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**INVESTMENT TREATY CLAIMS –  
LIMITATION PERIODS FOR JAPANESE COMPANIES**

## Key takeaways

- Investment treaties are international law agreements, signed between two or more states, that provide investors with protection for their overseas investments or business operations
- Investment treaties are used to mitigate political risks because they provide a right of recourse to investors in the event that the acts or omissions of a foreign government unlawfully or unfairly result in a taking or destruction in the value of the protected investment
- Most investment treaties are enforceable if they include an international arbitration clause whereby the state parties consent to arbitration of investment disputes with investors of the other party
- Most of Japan's treaties contain a time limit for investors to submit claims to arbitration. The time limit, and the formula used for calculating the relevant period, vary from treaty to treaty
- If a claim is brought after the limitation period has ended, the claim may be considered inadmissible or outside the jurisdiction of the tribunal
- This article contains a broad summary of the limitation period for each of Japan's bilateral investment treaties currently signed or in force



## INTRODUCTION

Bilateral investment treaties (**BITs**) are international law instruments signed between two states to create rights for "*investors*" from those countries. The purpose of these treaties is to promote and protect investments made by investors from one party being made into the territory of the other.

In most of Japan's BITs, companies incorporated in Japan will fall within the definition of an "*investor*". The protections granted by BITs to Japanese companies are wide-ranging and are designed to mitigate against the risk of a foreign government taking nationalist, unfair or discriminatory measures which destroy the value of an investor's investment.

For example, the Japan-Vietnam investment treaty provides rights for Japanese companies doing business in Vietnam. If, in violation of the treaty, Vietnam nationalizes a Japanese investment or otherwise takes unfair measures which destroy the value of that investment, Japanese investors can seek compensation through a claim under the treaty. If the claim is successful, the Japanese company will be in possession of an international arbitral award which is enforceable in more than 150 jurisdictions under either the Convention on the Settlement of Investment Disputes Between Investors and States (**ISCID Convention**) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).

In recent years, a number of Japanese companies have made claims using investment treaties. For example, four Japanese companies have brought arbitration claims against the Kingdom of Spain after Spain made changes to its regulatory framework for renewable energy. These claims were made

under the Energy Charter Treaty, a multilateral investment treaty to which Japan is also a party.

Importantly, the term "*investment*" is broadly defined to cover a wide range of business interests far beyond traditional equity investment. Typically, Japan's treaties specifically identify loans, real estate, IP, contractual rights, rights under licences and all forms of tangible and intangible property as investments.

However, claims concerning rights and obligations contained in a BIT may be subject to some form of limitation period. In other words, if a claim is not brought within a specified time period, the investor may be prevented from bringing an arbitration claim against the relevant government. Therefore, investors in a dispute with a foreign government, who have protection under a BIT, need to be aware of the relevant time limits specified in applicable BITs to ensure their claims or potential claims are not inadvertently lost by the passing of time.

This briefing explains the provisions and principles relevant to limitation periods for investment treaty claims and includes a table setting out our analysis of the limitation periods in all of Japan's BITs (or bilateral Economic Partnership Agreements including investment chapters) currently signed or in force, where such treaties include arbitration clauses for settlement of investment disputes.



## LIMITATION PERIODS FOR INVESTMENT TREATY CLAIMS

Most of Japan's BITs grant Japanese companies the right to bring claims to enforce their treaty rights against foreign governments either (i) by arbitration referred to a World Bank organization called the International Center for the Settlement of Investment Disputes (**ICSID**) or (ii) by arbitration under the rules of the United Nations Commission on International Trade Law (**UNCITRAL**).

ICSID arbitration is a self-contained process that operates at a supranational level. In other words, the governing law of the arbitration is the BIT and international law together with the ICSID Convention and the ICSID Rules. Unless expressly provided for in the BIT, the national law of a particular country is generally not applicable to the dispute between an investor and a government under the BIT. This means that no statute of limitations that forms part of the national law applies to investment treaty claims. Only a limitation period specifically included in the BIT applies.

This approach has been accepted by international tribunals. For example, in the case of *Gavazzi v Romania*, the Tribunal held:

*"In arbitration proceedings governed by international law, only international law – and no domestic law – can introduce time-bars. Neither the ICSID Convention, nor the BIT, nor international law in general contains any statute of limitations in relation to treaty claims. Without such clear legal provision, no time-bar can operate to bar an ICSID arbitration."*

However, if the relevant treaty contains a time limit by which the investor must bring a claim and the investor does not bring a claim within the relevant period, that investor will almost certainly face an argument that its claim is time barred.

