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ISDS Under the CPTPP and Beyond: Japanese Perspectives

Yuka Fukunaga (Waseda University) · Wednesday, May 30th, 2018

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was signed by 11 of the original TPP Partners on 8 March 2018 in Santiago, Chile. After the United States announced its withdrawal from the original TPP on 23 January 2017,¹⁾ Japan took the lead in the negotiations of the CPTPP, which concluded successfully in an exceptionally short period of time for this type of negotiations.²⁾ Contrary to the expectation that a signing ceremony would be hosted by Japan as a principal driving force behind the successful conclusion, Santiago was chosen as a venue. According to a local newspaper in Japan, the choice was made deliberately with the hope that the then Chilean President Bachelet, whose term was about to expire, would push for the conclusion of the CPTPP in order to add another achievement to her legacy.³⁾

Article 3.1 of the CPTPP provides that the “Agreement shall enter into force 60 days after the date on which at least six or at least 50 per cent of the number of signatories to this Agreement, whichever is smaller, have notified the Depository in writing of the completion of their applicable legal procedures.” Several original signatories have expressed a desire to complete their applicable legal procedures and bring the CPTPP into force before the end of the year.

In Japan, while the original TPP has already been approved by the Japanese Diet, the CPTPP as a separate agreement requires a new approval. Japanese Minister of State for Economic and Fiscal Policy, Toshimitsu Motegi, expressed his hope in a press conference that Japan’s quick completion of its domestic procedures would give momentum towards ratification by other signatories. The Japanese government is hoping to obtain the required approval during the current session of the Diet, which runs until 20 June 2018. For this purpose, the Cabinet of Prime Minister Abe officially decided on 27 March 2018 to submit the CPTPP to the Diet for approval together with a bill to make a few minor amendments to domestic law. The Diet started deliberations on the CPTPP and the bill on 17 April 2018.

Apart from the fact that the deliberations in the Diet could be stalled due to political scandals haunting Prime Minister Abe and his government, no major objections to the CPTPP and the bill are expected in the Diet. Concerns have been expressed about the potential impact on the

agricultural sector that could be caused by the trade liberalization under the CPTPP, but the concerns have already been addressed, at least to some extent, by budgetary measures in accordance with the Comprehensive TPP-Related Policy Framework, adopted by the Cabinet on 24 November 2017.

On investment, the Japanese government has been an adamant supporter of the protection and promotion of investment as well as of investor-state dispute settlement (ISDS). Most of the investment agreements and regional trade agreements signed by Japan,⁴⁾ including the CPTPP,⁵⁾ contain ISDS provisions. Despite the growing skepticism about ISDS in various parts of the world, no skepticism has been publicly voiced by the Japanese government. Japan's positive assessment of ISDS partly reflects the fact that the Japanese government has never faced investor-state arbitration so far. During the Diet deliberations on the original TPP, the government indicated that it did not envisage the possibility that Japan would be respondent in investor-state arbitration,⁶⁾ and that, even if it were, it would not lose.⁷⁾

ISDS is also supported by the Japanese business community.⁸⁾ For example, Keidanren (Japanese Business Federation) states in its policy statement that ISDS “plays an important role in facilitating foreign investments and improving the predictability of investment business, and this mechanism contributes to economic growth and employment expansion in investment recipient countries.”⁹⁾

It is true that Japanese companies tend to shy away from using arbitration – either commercial or investment.¹⁰⁾ So far, there have been only three publicly known investor-state arbitration cases commenced by Japanese investors. Two of them were brought in relation to Spain's renewable energy policies under the Energy Charter Treaty,¹¹⁾ while the third took issue with the failure of India to provide promised subsidies to the claimant-investor.¹²⁾ All of the proceedings are still pending as of today. Japanese investors' participation in investor-state arbitration may increase in the future as the Japanese government and local lawyers have been intensifying their efforts to raise awareness and understanding of ISDS among the business community.

