Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution

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Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-based Investor-State Dispute Resolution*

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I. Japan’s Foreign Investment Patterns and Policy: Introduction
   I.A Inbound Foreign Investment Patterns and Policy
   I.B Outbound Foreign Investment and Policy

II. Japan’s Domestic Law on Foreign Investment
   II.A The Constitutional Framework
   II.B The FEFTL and Other Statute Law Affecting Foreign Investors

III. Japan’s BIT and FTA (EPA) Program

IV. Commentary on Key Provisions in Japan’s BITs and FTA Investment Chapters
   IV.A Provisions on Inter-State Dispute Settlement
   IV.B Provisions on Investor-State Arbitration etc

V. Conclusions

Appendix A: Japan’s BITs and FTAs (EPAs) with Investment Chapters
Appendix B: Japan-Cambodia BIT (2008) Art 17
Appendix C: Key Features and Historical Development of Japan’s BITs

Abstract: This paper provides the first-ever detailed analysis of the dispute resolution provisions contained in Japan’s burgeoning international investment treaties (BITs and FTAs or EPAs). That development is further located in the context of Japan’s inbound and outbound flows in foreign investment and the background domestic law limiting or protecting foreign investment, as well as an overview of the process by which the Japanese government negotiates these treaties. The paper concludes that the considerable diversity in treaty provisions (especially regarding investor-state arbitration) increases transaction costs for governments and investors, but leaves scope to develop some innovative provisions (for example, on Arb-Med or transparency of proceedings).

Key Words: Japan, trade and investment policy, Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs), international economic law, international investment law, international arbitration, foreign investment regulation, constitutional law, Japanese law

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I. Japan’s Foreign Investment Patterns and Policy: Introduction

Especially since the 1980s, Japan’s investment policy has reflected its position as a net capital exporter. It has a high domestic savings rate, although this was unable to finance fully the large-scale corporate investment that underpinned rapid economic growth from the mid-1950s until 1970s. The Oil Shocks dampened domestic investment, as did longer-term developments such as increased labour costs associated with slower growth in Japan’s working population. The level of savings declined more slowly, turning a severe current account deficit into a large surplus from the 1980s, and some of these excess savings were directed abroad as portfolio investment and Foreign Direct Investment (FDI). Trade friction with Europe and especially the United States led to the Japanese government to stimulate domestic demand through loose monetary policy as well as yen appreciation, which further boosted outbound FDI and dampened inbound FDI. However, the collapse of the resultant “bubble economy” generated a “lost decade” of economic stagnation over the 1990s, reducing outbound FDI and creating pressures for structural reforms, which accelerated in the wake of a banking crisis in 1997. Inbound FDI jumped from the late 1990s, and over the last decade the Japanese government has intensified efforts to attract further investment from abroad.\(^1\)

Japan ranked only 16\(^{th}\) in the world for inward FDI stock as of 2009 (with about US$200b) compared to 3\(^{rd}\) in the world for outbound stock (with about $740b). However, the disparity has been declining particularly over the last decade, with the ratio of Japan’s outward to inward stock standing at 3.7:1 in 2009 and with Japan accounting for 1.6 per cent of FDI inward stock in all developed economies:\(^2\)

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<td>World</td>
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<td>4893490</td>
<td>145172</td>
<td>862628</td>
<td>2691484</td>
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<td>Plus: developed economies</td>
<td>1557248</td>
<td>5653182</td>
<td>12352514</td>
<td>1941646</td>
<td>7083493</td>
<td>16010825</td>
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<tr>
<td>Incl: Japan (Japan / Developed economies)</td>
<td>9850 (0.6%)</td>
<td>50322 (0.8%)</td>
<td>200141 (1.6%)</td>
<td>201441 (10.4%)</td>
<td>278442 (3.9%)</td>
<td>740930 (4.6%)</td>
</tr>
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</table>


Further, Japan’s traditionally low inflows and stocks of inbound FDI seem to reflect broader socio-economic factors rather than any particularly strict legal restrictions on FDI flows into Japan. The formal regulatory regime for foreign investment has been progressively liberalised from 1964 when Japan joined the OECD and accepted Article VIII of the Articles of Agreement of the International Monetary Fund. By the turn of 21st century Japan’s domestic law regulating foreign investment was very similar to that found in other major economies, in terms of both substantive provisions and procedures.  