For claims that are not within the ICSID system, for example, claims brought under the UNCITRAL Rules, a time limit specified in the applicable treaty will also be effective.

In practice, the facts relevant to the calculation of notice periods are often complex. This means a Tribunal will have to study the facts of the relevant dispute and think carefully before determining whether a claim is time barred.

### Calculating the limitation period

If there is no limitation period expressly provided for within the treaty, there is no limitation period to be calculated. However, even if there is no limitation period, it is possible that some tribunals will be more cautious of a claim that is made a significant amount of time (and without justification) after the relevant loss or knowledge of the events giving rise to the claim occurred. Respondent states may also argue that a claim made long after the loss or alleged events have occurred constitutes waiver or abandonment of an investor's rights. While such arguments may not ultimately prevail, they could add time and cost to the proceedings.

In this context, where a limitation period is specified in a BIT, care should be taken to carefully consider when the clock starts, for example, is it from when the loss occurred or when the investor knew about or should have known about the dispute? Different treaties take different approaches. Further, many treaties require a negotiation or 'cooling off' period before an investment treaty claim can be made. While tribunals have taken varying views on whether the times set for negotiation or 'cooling off' periods are rigid legal requirements, as a matter of best practice, time periods allowed for negotiations or 'cooling off' should be factored into the calculation of limitation periods.

## KEY LEARNINGS FROM OUR ANALYSIS

We have reviewed all of Japan's BITs currently signed and/or in force to produce the table included in the Annexure to this briefing. For each BIT, the table indicates the existence of the following provisions:

- (i) provisions requiring negotiations and/or consultations;
- (ii) specification of a specified time limit for the investor to commence arbitration following trigger events e.g. loss or the events giving rise to the dispute occurring;
- (iii) existence of provisions stating that arbitration cannot be started until the expiry of a specific period determined by reference to a written request for consultations and/or negotiations; and
- (iv) provisions stating that arbitration cannot be started until the expiry of a specific time period after the investor has filed a written notice stating its intention to commence an arbitration.

All of the above provisions should be considered when calculating limitation periods if the investor wishes to preserve its arbitration rights.

This is a high-level summary and investors considering a claim should seek legal advice in relation to the specific treaty and factual circumstances relevant to their claim. In particular, attention should be given to the wording of the trigger event for starting the limitation period clock (for example, whether the reference point is the date of knowledge of breach or date of loss or both).

Some broad trends emerge from our analysis.

**First**, while Japan's early treaties do not always include any limitation period, recent treaties typically include a limitation period of three years from the date upon which the claimant first acquired, or should have first acquired, knowledge of the breach and/or knowledge that the claimant has incurred loss or damage. However, there are some quite detailed differences and nuances in wording between different treaties. For example, some treaties draw a distinction between the date of knowledge of the breach and date of knowledge of the loss while others put these two together for the purposes of calculating the limitation period.

**Second**, the majority of Japan's treaties require the investor to enter into a period of consultation and negotiations with the foreign government, and/or to wait for a certain period between the occurrence of events giving rise to the dispute before commencing an arbitration (the "**cooling off period**").

**Third**, in addition to time-related requirements and notice provisions, some of Japan's treaties require other formalities to be completed before a claim can be submitted to arbitration (or notifications after such a claim has been submitted). For example, the Bahrain-Japan BIT prevents a claim from being submitted to arbitration unless the investor confirms in writing (i) that the investor consents to arbitration in accordance with the BIT and (ii) the investor waives its right to initiate or continue any administrative or court proceedings with respect to the same measure that is the subject of the arbitration (at least until the completion of the arbitration). These kinds of requirements should also be carefully checked by investors bringing claims. Failure to comply with such requirements may result in objections to the admissibility of the claim in its entirety.

Annex:  
**HIGH-LEVEL SUMMARY  
OF LIMITATION PERIOD  
PROVISIONS IN JAPAN'S  
INVESTMENT TREATIES**



## HIGH-LEVEL SUMMARY OF LIMITATION PERIOD PROVISIONS IN JAPAN'S INVESTMENT TREATIES

**Note:** This table is a summary only. The detailed provisions of the treaty should be considered on a case-by-case basis and legal advice should be sought in relation to any specific limitation period query. Further, the inclusion of a specified period from a treaty in this table does not mean that failure to comply with the provision will always be fatal to the investors' right to bring a claim. However, best practice is to act conservatively with respect to specified limitation periods.

