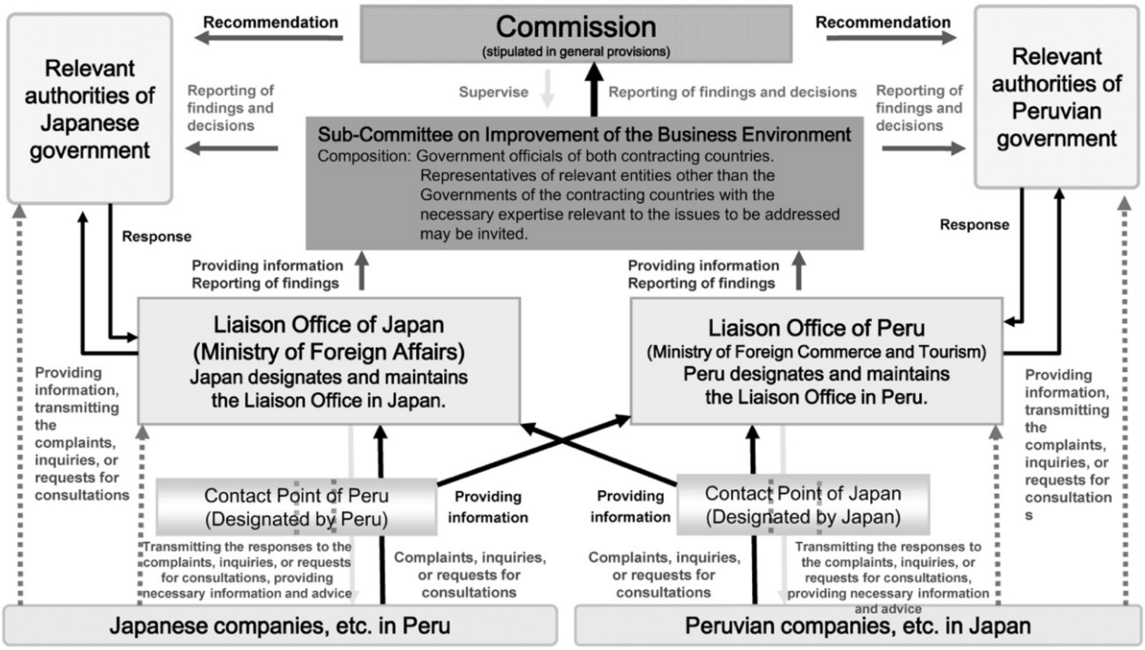


Figure III-9-3 The Mechanism Relating to Improving the Business Environment (Example of the Japan-Peru EPA)



3. *STIPULATION OF BUSINESS ENVIRONMENT IMPROVEMENT SUBCOMMITTEES IN EPAS IN FORCE AND THEIR IMPLEMENTATION STATUS*

Of Japan's 17 EPAs/FTAs with 14 countries and three region in force, business environment improvement subcommittees were established under bilateral EPAs/FTAs with 14 countries excluding the Japan-Singapore EPA, AJCEP and Japan-EU EPA.[3] Outlines of the provisions concerning business environment improvement subcommittees in EPAs in force and their implementation status are given below.

For the provisions and past results of holding committee related to the (1) Japan-Mexico EPA, (2) Japan-Malaysia EPA, (3) Japan-Chile EPA, (4) Japan-Thailand EPA, (5) Japan-Indonesia EPA, (6) Japan-Brunei EPA, (7) Japan-Philippine EPA, (8) Japan-Switzerland EPA, (9) Japan-Viet Nam EPA, (10) Japan-India EPA, (11) Japan-Peru EPA, (12) Japan-Australia EPA, (13) Japan-Mongolia EPA, see pages 999-1003 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, EPA/FTA and IIA -.

During the period from March 2018 to February 2019, the Japan-Mexico EPA and Japan-Thailand EPA as well as other committee joint meetings were held, where subjects including demand for improved business environment were discussed.

(14) CPTPP

In the Chapter 22 "Competitiveness and Business Facilitation", there stipulates the establishment of a Committee on Competitiveness and Business Facilitation (Committee) composed of government representatives of each Party, and its exploration for ways to promote the development

[3] There are no provisions in the Japan-EU EPA that stipulate the establishment of a committee on the improvement of the business environment. Chapter 18 stipulates the establishment of the Committee on Regulatory Cooperation that enhances and promotes regulatory cooperation between the EU and Japan.

and strengthening of supply chains. Also, this chapter is excluded from the application of the dispute resolution.

4. REGULAR MEETINGS BETWEEN JAPAN AND VARIOUS COUNTRIES

In addition to the meetings prescribed in economic partnership agreements and investment treaties, there have been many meetings at which matters relating to the improvement of the business environment are addressed.

Between Japan and Brazil, for example, meetings of the “Japan-Brazil Trade & Investment Promotion Joint Committee”, which is not based on any treaty, have been held six times since 2009. In these meetings, discussions have occurred on the improvement of trade/business environments on the part of both parties, and there have been achievements such as extension of expiration date of commercial visa and extension of the period of technology transfer contracts, etc. In 2013, industrial cooperation was included in the topics at the “First Meeting of the Japan-Brazil Joint Committee on Promoting Trade, Investment, and Industrial Cooperation”. In 2016, the joint committee held its fourth meeting. In addition, as a joint initiative between Japan and Viet Nam, an action plan focused on problems in the investment environment in Viet Nam has been compiled in coordination with the chapter on business environment improvements in the Japan-Viet Nam Economic Partnership Agreement, with initiatives being carried out with the aim of following up on progress regarding these issues. Results were achieved, such as “exemption of business visa during a short stay,” “extension of time for receiving an application for customs checks” and “stricter enforcement (penalties) for infringement on intellectual property”. Japan and Indonesia have held meetings of the Japan-Indonesia Joint Public-Private Sector Investment Forum since 2010 (called Japan-Indonesia Investment and Export Promotion Initiative (PROMOSI) since 2015), which provides a framework for promoting improvements in infrastructure, investment and business environments. Japan and Myanmar also have held meetings (the Japan-Myanmar Joint Initiative) since 2013, in order to discuss individual issues such as taxation, business environment and labour, and industrial policies.

Companies are facing problems relating to governmental measures in their export destinations or countries into which they are expanding, as well as conveying requests and submissions directly to the local government, frequently convey these requests and submissions via the Japanese government. In addition to the inter-governmental meetings on improvements in the investment environment prescribed in economic partnership agreements and other agreements, inter-governmental meetings held on both a regular and an ad hoc basis provide an opportunity to raise such issues with other governments.