Structural reforms improving the environment for foreign investors were driven partly by domestic economic and political imperatives, and partly by multilateral developments. Particularly important was the founding of the World Trade Organization (WTO) in 1994, with its General Agreement on Trade in Services (GATS) committing states to liberalise agreed sectors for “commercial presences” of investors from other WTO member states. Japan welcomed the WTO system partly because of some frustration with the bilateral “Structural Impediments Initiative” that had been promoted earlier by the US, aimed at improving the environment in Japan for US investors as well as exporters.  

In addition, part of the quid pro quo for further liberalising inbound FDI under the WTO system was the promise of more liberal regimes in overseas markets for Japanese investors. But by 2003 momentum had clearly been lost for adding a broader multilateral investment agreement within the WTO. Already from the late 1990s key Japanese business interests began pressing the government to conclude ‘Economic Partnership Agreements’ (Free Trade Agreements: FTAs) containing comprehensive Investment Chapters. These were to include not only liberalisation commitments, but also protections for investments once made, as in the nine ‘old-generation’ Bilateral Investment Treaties (BITs) concluded by Japan between 1977 (with Egypt) and 2001 (with Mongolia). Over 2002-09, Japan concluded fifteen investment treaties (BITs and FTAs) under greater leadership from the Prime Minister and

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Cabinet (as outlined in Part I.B below). For foreign investors in Japan from those countries, all these treaties (listed in Appendix A) qualify treatment in various ways under Japan’s generic domestic law regime regulating FDI.

I.A Inbound Foreign Investment Patterns and Policy

The Tokugawa Shogunate strictly controlled foreign trade from the 1630s until the United States pressured the nation into concluding in 1858 the first of several “unequal” treaties with Western powers. These restricted Japan’s powers to impose tariffs, opened specified treaty ports for foreign business and granted foreigners extraterritorial rights. In 1899, parallelling enactment of various modern legal codes based on continental European models, revisions to these treaties granted rights to foreigners to invest in Japan. FDI grew after Japan regained full autonomy over tariffs in 1911 and further increased tariff rates after World War I. An increasingly nationalist and militarist government gradually tightened controls over FDI from the 1930s, resulting in divestments and then expropriations of US and other Allied countries’ investments during World War II.

The US-led Occupation from 1945-52 restored expropriated capital and allowed limited scope for further investments by those investors, but many did not re-establish a presence given the economic devastation. The Foreign Exchange Control Law (No. 228 of 1949) and Foreign Investment Law (No. 163 of 1950) allowed very limited scope for inbound FDI even though real GDP grew at an average of 10 per cent per annum over 1956-70. The government’s import-substitution policy also generated interest from foreign firms in investing in Japan, and the nation committed to liberalisation of its foreign investment regime and exchange controls in 1964, when it joined the OECD and also accepted Article VIII of the Articles of Agreement of the International Monetary Fund. However, FDI liberalisation was only gradually phased in, through to 1976, by which time only four sectors still had blanket restrictions (agriculture, oil, mining and leather products). The Foreign Investment Law was abolished in 1980. The (renamed) Foreign Exchange and Foreign Trade Control Law no longer required investors to obtain prior permission for FDI, but rather to give prior notification so the government could determine whether screening was required. Screening was specifically required for 11 (mostly oil) companies on national security grounds until 1984.7

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6 In addition, agreement in principle was reached on 2 May 2008 for the Japan-Saudi Arabia BIT, on 9 September 2010 for the Japan-India FTA, on 26 November 2010 for the Japan-Kuwait BIT and on 17 December 2010 for the Japan-Colombia BIT.

Annual inbound FDI did grow from under US$200m in the first half of the 1970s to $500m by the end of the decade, increasing further during the 1980s “bubble economy” to peak at US$4.3b in 1991, despite the GDP growth rate declining (after the Oil Shocks) to around 4 per cent per annum over 1974-91. But there remained a perception, at least, that various informal impediments to FDI into Japan remained: labour market rigidities (especially the “lifelong employment” practice that developed after WWII especially in larger companies), stable or cross-shareholdings and complex distribution systems (particularly in keiretsu corporate groups), and limited enforcement of Japan’s anti-monopoly law (No. 54 of 1947). By contrast, FDI outflows were ten times as large as inflows.

