

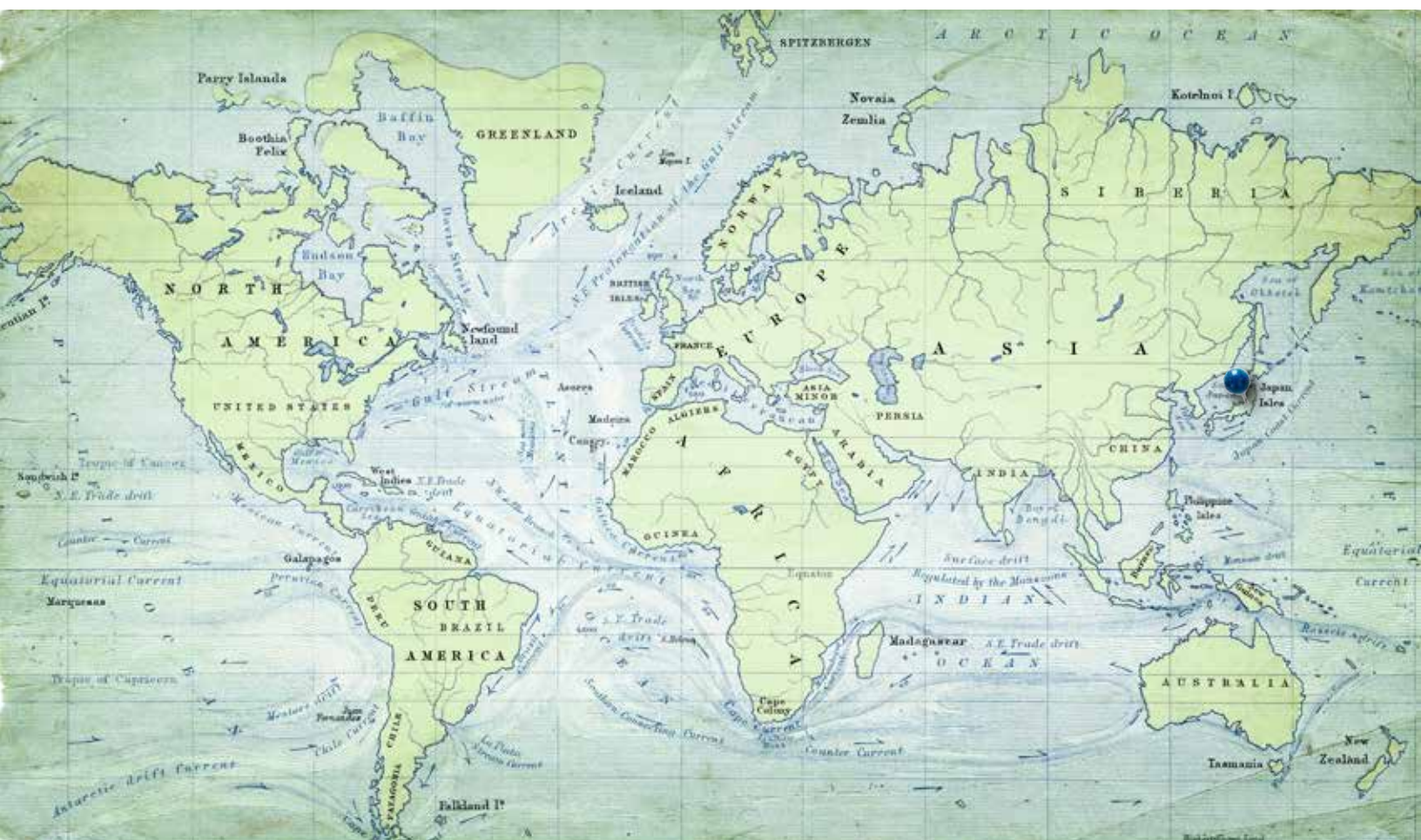


INVESTOR-STATE ARBITRATION SERIES

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DEBATES IN JAPAN OVER INVESTOR-STATE ARBITRATION WITH DEVELOPED STATES

SHOTARO HAMAMOTO



**DEBATES IN JAPAN OVER INVESTOR-STATE ARBITRATION
WITH DEVELOPED STATES**

Shotaro Hamamoto



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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



Shotaro Hamamoto is a CIGI senior fellow and a professor at Kyoto University's Graduate School of Law. Previously, he was a guest professor at the University of Paris I (Panthéon-Sorbonne) and at Sciences Po de Paris and professor at Kobe University. Shotaro has also been a research fellow at the Japan Society for the Promotion of Science. He is a member of the American Society of International Law, the Japanese Society of International Law, the Japanese Association of World Law and the International Law Association, among others.

From 2007 to 2009, Shotaro was vice president of the EU Institute in Japan and since 2008 he has been an arbitrator with the Japan Sports Arbitration Agency. He has been a representative to the Organisation for Economic Co-operation and Development's Investment Committee and the United Nations Commission on International Trade Law Working Group II. Shotaro appeared before the International Tribunal for the Law of the Sea in 2007, and appeared before the International Court of Justice from 2013 to 2014 as an advocate for the Japanese government and as an assistant to the Spanish government from 1997 to 1998.

