

# WORLD TRADE ORGANIZATION

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**Working Group on the Relationship  
between Trade and Investment**

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## COMMUNICATION FROM JAPAN

The following communication, dated 30 March 1998, was received from the Permanent Mission of Japan with the request that it be circulated to Members.

### Abstract

The previously distributed Secretariat's note (WT/WGTI/W/22) has provided a valuable overview of existing investment treaties. In addition to the first part of the Secretariat's note, we present some details regarding Japan's bilateral investment treaties (hereinafter "BITs") with the aim of deepening the understanding of the Working Group participants with regard to investment treaties. In the following section, we make full use of the Secretariat's note to identify elements common to recent investment treaties (including Japan's BITs), and introduce the elements of the investment treaty that will potentially be required in the future. We conclude the paper by indicating particular issues relating to the elements identified in the previous section in the hope of providing a concrete proposal regarding the direction of future debate within this Working Group.

#### 1. Japan's Bilateral Investment Treaties (BITs)

Japan currently maintains five BITs. Bilateral investment treaty negotiations are also in progress with some other countries in response to an increased demand from Japanese companies. Below we have outlined some of the elements common to Japan's current BITs; these details essentially correspond what we describe later as a typical, traditional BIT.

##### (1) Definition of "investments"

All five treaties specify investments as being "every kind of assets", representing a broad concept of "investment".

##### (2) Admission of investment

Foreign investment is required to be admitted in accordance with domestic law. A conferring of a most favoured nation (MFN) status is also required.

##### (3) Treatment of investments

The following items are disciplined according to the conferring of national treatment and a MFN status:

- (i) investments and business activities;

- (ii) right to take legal action;
- (iii) compensation regarding expropriation and nationalization.

(4) Conditions regarding nationalization and compensation

Expropriation, nationalization, or other measures having the tantamount effects to them, are not permitted, except where the measures are taken for a public purpose, on a non-discriminatory basis, under the due process of law and against payment of compensation. Compensation must be equivalent to the normal market value of investment assets and returns.

(5) Subrogation of the right or claim

If a payment is made under guarantee by a contracting party, it is permitted that any right or claim will be transferred to guarantors.

(6) Companies of third countries with substantial interests

Companies of any third country in which investors have a substantial interest must be accorded a certain level of treatment within the territory of the other contracting party.

(7) Dispute settlement

An investor-state dispute settlement mechanism is provided in addition to a state-state dispute settlement mechanism.

2. Common Elements of Existing Investment Treaties

Traditionally, bilateral and regional investment treaties have been centred around laws relating to investment protection, but in recent years, economic globalization and increased corporate investment activities have led to calls for investment treaties which address investment liberalization. Below, we identify some elements common to existing investment treaties, and classify them according to whether they relate to investment protection or investment liberalization.

(1) Elements relating to investment protection

Based on details provided in the Secretariat's note, disciplines pertaining to investment protection in existing investment treaties (including Japan's BITs) can be roughly summarized as follows:

- (i) Definition of "investment". Generally, "investment" is defined very broadly with a list of examples.
- (ii) Admission of investment. Treaties typically stipulate that investment should be admitted in accordance with domestic law.
- (iii) General standards relating to the treatment of investments. Parties are generally required to accord covered investments fair and equitable treatment and full/constant protection and security, and to refrain from impairing by unreasonable or discriminatory measures on investment.
- (iv) Expropriation and compensation. Direct or indirect expropriation is prohibited except in cases where expropriation is implemented for a public

purpose, on a non-discriminatory basis, under due process of law and against payment of compensation.

- (v) Free transfer of payments.
- (vi) Dispute settlement procedures. Investor-state dispute settlement procedure is often provided in addition to state-state dispute settlement procedure.

(2) Elements relating to investment liberalization

In recent years, the United States, the world's largest investor as well as the largest investment recipient, and, even more recently, Canada, have entered into a number of BITs with disciplines governing a broad range of investment liberalization measures. In addition to such BITs, the NAFTA treaty, for example, incorporates liberalization measures, and the MAI currently being negotiated in the OECD is also centred around investment liberalization measures. Below, we list a number of items pertaining to investment liberalization that are commonly found in existing investment treaties.

- (i) Prohibition of performance requirements:
  - local content requirements;
  - trade-balancing requirements;
  - export requirements;
  - technology transfer requirements.
- (ii) Right of temporary entry and stay for managerial personnel.
- (iii) Prohibition of nationality restrictions regarding the employment of key personnel.

(3) Items that may need to be incorporated into investment treaties

The quantity of BITs has increased rapidly during the 1990s (of approximately 1,300 BITs currently in place, over two thirds have been entered into since 1990). The quality of such treaties has also changed, with traditional types of investment treaties that emphasize investment protection, giving way to "high standard" treaties emphasizing investment liberalization. Economic globalization has provided the background to this trend, and there is likely to be an increasing demand in coming years for such "high-standard" treaties. In Japan, although companies have always had an interest in the conclusion of investment treaties (see, for example, our previous contribution paper, WT/WGTI/W/11), the need for high standard investment treaties is growing in magnitude, despite the investment environment becoming increasingly unclear in the wake of the Asian currency crisis.

3. Proposal regarding the direction of future discussions

Given the items listed above that are typical of existing investment treaties, it is important for this Working Group to examine whether or not such items should be incorporated into future multilateral treaties. In this context, it will be useful to discuss items that have been subject to debate during the past treaty negotiations, as well as items which appear to be particularly important to the promotion of investment. To this end, we have listed some of the specific items and issues that should be addressed when our Group next convenes.

(1) Range of "investment"

Should consideration be limited to FDI, or should portfolio investment also be included?  
Should indirect investment (investment via a third country) be included?

(2) National treatment and MFN status

What are the advantages and disadvantages of a positive list approach or a negative list approach when applying national treatment to investment approval?

(3) Prohibition/restriction of performance requirements

In addition to items already disciplined under the TRIMs Agreement, items, such as those listed below, are disciplined under existing bilateral or regional treaties. Thus, we need to consider whether such items should be incorporated into investment treaties, and to examine the types of problem that might arise as a result.

(i) Export requirements:

- How should Foreign Trade Zones (FTZs) be treated?

(ii) Technology transfer requirements:

- How should incentive-added technology transfer requirements be handled?

(Prohibit or control?)

(iii) Foreign capital restrictions:

- How should the relationship with the GATS be viewed?

(4) Right of temporary entry and stay for key personnel

(5) Tax

- How should the relationship with bilateral tax treaties and the domestic tax system be viewed?

(6) Free transfer of payments

(7) Arrangements regarding expropriation and compensation

(8) Dispute settlement

- Should investor-state disputes be provided? Should the scope of such disputes be limited to "investment protection"?

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