After the bubble burst, in 1991 the Foreign Exchange and Foreign Trade Control Law was further amended (with effect from 1992) to require prior notification of inbound FDI only in certain situation; otherwise, only ex post reporting was necessary. Foreign investment in telecommunications and broadcasting was liberalised from 1998, when the legislation was further renamed the Foreign Exchange and Foreign Trade Law (FEFTL, No. 228 of 1949). Although GDP only grew around 1 per cent on average during Japan’s post-Bubble “lost decade” over 1991-2002, FDI expanded strongly from the late 1990s. However, this was heavily concentrated in telecommunications, the financial sector (which suffered a major banking crisis in late 1997) and, to a lesser extent, the automobile industry (where foreign investors already had a long history of involvement). Japan’s upsurge in FDI also mirrored a dramatic increase in global inbound FDI flows, although deregulation and other structural reforms to the Japanese economy since the 1990s (not just in these three sectors) arguably helped secure a significant share of that wave of FDI world-wide.

As part of a broader economic and political reform program, and as the Japanese macro-economy regained momentum, in January 2003 then Prime Minister Koizumi announced the goal of doubling inbound FDI flows within five years. In March 2006, he set a new aim of doubling inward FDI stock to amount to 5 per cent of GDP by end of 2011. “The Program for Acceleration of Foreign Direct Investment” was unveiled in June 2006, and revised in 2008 (based on recommendations by an “Expert Committee on FDI Promotion”) to include:

- a total of 91 policies, including 25 new measures. The additional measures specify new approaches to such issues as the appropriate use and implementation of takeover

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defence measures, a study of existing FDI regulations, and an action program for faster approval of medical equipment.\(^\text{11}\)

The government’s concern was that Japan still had a much lower share of inbound FDI to GDP than other OECD countries, as well as Asian neighbours – both emerging economies such as the People’s Republic of China, and more comparable economies such as the Republic of Korea.\(^\text{12}\) With the mature Japanese economy already having achieved very high per capita GDP, and facing the challenges of an ageing population and a slowly declining savings rate, there was growing awareness that inbound FDI could help maintain economic growth through greater competition and productivity gains.\(^\text{13}\)

Although Koizumi’s first goal was largely achieved in 2006, the second was affected by the Global Financial Crisis (GFC) in late 2008, which resulted in a large decrease in inbound FDI over 2009 – parallelling the decline in FDI flows worldwide.\(^\text{14}\) This is shown by Figure 1 below, which also highlights the extent to which Japan remains a major source of outbound FDI to other parts of the world:

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\(^{12}\) See also the comparative Figures available via <http://www.mofa.go.jp/economy/japan/invest/index.html>.


\(^{14}\) On the broader impact of the GFC, see UNCTAD (2010) ‘World Investment Report 2010’ <http://www.unctad.org/templates/WebFlyer.asp?intItemID=5539&lang=1> (accessed 16 December 2010), pp 1-15. The first goal set by Japan to expand inward FDI was either almost achieved (according to UNCTAD statistics) or effectively achieved (according to the US-Japan Report 2009): see C Pokarier, ‘Open to Being Closed? Foreign Control and Adaptive Efficiency in Japanese Corporate Governance’ in L Nottage, L Wolff and K Anderson, Corporate Governance in the 21st Century: Japan’s Gradual Transformation, Edward Elgar, Cheltenham, 2008, p 197, p 201. Until 2004, there were particular difficulties with data sources on FDI into Japan: see R Paprzycki and K Fukao, Foreign Direct Investment in Japan: Multinationals’ Role in Growth and Globalization, Cambridge University Press, New York, 2008, pp 13-16. Balance of Payment statistics from the Bank of Japan (BOJ) were only published on a net basis (without separating inbound investment flows from outflows or divestments) and with no breakdown by sector. Ministry of Finance (MOF) data differentiated across sectors because it was based on notifications under the FEFTL, but the data also did not include withdrawals, nor did it include reinvested earnings as these did not involve any foreign exchange transactions. The MOF data set was discontinued in 2004, with the BOJ (and JETRO) now providing breakdown of fresh inflows versus withdrawals as well as a breakdown of FDI by industry. These improvements themselves indicate the growing attention paid by the government to FDI policy.
I.B Outbound Foreign Investment and Policy