Shotaro holds a doctorate in law from the University of Paris II and an LL.M. and LL.B. from Kyoto University.

ACRONYMS AND ABBREVIATIONS

| | |
|----------|--|
| BITs | bilateral investment treaties |
| EPA | economic partnership agreement |
| FET | fair and equitable treatment |
| FTA | free trade agreement |
| ISDS | investor-state dispute settlement |
| MFN | most-favoured nation |
| ROK | Republic of Korea |
| TPP | Trans-Pacific Partnership |
| UNCITRAL | United Nations Commission on International Trade Law |

EXECUTIVE SUMMARY

This paper analyzes critical opinions about investor-state arbitration (ISA) in relation to investment treaties concluded by Japan, with particular emphasis on the Trans-Pacific Partnership (TPP) negotiations. Japan has concluded 28 investment treaties, along with 12 economic partnership agreements (EPAs) that each contain a chapter on investment, and is a party to the Energy Charter Treaty. Currently, Japan is negotiating more than 20 bilateral investment treaties (BITs) and EPAs that include investment chapters. Japan has also signed the TPP.

Against ISA, in particular in relation to the TPP negotiations, a number of familiar criticisms have been addressed: ISA infringes on state sovereignty; it is unconstitutional; it unduly restricts regulatory space; and it unduly restricts government procurement. However, these elements cannot be the real cause of opposition to ISA itself. Although these criticisms, if valid, should apply to all of Japan's investment treaties, the Diet continues to approve other BITs and EPAs with unanimity or by an overwhelming majority, and public opinion continues to be indifferent to investment treaties other than the TPP. The complete lack of discussion concerning ISA being included in treaties with Switzerland and the Republic of Korea (ROK), as well as during the EPA negotiations with the European Union, indicates that few people believe that ISA with developed states is unnecessary or problematic. What makes the TPP appear problematic is the presence of the United States, as it is perceived that Japan may well be brought to arbitration by US investors.

INTRODUCTION

This paper analyzes critical opinions about ISA in relation to investment treaties concluded by Japan, with particular emphasis on the TPP negotiations. After briefly reviewing Japan's treaty practice in the first part of this paper, such critical opinions will be analyzed in the second part.

JAPAN'S TREATY PRACTICE

Japan has concluded 28 investment treaties, along with 12 EPAs¹ that each contain a chapter on investment,² and is a party to the Energy Charter Treaty. Currently, Japan is negotiating more than 20 BITs and EPAs that include investment chapters. Japan has also signed the TPP.³

The author has had several opportunities to analyze these treaties and Japan's international investment law policy.⁴ As explained in those studies, although Japan concluded only a small number of simple, "old-generation" BITs before 2001, due to its strong belief in multilateralism, the collapse of the negotiations on a Multilateral Agreement on Investment and the stalemate in the World Trade Organization's Doha Round led it to negotiate an increasing number of far more detailed "new-generation" BITs and EPAs with investment chapters, starting in 2002. This paper does not reproduce what has already been explained in the author's previous studies and in other publications⁵ but rather summarizes the basic features of Japan's recent treaties, those signed in and after 2012: BITs with Iraq (signed in 2012), Kuwait (2012), Mozambique (2013), Myanmar (2013), Saudi Arabia (2013), Kazakhstan (2014), Oman (2015),

1 These are essentially identical to free trade agreements (FTAs). See Shotaro Hamamoto, "Economic Partnership Agreements Concluded by Japan" (2015) 6 Euro YB Intl Econ L 191.

2 This includes the Japan-Mongolia EPA, which was signed in 2015, but as of June 2015 has not entered into force. Japan and Mongolia had already concluded a BIT in 2001, which will be terminated when the EPA enters into force (article 10.19 of the EPA). On the other hand, the three EPAs concluded with Peru, Vietnam and ASEAN are excluded. The Japan-Peru EPA and the Japan-Vietnam EPA simply incorporate the BITs already existing between respective parties. The Japan-ASEAN EPA has a chapter on investment, containing a single article, which provides that the parties shall continue to discuss and negotiate provisions for investment.

3 Ministry of Economy, Trade and Industry, "EPA/FTA/Investment Agreements" (2015), online: <www.meti.go.jp/policy/trade_policy/epa/>.

4 Shotaro Hamamoto, "Passive Player in International Investment Law: Typically Japanese?" in Vivienne Bath & Luke Nottage, eds, *Foreign Investment and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2011) 53 [Hamamoto, "Passive Player"]; Shotaro Hamamoto & Luke Nottage, "Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution" (2011) 8:5 Transnational Dispute Management 1; Shotaro Hamamoto, "Japan" in Wenhua Shan, ed, *The Legal Protection of Foreign Investment* (Oxford: Hart, 2012) 445; Shotaro Hamamoto & Luke Nottage, "Japan" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 347 [Hamamoto & Nottage, *Commentaries*].

5 See Jonathan T. Stoel, Tomoko Ishikawa & Michael Jacobson, "Japan's Ambitious International Investment Agreement Policy" (2015) 12:1 Transnational Dispute Management 1; Ministry of Economy, Trade and Industry, "2014 Report on Compliance by Major Trading Trade Partners with Trade Agreements" (2014), online: <www.meti.go.jp/english/report/index_report.html>.

