Kluwer Arbitration Blog

The UK-Japan CEPA Investment Protection Standards: A Glass Half Full?

Naimeh Masumy and Munia El Harti Alonso (Robalino Abogados) · Thursday, February 25th, 2021

On 23 October 2020, Japan and the United Kingdom (UK) signed a Comprehensive Economic Partnership Agreement (CEPA) with the agreement coming into force on 1 January 2021. This signifies a historic landmark as the UK's first trade deal as an independent nation, and represents a key milestone for international trade in a post-Brexit UK. The parties have stated their ambition for the CEPA to go "beyond the existing EU agreement [with Japan], securing bespoke benefits for British businesses and citizens". The CEPA encapsulates the UK and Japan's commitment to address the gaps of the 2018 EU-Japan EPA, including to address e-commerce, rules of origin, financial services, and to provide for the UK's immediate reductions of tariffs on electrical control units used in cars.

Despite CEPA's ambitious objectives, the absence of a substantive investment protection scheme coupled with the failure to include a potent dispute resolution mechanism have rendered this instrument a missed opportunity for the UK to enact a truly comprehensive agreement. In a similar vein, the absence of an investor-state dispute resolution mechanism therein, was a missed opportunity for the UK to establish itself as a proactive player in the investor-state dispute settlement ("ISDS") system, contrasting with the EU's current reformist stance.

This post argues that in the absence of a clear articulation of investment protection standards, this instrument can only serve as an *accord de principe*, as it mirrors the characteristics of a framework agreement. Further, by examining the UK's and Japan's current investment policies, this post considers possibilities for the future revision of the CEPA, with – one can hope – more robust investment protections.

The Investment Aspiration of CEPA: A Semantic Move or an Actual Objective?

Similar to the EU-Japan and India-Brazil economic partnership agreements which came into force in 2021, the CEPA moved away from traditional treaty practice by failing to adopt effective investment mechanisms. An investment protection regime was purposefully left outside the scope of the CEPA for the sake of concluding the Economic Partnership as a Trade Agreement, rather than a comprehensive trade and investment agreement. This is partly due to the fact that the drafting and negotiation of the CEPA took place during a time at which there were mounting concerns about ISDS and its viability. Accordingly, negotiating the investment section of the

CEPA was slow to take shape and in turn, the investment protection mechanism was decidedly left outside the scope of the CEPA.

Whilst investment provisions were excluded from the scope of the agreement, the importance of investment protection has been echoed in the agreement's preamble and Chapter 8. The preamble, for instance, recalls "the objective of sustainable development in the economic, social and environmental dimensions, and of promoting trade *and investment* between them". Chapter 8 also includes provisions on investment liberalization, setting out the treatment and the level of access to the domestic market granted to investors of the respective parties. This chapter also provides specific provisions related to international maritime transport service and electronic commerce. Article 8.11, for example, prohibits an extensive list of performance requirements as conditions for the establishment or operation of an investment. Article 8.16 also provides a firm commitment to national and Most Favored Nation (MFN) treatment standards. Chapter 9 of the CEPA covers capital movements, payments, and transfers and is therefore also relevant to certain investment activities. Article 9.2, for example, provides a guarantee on the free movement of capital, payments, and transfers between the UK and Japan. Crucially, the objective and the concept of investment protection are alluded to in a number of provisions throughout the agreement.

However, despite echoing the shared values concerning the fundamental right to investment protection, the failure to adequately delineate the scope of investment protection within the context of CEPA is a visible departure from the trends set by other comparable foreign trade agreements – widely characterized as the new generation of Free Trade Agreements. This begs the question of whether the cursory reference to investment protection standards – without clear guidance on the scope of investment protection– may lead to an effective application of these provisions.

As the investment provisions have been watered down, the CEPA unsurprisingly does not provide for investor-state dispute resolution. It is not clear what recourse investors may have in the event of an investor-state dispute, as there is no UK-Japan BIT. In a previous KAB post, it was suggested that the new UK "free-trade agreements ['FTA'] are likely to provide for arbitration with regard to investor-state disputes"; alas, the first UK FTA with a country that is not part of the EU does not.

Article 8.5 of the CEPA timidly makes up for the symbolic investment protections and absence of an ISDS mechanism with the possibility to review the CEPA if either of the parties concludes a new agreement with "investment protections or […] investor-to-state dispute settlement". It is only after the entry into force of that agreement that the party can request a review. The review may commence "within two years of the request and shall be concluded within a reasonable time". Such a review mechanism is an interesting technique, used in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (to which Japan is a party, and to which the UK has recently sought membership). It is also worth noting, as was commented in this blog, that Japan and the EU are in ongoing negotiations concerning "investment protection standards and dispute resolution". However, the lag between the request and the actual review may further delay a robust investment regime between the parties.

On the investment side, the CEPA as it stands is more similar to a framework agreement, much like the US-Trade and Investment Framework Agreements (TIFAs) which provide "strategic frameworks and principles for dialogue on trade and investment issues" in which the scope of application of investment protection regime is not clearly identified and no substantive protection measures have been introduced that would ensure the achievement of the parties' envisaged commitments.