Japanese firms have a long history of investing abroad. Only a few decades after the country reopened to the world, in 1914 they accounted for some 2 per cent of cumulative FDI worldwide, with large trading companies such as Mitsui already establishing overseas presences. Global cumulative FDI doubled worldwide between the World Wars, with Japan exceeding the average and its firms further developing production bases in China, for example. Post-War FDI was dominated by US firms until the 1970s, when firms from Japan (and Europe) began investing overseas again from a restored home base economy. Outbound FDI grew dramatically over the 1980s, partly driven by trade friction with the US and Europe caused by persistent current account deficits vis-à-vis Japan. Japanese firms established manufacturing bases in those parts of the world, and also in lost-cost economies in Asia.
(especially South-East Asia).\textsuperscript{15} Japan was also an active investor in natural resource projects world-wide, for example, in Australia. The boom in outbound FDI over the 1980s also benefited from yen appreciation, and easy access to credit in Japan due to loose monetary policy – measures urged by the US, in particular, to expand market access for its exports.\textsuperscript{16} A significant proportion of the outbound FDI ended up in more speculative and less productive investments, for example in real estate and tourism developments, in developed economies such as the US and Australia.\textsuperscript{17}

The collapse of Japan’s bubble economy led to large declines in FDI outflows over the 1990s, but significant investments were still made throughout Asia, especially in the increasingly-liberalised Chinese market.\textsuperscript{18} Outbound FDI expanded strongly after economic growth picked up in Japan from 2002, thanks to successive government stimulus packages and (somewhat belated) measures to resolve the non-performing loans problems in Japan’s banking sector. There is growing interest in South Asia, as the next likely cheap manufacturing base. However, as other parts of the world have also increased investment into Asia, Japan’s share of FDI stock there has declined from around 20 per cent in 1981 and 1991 (when its stock was US$32b) to around 8 per cent in 2001 and 2008 (US$181b).\textsuperscript{19} In addition, the GFC has had a big impact on FDI outflows from Japan, mirroring patterns in countries like Germany and the decline of 43 per cent in global outflows in 2009. Japan’s investment abroad dropped from US$128b in 2008 to US$75b in 2009, after an initial flurry of purchases in the US and Europe by Japanese financial institutions, and despite further major investments in natural resources and foodstuffs in countries like Australia.\textsuperscript{20}

Outbound FDI by Japanese firms has been supported by the government in various ways, including by the Japan External Trade Organisation (JETRO). Established in 1958 and linked to the Ministry of the Economy, Trade and Industry (METI, formerly MITI), JETRO initially focused on promoting Japanese exports overseas, for example, by conducting surveys and providing free or discounted seminars. As trade friction escalated and Japanese firms began


\textsuperscript{19} See UNCTAD (2010) ‘World Investment Report 2010’ <http://www.unctad.org/templates/WebFlyer.asp?intItemID=5539&lang=1> (accessed 16 December 2010), p 41 (Table II.6). The US shows a similar pattern. The EU has recorded a smaller decline (to 14 per cent in 2008, when its stock was US$329b). The most dramatic change has been growth in FDI into Asia from other parts of Asia, from US$6b in 1981 (representing 22 per cent) to US$875b (38 per cent). However, data does not cover all countries consistently and some of the declines may be offset by FDI being made now through four offshore financial centres in the Caribbean (negligible amounts in 1981 and 1991, but US$348b in 2008).

\textsuperscript{20} Further declines are likely due to a 95 per cent tax exemption on dividends repatriated to Japanese firms by their foreign affiliates, available from April 2009: see ibid pp 5-6 (Figure I.5 and n8). On Japanese investment in Australia see, for example, P Drysdale, \textit{Australia and Japan: A New Economic Partnership in Asia} (2009).
investing abroad from the 1980s, it began supporting outbound FDI initiatives, as well as foreign firms attempts to import more into Japan. In the 21st century, JETRO has also actively encouraged FDI into Japan.  