Ukraine (2015), Uruguay (2015) and Iran (2016); a trilateral investment treaty with China and the ROK (2012); an EPA with Mongolia (2015); and the TPP (2016).⁶

Japan's treaties are generally based on the following structure:

- definitions
 - investment
 - investors
- substantive protection
 - national treatment
 - most-favoured-nation (MFN) treatment
 - fair and equitable treatment (FET)
 - full protection and security
 - observance of obligations
 - access to courts
 - prohibition of performance requirements
 - transparency
 - expropriation
 - subrogation
 - capital transfer
- dispute settlement
 - state-to-state dispute settlement
 - investor-state dispute settlement (ISDS)
- exceptions
- denial of benefits
- joint committee

The following discusses selected provisions contained in the post-2012 treaties and will not address those with respect to which there is no observed material difference from the pre-2012 new-generation treaties.

Definition of Investment

As in the pre-2012 treaties, Japan's recent treaties contain a catch-all definition of investment ("every kind of asset"), combined with several groups of illustrative categories. Contrary to most of the pre-2012 treaties, however, some of the recent treaties set forth an element qualifying the scope of the general definition, which refers to "every kind of asset...which has the characteristics of an investment, such

⁶ For treaties signed before 2012, see the papers cited *supra* note 4. The list does not include the Japan-Australia EPA signed in 2014, which does not provide for ISA. It provides, however, that the parties shall conduct a review if, following the entry into force of the EPA, Australia enters into any multilateral or bilateral international agreement providing for ISA, with a view to establishing an equivalent mechanism under the EPA (article 14.19(2)). The EPA entered into force on January 15, 2015, and Australia signed an FTA with China on July 17, 2015. Although the FTA provides for an extremely limited ISA, Japan and Australia are now supposed to commence the review. It is true, however, that many aspects of the Japan-Australia EPA are covered by the TPP, which provides for ISA.

as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” (article 1(1), Japan-Iraq BIT; article 1(a), Japan-Oman BIT; article 1(1), Japan-China-ROK treaty; article 1(a), Japan-Uruguay BIT; article 1(1), TPP). The Japan-Uruguay BIT and the TPP are the most detailed in this respect and contain notes to the definition of the term “investment.” For example, article 1 of the Japan-Uruguay BIT provides:⁷

Note 1: Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as a bank account that does not have a commercial purpose and is related neither to an investment in the territory in which the bank account is located nor to an attempt to make such an investment, are less likely to have such characteristics.

Note 2: For the purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments.

It is difficult to determine why this element qualifying the scope of the general definition is found in treaties concluded with these states but not in other treaties.

Another interesting aspect of the definition of investment adopted in Japan’s treaties is that of indirect ownership and/or control of an enterprise. As in many treaties, “investment” encompasses an “enterprise” that is “owned or controlled, directly or indirectly, by an investor” under Japan’s treaties (for example, article 1(1)(a), Japan-Myanmar BIT). What is interesting is the fact that ownership and control are precisely defined in some treaties but not in others. For example, article 1 of the Japan-Mozambique BIT provides:

(c) an enterprise is:

(i) “owned” by an investor if more than fifty (50) percent of the equity interest in it is owned by the investor; and

(ii) “controlled” by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

Almost identical provisions are found in the Japan-Saudi Arabia BIT (article 1(4)), the Japan-Mongolia EPA (article 10.2(b)), the Japan-Oman BIT (article 1(d)) and the Japan-Uruguay BIT (article 1(c)). Five of the other post-2012 treaties have a similar provision in their denial of benefit clause, but the definition of ownership and control provided therein is explicitly made applicable only to that clause (article 23 note, Japan-Iraq BIT; article 24(3), Japan-Kuwait BIT; article 26(3), Japan-Myanmar BIT; article 25(3), Japan-Kazakhstan BIT; article 26 note, Japan-Ukraine BIT). No definition of ownership or control is contained in the Japan-China-ROK trilateral treaty or in the TPP.

Substantive Protection

National Treatment

In a previous publication, the author said that “[o]ne of the key elements distinguishing Japan’s new-generation BITs/FTAs from the old-generation BITs is the applicability of the national treatment clause to the establishment and/or acquisition of investments.” The author also noted that “[a] notable exception is the recently signed Japan-Papua New Guinea BIT (2011), providing for [national treatment] with respect to ‘investment activities’ (Art. 2(1)), which include neither establishment nor acquisition of investments (Art. 1(4)),” and that “it is difficult at this stage to tell whether this BIT announces the arrival of a ‘third generation’ for Japan’s BITs/FTAs.”⁸ Although it is still difficult to identify a “third generation” of treaties, it is no less difficult to see any tendency in the post-2012 treaties in this respect. National treatment with respect to the establishment and/or acquisition of investments, which is “one of the key elements” of Japan’s new-generation treaties, is provided in one half of the post-2012 treaties (articles 1(d) and 2(1), Japan-Kuwait BIT; articles 1(e) and 2(1), Japan-Mozambique BIT; articles 1(d) and 2(1), Japan-Myanmar BIT; articles 10.2(e) and 10.3, Japan-Mongolia EPA; articles 1(f) and 3, Japan-

⁷ The TPP contains notes similar to article 1.