The UK's Potential to Provide a Contrast the European Union's ISDS Reformist Stance

In view of the ambition of the CEPA in advancing the rule of law in areas including digital trade, data, e-commerce, and promoting commitment to free and rules-based trade, as well as the symmetry between Japan and the UK, the CEPA could have been more than a paper tiger. The traces of investment protection in the CEPA may indicate that the parties will review the CEPA to include investment protection in the future, or otherwise may pave the way for the parties to negotiate a separate investment treaty at a later stage. For any future investment agreement, it remains unclear if the UK will opt for the EU's reformist stance on ISDS or consider different avenues. Furthermore, the UK could have leveraged the CEPA as an opportunity to clearly indicate its stance towards ISDS and differentiate itself from the EU by embracing ISDS as a potent mechanism to resolve investor-related disputes.

While Japan has thus far opted for a "quiet approach" to ISDS, as a "treaty signatory and host state, or as a seat for claimants", it has nevertheless remained a supporter. This is evidenced by most of the agreements recently signed by Japan which contain ISDS provisions. Japan was also the main architect of the CPTPP, "[taking] the lead in the negotiations". Japan's posture was evidenced in the January 2020 Session of United Nations Commission on International Trade Law WGIII, whereby Japan along with a few other countries pushed for incremental reform rather than addressing more substantive and controversial ISDS issues. Japan has also tabled a proposal at UNCITRAL for a Multilateral Investment Reform Agreement ("MIRA") – a menu of reform solutions that states can opt into "a la carte". Japan has advocated for the reinforcement of investment protections in the ECT through the ongoing ECT modernization reform process as well. It has, for example, proposed the inclusion of "pre-establishment" protections for the making of investments, and has been a voice against wholescale reform in recent modernization negotiations. Japan's proposals for enhanced investment protections may well influence future investment talks with the UK.

Concluding Remarks

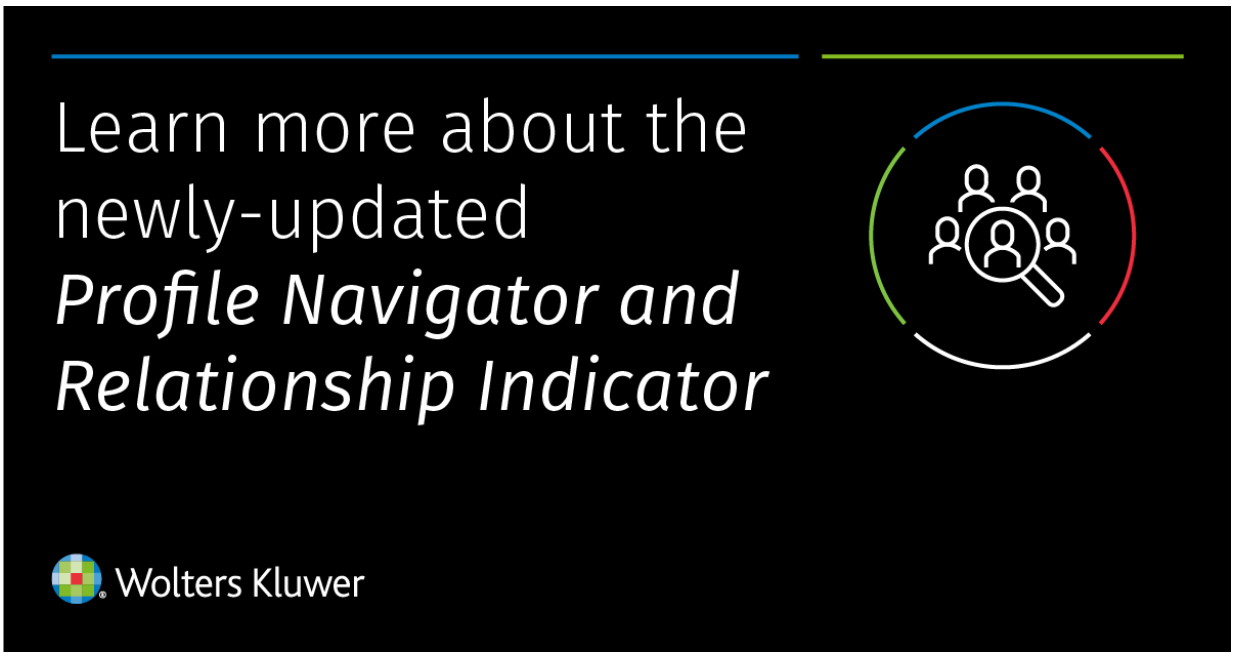
Seeing the glass half full, the absence of substantive investment provisions in the CEPA may well foreshadow an enhanced degree of investment protections via the possibility of review of Article 8.5 and a pro-ISDS political stance from both parties. However, one cannot fail to notice the missed momentum and the protracted nature of the review mechanism that the CEPA provides in the emerging post-Brexit landscape.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



This entry was posted on Thursday, February 25th, 2021 at 7:12 am and is filed under Brexit, Free Trade Agreements, International arbitration, Investment Arbitration, Japan, Reform
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.