| BILATERAL INVESTMENT TREATIES |                   |   |                         |  |   |
|-------------------------------|-------------------|---|-------------------------|--|---|
|                               | Parties           | Provisions relevant to limitation periods |                         |  |   |
|                               |                   | Negotiations or "cooling off" period      | Time limit to arbitrate | Written notice   | Notice of intent to claim                         |
| 1.                            | <b>Argentina</b>  | Included                                  | Three years             |  | 90 days before a claim is referred to arbitration |
| 2.                            | <b>Armenia</b>    | Included                                  | Three years             |  | 90 days before a claim is referred to arbitration |
| 3.                            | <b>Bahrain</b>    | Included                                  | Three years             | Written request for consultations required six months before submission to arbitration   |   |
| 4.                            | <b>Bangladesh</b> | Included                                  | No time limit specified |  |   |
| 5.                            | <b>Brunei</b>     | Included                                  | Three years             | Written request for consultations required five months before submission to arbitration  | 90 days before a claim is referred to arbitration |
| 6.                            | <b>Cambodia</b>   | Included                                  | Three years             | Written request for consultations required three months before submission to arbitration | 90 days before a claim is referred to arbitration |

| <b>BILATERAL INVESTMENT TREATIES</b> |                      |  |                                |   |   |
|--------------------------------------|----------------------|--|--------------------------------|---|---|
|                                      | <b>Parties</b>       | <b>Provisions relevant to limitation periods</b> |                                |   |   |
|                                      |                      | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>   | <b>Notice of intent to claim</b>                  |
| 7.                                   | <b>Chile</b>         | Included   | Three years                    |   | 90 days before a claim is referred to arbitration |
| 8.                                   | <b>China</b>         | Included   | No time limit specified        |   |   |
| 9.                                   | <b>Colombia</b>      | Included   | Three years                    | Written request for consultations required six months before submission to arbitration  | 45 days before a claim is referred to arbitration |
| 10.                                  | <b>Cote D'Ivoire</b> | Included   | Three years                    |   | 90 days before a claim is referred to arbitration |
| 11.                                  | <b>Egypt</b>         | Not included                                     | No time limit specified        |   |   |
| 12.                                  | <b>Georgia</b>       | Included   | Three years                    |   | 90 days before a claim is referred to arbitration |
| 13.                                  | <b>Hong Kong</b>     | Included   | No time limit specified        | Written notification of claim required six months before submission to arbitration      |   |
| 14.                                  | <b>India</b>         | Included   | Three years                    | Written request for consultations required six months before submission to arbitration  | 90 days before a claim is referred to arbitration |
| 15.                                  | <b>Indonesia</b>     | Included   | Three years                    | Written request for consultations required five months before submission to arbitration | 90 days before a claim is referred to arbitration |



| <b>BILATERAL INVESTMENT TREATIES</b> |                   |  |                                |  |   |
|--------------------------------------|-------------------|--|--------------------------------|--|---|
|                                      | <b>Parties</b>    | <b>Provisions relevant to limitation periods</b> |                                |  |   |
|                                      |                   | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>  | <b>Notice of intent to claim</b>                  |
| 16.                                  | <b>Iran</b>       | Included   | No time limit specified        | Written notification of claim required six months before submission to arbitration     |   |
| 17.                                  | <b>Iraq</b>       | Included   | Five years                     | Written notification of claim required three months before submission to arbitration   |   |
| 18.                                  | <b>Israel</b>     | Included   | Three years                    | Written notification of claim required six months before submission to arbitration     | 90 days before a claim is referred to arbitration |
| 19.                                  | <b>Jordan</b>     | Included   | Three years                    | Written request for consultations required six months before submission to arbitration | 90 days before a claim is referred to arbitration |
| 20.                                  | <b>Kazakhstan</b> | Included   | Three years                    | Written request for consultations required six months before submission to arbitration |   |
| 21.                                  | <b>Kenya</b>      | Included   | Three years                    | Written request for consultations required six months before submission to arbitration |   |