⁸ Hamamoto & Nottage, *Commentaries*, *supra* note 4, at 359.

Uruguay BIT; articles 9.4(1), TPP) but not in the other half (Japan-Iraq BIT, Japan-China-ROK treaty, Japan-Saudi Arabia BIT, Japan-Kazakhstan BIT, Japan-Oman BIT, Japan-Ukraine BIT and Japan-Iran BIT). It seems that Japan always proposes including national treatment with respect to the establishment and/or acquisition of investments but does not insist on this point when the counterparty's reluctance makes negotiations unnecessarily difficult or lengthy.⁹

MFN Treatment

Apparently taking into account the inconsistent arbitral jurisprudence concerning the applicability of the MFN treatment to a dispute settlement clause, certain pre-2012 treaties already stipulated that the MFN clause is not applicable to provisions concerning ISDS (article 4(2), Japan-Peru BIT; article 88(2), Japan-Switzerland EPA). The same approach is taken in half of the post-2012 treaties (article 4(3), Japan-Iraq BIT; article 4(3), Japan-China-ROK treaty; article 4(1) note, Japan-Oman BIT; article 5(4), Japan-Ukraine BIT; article 4 note, Japan-Uruguay BIT; article 9.5(3), TPP).

On the other hand, the MFN clause contained in the other half of the post-2012 treaties is silent in this respect (Japan-Kuwait BIT, Japan-Mozambique BIT, Japan-Myanmar BIT, Japan-Saudi Arabia BIT, Japan-Kazakhstan BIT, Japan-Mongolia EPA and Japan-Iran BIT). Interestingly, the Japan-Kazakhstan BIT establishes a list of elements to which the MFN clause is not applicable, which does not include ISDS (article 4(2)).

This apparent inconsistency may cause a difficult problem in the application of an MFN clause that does not explicitly exclude its applicability to the dispute settlement clause. Given article 5(4) of the Japan-Ukraine BIT and article 9.5(3) of the TPP, which provide that “[f]or greater certainty,” the MFN clause does not apply to the dispute settlement clause, one may consider that Japan's position is that an MFN clause is not applicable to a dispute settlement clause unless the former is expressly made applicable to the latter. This interpretation is, however, not quite compatible with the other treaties that expressly exclude the dispute settlement clause from the scope of the MFN clause without stating that it does so “for greater certainty.”

FET

As noted in the author's previous studies, Japanese practice regarding FET clauses contained in pre-2012 treaties is extremely flexible: some of the early treaties do not contain any FET provisions; a second category of treaties simply stipulate that FET shall be accorded; and a third category includes an FET clause with notes or comments further specifying the extent of the clause — and the content of these notes and comments is far from uniform.

Although all of the post-2012 treaties contain an FET clause, the content of such clauses continues to vary widely from treaty to treaty. Simple FET clauses are provided in the Japan-Iraq BIT (article 5(1)) and the Japan-Kazakhstan BIT (article 5(1)).

Some treaties provide that each party shall accord “treatment in accordance with international law, including fair and equitable treatment” (article 4(1), Japan-Kuwait BIT; article 4(1), Japan-Mozambique BIT; article 4(1), Japan-Myanmar BIT; article 4, Japan-Saudi Arabia BIT; article 5(1), Japan-Oman BIT; article 6(1), Japan-Ukraine BIT). The Japan-Uruguay BIT adds some qualification in providing that each party shall accord “treatment in accordance with *customary* international law, including fair and equitable treatment” (article 5(1)).¹⁰ Similarly, the Japan-Iran BIT provides that the concepts of FET and full protection and security “do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens” (article 5).

In a slightly more detailed manner, the Japan-China-ROK treaty adds two qualifications to the FET obligation: first, it does not require treatment in addition to or beyond any reasonable and appropriate standard of treatment given in accordance with generally accepted rules of international law; second, a determination that there has been a breach of another provision of the agreement, or of a separate

9 The author argued in 2011 that the inclusion of pre-establishment national treatment was one of the reasons for which Japan had concluded a relatively small number of investment treaties. Hamamoto, “Passive Player”, *supra* note 4, at 55–56.

10 Emphasis added.

international agreement, does not *ipso facto* establish that there has been a breach of the FET clause (article 5(1)).

Adopting these two qualifications contained in the Japan-China-ROK treaty, the Japan-Mongolia EPA further states that its FET clause prescribes the customary international law minimum standard of treatment of aliens, apparently in order to restrict the scope of the clause. On the other hand, it widens (or tries not to further restrict) its scope by adding another note that FET includes the obligation of the party not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process (article 10.5(1) notes 1 and 2).