Japan's support of ISDS is contrasted with the position of the European Union (EU), which seeks to eventually replace ISDS with a permanent investment court system. The disagreement of the two sides was one of the major obstacles to the conclusion of the Economic Partnership Agreement between Japan and the EU (JEEPA). Both sides finalized the negotiations on JEEPA on 8 December 2017, but decided to continue negotiations on investment protection and investment dispute settlement. They later reached an agreement to leave out investment protection and investment dispute settlement from JEEPA. The published text of JEEPA includes certain provisions on investment liberalization, some of which, such as national treatment and most-favoured-nation treatment provisions, could also cover investment protection to some extent. According to news reports, both parties are currently considering holding a signing ceremony of

JEEPA in Brussels in mid-July.¹³⁾ According to a press release of the European Commission, JEEPA's entry into force does not require ratification at Member State level.¹⁴⁾ Japan and the EU reportedly will continue negotiations on a separate agreement on investment.¹⁵⁾

Japan's support of ISDS is also reflected in its position in the discussions of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on reforms of ISDS. During the last year's session of the Working Group III, the Japanese delegation expressed doubts about the necessity of replacing the current ISDS with a permanent investment court, while showing its openness to discuss reforms to ISDS.¹⁶⁾ In particular, it suggested that the value of consistency and coherence should not be overemphasized to the detriment of the diversity of investment treaty texts, by pointing out that the diversity reflects treaty negotiators' deliberate intent to address different investment environments of each country.¹⁷⁾

It is somewhat ironic that Japan, one of the least frequent parties to ISDS, either as the claimant investor or the respondent state, is an adamant supporter of ISDS. It might rather be that its lack of experience with ISDS keeps it from being disillusioned with ISDS. In fact, it has to be pointed out that Japan's views on what reforms to ISDS would be needed, if not replacing it, are not yet fully formed. While Japan is not likely to withdraw its objections to a permanent investment court in any near future, its view on ISDS may develop if it faces more ISDS cases.

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References

- The announcement made it clear that the United States was not ‘obliged to refrain from acts which would defeat the object and purpose of’ the TPP, as provided in Article 18 of the Vienna Convention on the Law of Treaties. See Catherine H. Gibson (Assistant Editor for North America), ‘Delayed Ratification, TPP, and the United States’, Kluwer Arbitration Blog, October 20 2016, <https://arbitrationblog.kluwerarbitration.com/2016/10/20/delayed-ratification-tpp-united-states/>
- Ironically, Japan was the last to join the original TPP negotiations. See David Gantz, ‘Japan’s Entry into the TPP Negotiations Raises the Economic Stakes’, Kluwer Arbitration Blog, May 20 2013, <https://arbitrationblog.kluwerarbitration.com/2013/05/20/japans-entry-into-the-tpp-negotiations-raises-the-economic-stakes/>
- Nikkei, Morning Edition, 9 March 2018.
- As an exception, the economic partnership agreement between Japan and the Philippines as well as the one between Japan and Australia do not provide for ISDS, but the latter also provides that the parties shall review the investment chapter of the agreement “with a view to the possible improvement of the investment environment through, for example, the establishment of a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party.” See Article 14.19 of the agreement between Japan and Australia. See also Jarrod Hepburn, Mark Huber, ‘An Assessment of Australia’s Parliamentary Report on ISDS in the TPP’, Kluwer Arbitration Blog, January 5 2017, <https://arbitrationblog.kluwerarbitration.com/2017/01/05/reserved-an-assessment-of-australias-parliamentary-report-on-isds-in-the-tpp/>
- Some signatories to the CPTPP have signed side letters to mutually exclude the application of ISDS, but Japan has chosen not to.
- See, e.g., Statements of the then Minister of Foreign Affairs, Fumio Kishida, 192nd Session of the Diet (27 October 2016).
- Statements of Prime Minister Abe, 192nd Session of the Diet (11 November 2016).
- See, e.g., Keidanren (Japan Business Federation), The Japan Chamber of Commerce and Industry, Japan Association of Corporate Executives, & Japan Foreign Trade Council, Inc., Policy Proposal: Seeking the Swift Conclusion of the TPP11, 23 October 2017, www.keidanren.or.jp/en/policy/2017/085.html.
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- Japanese companies are said to have an aversion to judicial procedures and to prefer an amicable solution.
- JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27); *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/4).
- Lacey Yong, Treaty claims against India get under way, *Global Arbitration Review* 22 February 2018.
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- Press Release (18 April 2018): European Commission proposes signature and conclusion of Japan and Singapore agreements, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1826>.
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- IA Reporter (Luke Eric Peterson, 9 December 2017), UNCITRAL meetings on ISDS reform get off to bumpy start, as delegations can’t come to consensus on who should chair sensitive process – entailing a rare vote.
- Statement of the Japanese delegation on 30 November 2017, Working Group III (Dispute Settlement), 34th session, Audio Recordings.

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