| <b>BILATERAL INVESTMENT TREATIES</b> |                      |  |                                |  |   |
|--------------------------------------|----------------------|--|--------------------------------|--|---|
|                                      | <b>Parties</b>       | <b>Provisions relevant to limitation periods</b> |                                |  |   |
|                                      |                      | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>  | <b>Notice of intent to claim</b>                  |
| 22.                                  | <b>(South) Korea</b> | Included   | Three years                    | Written request for consultations required six months before submission to arbitration   | 90 days before a claim is referred to arbitration |
| 23.                                  | <b>Kuwait</b>        | Included   | Five years                     | Written request for consultations required six months before submission to arbitration   |   |
| 24.                                  | <b>Laos</b>          | Included   | Three years                    | Written request for consultations required three months before submission to arbitration | 90 days before a claim is referred to arbitration |
| 25.                                  | <b>Malaysia</b>      | Included   | Three years                    | Written request for consultations required five months before submission to arbitration  | 90 days before a claim is referred to arbitration |
| 26.                                  | <b>Mexico</b>        | Included   | Three years                    | Written request for consultations required 180 days before submission to arbitration     |   |
| 27.                                  | <b>Mongolia</b>      | Included   | Three years                    | Written request for consultations required 120 days before submission to arbitration     | 90 days before a claim is referred to arbitration |

| <b>BILATERAL INVESTMENT TREATIES</b> |                         |  |                                |  |   |
|--------------------------------------|-------------------------|--|--------------------------------|--|---|
|                                      | <b>Parties</b>          | <b>Provisions relevant to limitation periods</b> |                                |  |   |
|                                      |                         | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>  | <b>Notice of intent to claim</b>                  |
| 28.                                  | <b>Morocco</b>          | Included   | Three years                    | Written request for consultations required six months before submission to arbitration   |   |
| 29.                                  | <b>Mozambique</b>       | Included   | Three years                    | Written request for consultations required three months before submission to arbitration |   |
| 30.                                  | <b>Myanmar</b>          | Included   | Three years                    | Written request for consultations required three months before submission to arbitration |   |
| 31.                                  | <b>Oman</b>             | Included   | Three years                    | Written request for consultations required six months before submission to arbitration   |   |
| 32.                                  | <b>Pakistan</b>         | Included   | No time limit specified        |  |   |
| 33.                                  | <b>Papua New Guinea</b> | Included   | Five years                     | Written request for consultations required three months before submission to arbitration |   |
| 34.                                  | <b>Peru</b>             | Included   | Three years                    | Written request for consultations required six months before submission to arbitration   | 90 days before a claim is referred to arbitration |
| 35.                                  | <b>Russia</b>           | Included   | No time limit specified        |  |   |

| <b>BILATERAL INVESTMENT TREATIES</b> |                             |  |                                |  |   |
|--------------------------------------|-----------------------------|--|--------------------------------|--|---|
|                                      | <b>Parties</b>              | <b>Provisions relevant to limitation periods</b> |                                |  |   |
|                                      |                             | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>  | <b>Notice of intent to claim</b>                  |
| 36.                                  | <b>Saudi Arabia</b>         | Included   | Five years                     | Written request for consultations required six months before submission to arbitration | 90 days before a claim is referred to arbitration |
| 37.                                  | <b>Singapore</b>            | Not included                                     | Three years                    |  | 90 days before a claim is referred to arbitration |
| 38.                                  | <b>Sri Lanka</b>            | Not included                                     | No time limit specified        |  |   |
| 39.                                  | <b>Switzerland</b>          | Included   | Five years                     | Written request for consultations required six months before submission to arbitration |   |
| 40.                                  | <b>Thailand</b>             | Included   | Two years                      | Written request for consultations required six months before submission to arbitration | 90 days before a claim is referred to arbitration |
| 41.                                  | <b>Turkey</b>               | Included   | No time limit specified        |  |   |
| 42.                                  | <b>Ukraine</b>              | Included   | Three years                    | Written request for consultations required six months before submission to arbitration |   |
| 43.                                  | <b>United Arab Emirates</b> | Included   | Five years                     | Written request for consultations required six months before submission to arbitration | 90 days before a claim is referred to arbitration |

| <b>BILATERAL INVESTMENT TREATIES</b> |                   |  |                                |  |   |
|--------------------------------------|-------------------|--|--------------------------------|--|---|
|                                      | <b>Parties</b>    | <b>Provisions relevant to limitation periods</b> |                                |  |   |
|                                      |                   | <b>Negotiations or "cooling off" period</b>      | <b>Time limit to arbitrate</b> | <b>Written notice</b>  | <b>Notice of intent to claim</b>                  |
| 44.                                  | <b>Uruguay</b>    | Included   | Three years                    | Written request for consultations required six months before submission to arbitration   | 90 days before a claim is referred to arbitration |
| 45.                                  | <b>Uzbekistan</b> | Included   | No time period specified       | Written request for consultations required three months before submission to arbitration |   |
| 46.                                  | <b>Vietnam</b>    | Included   | No time period specified       | Written request for consultations required three months before submission to arbitration |   |

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