Quite unsurprisingly, the most detailed FET clause is found in the TPP. Its article 9.6 contains all the qualifications mentioned above and adds two important ones:

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.¹¹
5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

This flexible treaty practice will influence the interpretation of respective FET clauses. Tribunals will probably interpret the simple FET clause without any qualification in a wide manner. An interesting question is whether a breach of other rules of international law constitutes a violation of clauses that require each party to the treaty to accord "treatment in accordance with international law, including fair and equitable treatment." Given the wide variety of Japanese treaty practice regarding FET clauses, tribunals may well place a particular emphasis upon the difference of languages used and conclude in the affirmative, taking into account the fact that the Japan-China-ROK treaty, the Japan-Mongolia EPA and the TPP expressly state that a breach of a separate international agreement does not establish a breach of the FET clause contained in these treaties.

Obligations Observance Clauses

Obligations observance clauses (often called "umbrella clauses") are contained in all post-2012 treaties, except for the Japan-Saudi Arabia BIT. Many of the post-2012 treaties (article 5(3), Japan-Iraq BIT; article 4(3), Japan-Kuwait BIT; article 4(2), Japan-Mozambique BIT; article 4(2), Japan-Myanmar BIT; article 5(3), Japan-Kazakhstan BIT; article 5(3), Japan-Oman BIT; article 6(3), Japan-Ukraine BIT) contain a simple type of this clause that reads as follows: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other Contracting Party."

The Japan-Iran BIT contains an essentially identical clause (article 6).

In the other post-2012 treaties, however, some qualifications are added. First, the Japan-China-ROK treaty limits the scope of the clause to "written commitments in the form of an agreement or contract" (article 5(3)). The Japan-Mongolia EPA adds another condition, that the written obligation needs to be one which the investor could have relied on at the time of establishment, acquisition or expansion of its investment (article 10.5(2)). The Japan-Uruguay BIT considerably restricts the scope of the clause, which provides:

Each Contracting Party, subject to its laws, shall do all in its power to ensure that a written agreement with regard to a specific investment... is respected, provided that the written agreement is with respect to:

- (a) natural resources that a national authority controls;

¹¹ The investor's "reasonable expectations" are taken into account in the context of indirect expropriations. See "Expropriation" below. This is in accordance with US treaty practice, but its theoretical foundation is uncertain. See Shotaro Hamamoto, "Protection of the Investor's Legitimate Expectations: Intersection of a Treaty Obligation and a General Principle of Law" in Wenhua Shan, ed, *China and International Investment Law* (Leiden: Brill/Nijhoff, 2014) 141 at 152, n 43.

- (b) supply of services to the public on behalf of the former Contracting Party; or
- (c) infrastructure projects, that are not for the exclusive or predominant use and benefit of the government.

This clause is further qualified by a note that provides as follows: “For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license or authorization issued by a Contracting Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.”

The TPP does not contain an obligations observance clause, but its dispute settlement clause allows the investor to submit to arbitration a claim that the host state has breached an investment agreement (article 9.18(1)(a)(i)), which is narrowly defined in article 9.1. As the term “agreement” indicates, it does not include unilateral acts of the host state.

It is to be noted that disputes regarding obligations observance clauses are not necessarily subject to dispute settlement clauses. The Japan-Iraq BIT (article 17(5)) and the Japan-Oman BIT (article 15(5)) thus provide that an ad hoc agreement is needed so that such dispute will be brought to arbitration.

Expropriation

Four of the 12 post-2012 treaties provide detailed rules on indirect expropriation. Article 2 of the protocol to the Japan-China-ROK treaty provides:

- (b) The determination of whether an action or a series of actions by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the action or series of actions, although the fact that such action or series of actions has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the action or series of actions interferes with distinct and reasonable expectations arising out of investments; and
 - (iii) the character and objectives of the action or series of actions, including whether such action is proportionate to its objectives.
- (c) Except in rare circumstances, such as when an action or a series of actions by a Contracting Party is extremely severe or disproportionate in light of its purpose, non-discriminatory regulatory actions adopted by the Contracting Party for the purpose of legitimate public welfare do not constitute indirect expropriation.

The Japan-Mongolia EPA (article 2, annex 10) and the Japan-Uruguay BIT (article 2, annex III) include essentially identical provisions. The TPP (annex 9-B) has a slightly more detailed provision. It explicitly mentions “public health” in the clause that provides that relevant measures do not constitute indirect expropriation “except in rare circumstances” and also adds the following: “For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.”

The TPP also adds a comment on the reasonableness of the investor’s expectations: “For greater certainty, whether an investor’s investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.”

It is again difficult to conjecture why these detailed notes on indirect expropriation are included in these four treaties but not in the other eight post-2012 treaties. In any case, it is submitted that the inclusion or

absence of such notes will not make any tangible difference, given the arbitral jurisprudence that tends to equate the rules on indirect expropriation with those on FET.¹²

ISA Provisions

Remedies

All of the post-2012 treaties, but for the EPA with Australia,¹³ provide for ISA. Its scope is limited to “investment disputes,” defined as those between a party and an investor of the other party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former party under the treaty with respect to the investor of that other party or its investments (for example, article 17(1), Japan-Iraq BIT). Some treaties include rules on remedies. For example, the Japan-China-ROK treaty provides (article 15(9)):

The award rendered by an arbitral tribunal...shall include:

- (a) a finding whether or not there has been a breach by the disputing Contracting Party of any obligation under this Agreement with respect to the disputing investor and its investments; and
- (b) one or both of the following remedies, only if the disputing investor’s loss or damage is attributed to such breach:
 - (i) monetary damages and applicable interest;
 - and
 - (ii) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest, in lieu of restitution.

Essentially identical provisions are included in the Japan-Mozambique BIT (article 17 (11)), the Japan-Myanmar BIT (article 18(11)), the Japan-Saudi Arabia BIT (article 14(18)), the Japan-Kazakhstan BIT (article 17(19)), the Japan-Mongolia EPA (article 10.13(18)), the Japan-Oman BIT (article 15(11)), the Japan-Uruguay BIT (article 21(17)) and the TPP (article 9.28(1)). It follows that judicial restitution (such as revocation of a judgment of a domestic court or amendment of legislation) is not allowed under these treaties. However, if the tribunal orders judicial restitution under other treaties (i.e., Japan-Iraq BIT, Japan-Kuwait BIT, Japan-Ukraine BIT or Japan-Iran BIT), such an order will in any case not be enforceable under the International Centre for Settlement of Investment Disputes Convention (article 54(1)) or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Transparency

Some of the post-2012 treaties contain very basic rules on the transparency of ISA procedure that allow — not oblige — the disputing state party to make available to the public documents submitted to or issued by the tribunal, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under the applicable laws and regulations of either party to the treaty (article 17(12), Japan-Mozambique BIT; article 19(12), Japan-Myanmar BIT; article 10.13(19), Japan-Mongolia EPA; article 15(12), Japan-Oman BIT; article 21(18), Japan-Uruguay BIT). The TPP envisages a high degree of transparency, modelled after recent US treaties and the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (article 9.23).¹⁴

The UNCITRAL Rules on Transparency apply to arbitrations initiated under the UNCITRAL Arbitration Rules, pursuant to a treaty concluded on or after April 1, 2014, unless the parties to the treaty have

12 See Shotaro Hamamoto, “Requiem for Indirect Expropriation: On the Theoretical and Practical Uselessness of a Contested Concept” (2013), PILAGG e-series/IA/1, École de Droit, Sciences Po de Paris, 1–28, online: SSRN <<http://ssrn.com/abstract=2666836>>.

13 See *supra* text at note 6.

14 *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, adopted by UN GA Res 68/109, 16 December 2013, online: <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

agreed otherwise (article 1(1)).¹⁵ All of Japan's treaties concluded after that date (with the exception of the Japan-Australia EPA, which does not provide for ISA) give the investor the possibility to initiate arbitration under the UNCITRAL Arbitration Rules and do not exclude the applicability of the Rules on Transparency (article 17(4)(c), Japan-Kazakhstan BIT; article 10.13(4)(c), Japan-Mongolia EPA; article 15(4)(c), Japan-Oman BIT; article 21(3)(c), Japan-Uruguay BIT; article 18(4)(c), Japan-Ukraine BIT; article 18(2)(b), Japan-Iran BIT).

When to Adopt Pro-investor or Pro-state Text?

As indicated above, Japan's treaty practice continues to be quite flexible, but one can observe a general tendency. Japan tends to include pro-investor provisions in treaties concluded with states from which Japan receives a small amount of investment. According to foreign direct investment statistics from the Organisation for Economic Co-operation and Development, among the states with which Japan signed investment treaties in and after 2012, the TPP signatories (including the United States, Canada and Australia), China and the ROK are, unsurprisingly, important investors in Japan.¹⁶ A small amount of investment also comes to Japan from Saudi Arabia and Oman, while no or statistically negligible investment comes to Japan from Iraq, Kuwait, Mozambique, Myanmar, Kazakhstan, Ukraine, Uruguay, Iran or Mongolia.

As pointed out above, the TPP and the Japan-China-ROK trilateral treaty contain MFN clauses made inapplicable to dispute settlement, relatively restrictive FET clauses, detailed provisions restricting indirect expropriation, and a restrictive obligations observance clause (Japan-China-ROK) or a narrowly defined clause on investment agreement (TPP). This suggests that Japan is well aware of the possibility of being a respondent on the basis of these treaties.

It is also interesting that three of the four treaties that give tribunals the power to order juridical restitution, as well as restitution of property that is not necessarily to be replaced by payment of compensation, are concluded with oil-producing states (Iraq, Iran and Kuwait).

CRITICAL OPINIONS ABOUT ISA IN JAPAN

The current Japanese policy on ISA is well summarized in the statement delivered in the Diet¹⁷ by the minister for foreign affairs on November 21, 2013:

ISDS clauses are included in 24 of the 25 investment treaties that Japan has concluded. Such a clause happened not to be included in one of the treaties due to our counterpart's situation at that time, but it is provided in the treaty that the parties will consider including an ISDS clause.¹⁸ In the world, there are more than 2,800 investment treaties, and an ISDS clause, which is a key provision of such treaties, is usually included in treaties concluded by various states.

In addition, the business sector considers these clauses to be important, as they are helpful to protect Japanese companies investing in foreign countries. These clauses are also useful to induce inbound foreign investment and to stimulate the Japanese economy by giving foreign investors the possibility of utilizing impartial international investment arbitration.¹⁹

Against this government's policy, a number of familiar criticisms have been addressed, in particular in relation to the TPP negotiations: that ISA infringes on state sovereignty; it is unconstitutional; it unduly restricts regulatory space; and it unduly restricts government procurement. However, these elements cannot be the real cause of opposition to the TPP negotiations. Although these criticisms, if valid, should apply to all of Japan's investment treaties, the Diet continues to approve other BITs/EPAs

¹⁵ *Ibid.*

¹⁶ OECD.Stat, online: <<http://stats.oecd.org/>>.

¹⁷ Records of the National Diet of Japan are available online at <http://kokkai.ndl.go.jp/>. All statements quoted in this paper are translated by the author.

¹⁸ Article 107(1) of the 2006 Japan-Philippines EPA provides as follows: "The Parties shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party."

¹⁹ Minister for Foreign Affairs Fumio Kishida (address delivered to the Committee on Foreign Affairs and Defence, House of Councillors, 21 November 2013), online: <<http://kokkai.ndl.go.jp/>>.

with unanimity or by an overwhelming majority, and public opinion continues to be indifferent to investment treaties other than the TPP.²⁰ Hence the subject of the present study: Why is ISA problematic only in the context of the TPP negotiations? Two hypotheses are considered here: first, that ISA is acceptable only in relation to developing states, and, second, that ISA is unacceptable only in relation to the United States.

“ISA is acceptable only in relation to developing states”

In the Diet, it is often stated that investment treaties providing for ISA are acceptable only in relation to developing states, to protect Japanese companies. For example, one Diet member argued: “Japan has concluded 15 investment treaties and 9 EPAs. However, these are treaties concluded — sorry for my rudeness for saying this — with developing states. The situation is considerably different with respect to developed states. I wish to make this clear.”²¹

Although this Diet member unfortunately does not make it clear why the situation is considerably different with respect to developed states, it is often argued that ISA is not necessary with developed states because they have sound legal systems. For example, a fervent opponent of the TPP negotiations maintains: “Many people try to justify ISDS clauses, saying that they are included in the EPAs that Japan has concluded. Of course! In developing states, where no rule exists, the host state must be held responsible for troubles caused to Japanese companies. Therefore, such a clause is not included in the Australia-US FTA, concluded between two developed states. It is also for this reason that these clauses have become problematic in the Republic of Korea, and President Park is now working on this problem, which was left unresolved by the previous administration.”²²

The government often concedes that ISA is not always necessary between developed states. For example, the state minister of the Cabinet Office stated: “Generally speaking, investment treaties are not necessary between developed states in many cases, since legal systems are well developed and there is no discrimination between domestic and foreign companies. However, in general, legal systems may not be sufficiently developed, and discrimination against foreign companies is often found in developing states. ISDS clauses are therefore necessary to protect companies of developed states or Japanese companies investing in developing states.”²³

Japan, however, concluded treaties including ISA with the ROK and Switzerland, and the official position of the government seems to be that “we have no policy to include the ISDS clause only in treaties concluded with a particular category of states.”²⁴

It is quite unfortunate that the argument against the inclusion of ISA in treaties with developed states in general (i.e., not only with the United States but also with other developed states) is only rarely voiced in the Diet or in the media, such that the option of not including ISA in treaties concluded with developed states has not been seriously discussed.²⁵ One problem that this option may cause is that it would create a difficult situation when negotiating treaties with developing states in which the Japanese government wishes to include ISA. If the government changes its policy to have ISA with developing states but not with developed states because the legal systems in the latter correctly function, the treaty negotiators will be obliged to say that Japan requires ISA because Japan believes the counterpart state’s legal system does not function correctly. That would not facilitate the negotiations.

20 Shotaro Hamamoto, “Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up but Glaring Hypocrisy” (2015) 16 *J World Investment & Trade* 923.

21 Katsumasa Suzuki (People’s Life Party), (address delivered to the Committee on Budget, House of Representatives, 2 April 2013) 44, online: <<http://kokkai.ndl.go.jp/>>. The People’s Life Party is a small opposition party.

22 Takashi Shinohara (Democratic Party of Japan), (address delivered to the Committee on Budget, House of Representatives, 18 March 2013), online: <<http://kokkai.ndl.go.jp/>>. When it was in power, until the end of 2012, the Democratic Party of Japan was promoting the TPP negotiations. Their members, including Shinohara, were silent about ISA during that period.

23 State Minister of Cabinet Office Yasutoshi Nishimura (address delivered to the Committee on Foreign Affairs and Defence, House of Councillors, 21 November 2013), online: <<http://kokkai.ndl.go.jp/>>.

24 Minister for Economy, Industry and Trade Akira Amari, Committee on Budget (address delivered to the House of Representatives, 27 February 2014), online: <<http://kokkai.ndl.go.jp/>>.

25 No comment can be found on the 2002 Japan-ROK BIT or the 2007 Japan-Switzerland EPA in the parliamentary debates or in the media.

“ISA is unacceptable in relation to the United States”

This is by far the most important reason for which ISA is criticized in Japan. One Diet member said: “I think ISDS clauses are quite dangerous because they give investors a huge power that trumps state sovereignty.... Previously, treaties included protection for investors against developing states. Now, however, such a clause included in a treaty with the United States will perhaps give investors a power that will trump our state sovereignty or the legislative power that we have in this Diet.”²⁶

It is to be noted in this context that, at the time of this statement, Japan had already concluded an EPA including ISA with Switzerland in 2009 and started to negotiate another EPA with the European Union. Nevertheless, only the United States is mentioned in the statement. This is no exception, however, and those who criticize ISA in the Japanese debates always look at only the TPP negotiations.

Why is ISA problematic only in relation to the United States? According to one Diet member: “I am well aware that an ISDS clause is included in all of Japan’s treaties. The problem is the United States. The United States is a highly litigious society and US companies bring a truly great number of arbitrations against host states. There are more than 400 ISDS cases, and we have to be really careful.”²⁷

A similar point was made by another member: “It is true that Japanese treaties concluded with developing states contain an ISDS clause. However, that does not mean that it is good to have it. The presence of the United States makes it clearly dangerous. The United States is a litigious society and I am afraid they would make exorbitant demands to rip us off.”²⁸

Another member says that many parts of the world consider ISA clauses in a treaty with the United States to be dangerous: “Naturally, some people consider ISDS clauses to be useful. I also believe that we should include them in treaties that we conclude with developing states. However, many people are concerned about having them in a treaty concluded with developed states, especially the United States, a litigious society, where a great number of huge multinational enterprises are established.... I believe that the Japanese government should, together with Australia, consider refusing the ISDS clause in the TPP and including one in other treaties where it is necessary for Japan.”²⁹

A similar argument has also been advanced by academics. For example, a leading economist stated in the Diet:

The source of competitiveness of Japan’s manufacturing industry and agriculture will be environment, ecology and safety. This will apply particularly to the automobile industry and agriculture.... The United States has been demanding that Japan’s safety standards concerning automobile parts should be lowered because Japanese cars are far better than US cars in terms of safety and fuel consumption.... For example, if the Japanese government prohibits or regulates some activities of a US company that has made investments in Japan, the company will sue Japan.... How to prevent this, and to what extent? The Japanese government has been thinking only about developing states, but, considering the possibility of a dispute arising between a US company and the Japanese government, as it happened between US companies and the Canadian government, should we accept the ISDS clause as it stands now?³⁰

In this context, we cannot help but refer to an interesting legal argument made by a group of practising lawyers, the Anti-TPP Lawyers’ Network, headed by a former president of the Japan Federation of Bar Associations. According to the network, “[t]here are reasons that including an ISDS clause in a treaty concluded with a developed state, particularly the United States, which is known as a litigious

26 Kazuhiro Haraguchi (Democratic Party of Japan), (address delivered to the Committee on Budget, House of Representatives, 7 March 2013), online: <<http://kokkai.ndl.go.jp/>>.

27 Yasue Funayama (Green Wind), (address delivered to the Committee on Budget, House of Councillors, 20 February 2013) online: <<http://kokkai.ndl.go.jp/>>. The Green Wind was a short-lived ecological party that no longer exists.

28 Koji Hata (People’s Life Party), (address delivered to the Committee on Agriculture, Forestry and Fishery, House of Representatives, 4 June 2014) online: <<http://kokkai.ndl.go.jp/>>. The People’s Life Party is a small opposition party.

29 Hiroe Makiyama (Democratic Party of Japan), (address delivered to the Committee on Audit, House of Councillors, 14 April 2014) online: <<http://kokkai.ndl.go.jp/>>.

30 Masaru Kaneko, professor of economics, Keio University, Research Committee on International Economics and Foreign Affairs (address delivered to the House of Councillors, 10 June 2015) online: <<http://kokkai.ndl.go.jp/>>.

society, infringes the sovereignty of Japan. The legal form of state sovereignty is the Constitution. An infringement of the sovereignty of Japan means, in domestic law, a violation of the Constitution of Japan.”³¹

A quick overview of these anti-ISA arguments indicates that most of the Japanese opponents of ISA are not critical of ISA as such. Nor are they interested in raising objection to investment treaties, including ISA, with developed states in general. It is ISA *with the United States* that they resolutely oppose.

CONCLUSION

As explained in one of the author’s recent papers, Japanese anti-ISA discourse is blatantly hypocritical.³² Few take issue with ISA when it comes to developing states. Worse, many of the opponents of ISA in relation to the United States explicitly emphasize the necessity of ISA with developing states. In addition, the complete lack of discussion concerning ISA being included in treaties with Switzerland and the ROK, as well as during the EPA negotiations with the European Union, indicates that few people believe that ISA with developed states is unnecessary or problematic.

It goes without saying that the situation may change when an investor of a state with which Japan has concluded a treaty with ISA — for example, a Malaysian company — brings arbitration against Japan. Then the anti-ISA discourse may become even more hypocritical: “No problem with treaties by which Japanese companies sue foreign governments, but down with treaties by which foreign companies sue the Japanese government.”

31 “Lawyers Demanding Withdrawal from TPP Negotiations” (open letter to Prime Minister Shinzo Abe, 29 July 2013), online: <tpplawnet.blog.fc2.com/blog-entry-2.html>.

32 Hamamoto, *supra* note 20.

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