Another public institution supporting outbound FDI is the Japan Bank for International Cooperation (JBIC), which subsumed the government-owned Export-Import Bank of Japan and the Overseas Economic Cooperation Fund, Japan, in 1999. Retaining its name for international trading purposes, the JBIC has been the international wing of the Japan Finance Corporation, another government-owned corporation established in 2008 to bring together also three other public institutions. The JBIC aims to promote economic cooperation between Japan and overseas countries by providing resources to foreign investments as well as fostering international commerce. However, its policy is not to compete with ordinary financial institutions and the JBIC comprises one of the instruments for Japan’s large Official Development Assistance program.

The government also established Nippon Export and Investment Insurance (NEXI) in 1950. It provides political risks insurance (extending to expropriation and other specified interference with insured investments abroad) and commercial risks insurance, which is reinsured by the government. Over the last 50 years the total insured amount and amount of claims paid amounted to approximately 380 trillion yen and 2.4 trillion yen respectively, covering about 20 per cent of total Japanese exports.

However, the most significant recent measure by which the government has sought to promote Japanese investment abroad has been through an increasingly active program of treaty negotiations. Japan was a major player in establishing the World Trade Organization (WTO) in 1994, including the GATS (and the narrower agreement on Trade Related Investment Measures). It was also actively involved in negotiations through the OECD for a Multilateral Agreement on Investment in the late 1990s. After that initiative failed, Japan kept pressing for an agreement as part of the WTO Doha Round instead. However, stalemate in that Round and bilateral or regional initiatives by some other major economies led to Japan qualifying its longstanding commitment to multilateral solutions. In “Japan’s Basic Strategy for the WTO New Round Negotiations” released in 2002, the Ministry of Foreign Affairs (MOFA) explicitly stated that Japan would instead promote Free Trade Agreements, while pointing out that such FTAs represented a second-best alternative to the WTO regime.

As indicated in Appendix A, the first bilateral FTA was the “Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership” concluded in 2002. The

23 See <http://nexi.go.jp/e/aboutus/index3_frame.html>. All Japan’s investment treaties, concluded since 1977 (see Appendix A), provide for subrogation of investors’ rights against host states: see below Part V.
Japanese government prefers to call its FTAs “Economic Partnership Agreements” (EPAs) because they encompass not only trade liberalisation, but also liberalisation (and protection) of investments and other measures to facilitate trade and investment or economic cooperation.\(^{25}\) Broad scope has indeed been one feature of the FTA strategy pursued by Japan so far, with all (except for the Japan-ASEAN and Japan-Vietnam EPAs concluded in 2008) containing a detailed Investment Chapter. The other characteristic so far has been Japan’s emphasis on concluding treaties with other Asian countries.\(^{26}\)

Japan also began adopting from around 2002 a different and more-proactive approach to negotiating Bilateral Investment Treaties (BITs). The impetus behind Japan’s eight “old generation” BITs concluded between 1977 and 2001 (listed in Appendix A) had tended to come primarily from the other contracting party.\(^{27}\) But Japan became noticeably more pro-active from the treaty concluded in 2002 with Korea. Further, the latter and the five other subsequent “new generation” BITs generally extend national treatment (NT) and Most-Favoured Nation (MFN) treatment to the pre- as well as post-establishment phases (as elaborated in the book chapter version of this paper). They are also generally more detailed and pro-investor in other ways. For example, all provide for full investor-state arbitration (ISA), as do Japan’s FTAs with Investment Chapters except for that with the Philippines signed in 2006. Ten out the 15 concluded BITs are with other Asian states; but not the two concluded in 2009, and only one (Japan-Korea-China) out of ten more under negotiation or consideration in 2010.

Part of the background to this new approach by the government is that by 2001 the balance on income (earnings from investments overseas) had basically reached parity with the balance on goods (income from trade in goods and services):

**Figure 2: Japan’s Balance on Goods vs Balance on Income (1996-2008)**

\(^{25}\) See, for example, ‘Japan’s Policy on FTAs/EPAs’ (March 2005), ‘Basic Policy on Comprehensive Economic Partnerships (Cabinet Decision)’ (9 November 2010) <http://www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/pdf/epa_20101109.pdf> (accessed 16 December 2010), and ‘Japan’s Policies and Strategies on International Investment Agreement [sic]’ (July 2008); all via <http://www.meti.go.jp/english/policy/indexExternaleconomicpolicy.html> (accessed 16 December 2010). Another reason may be that “Free Trade” has some negative connotations in the wake of protests, particularly by NGOs and developing countries over the last decade, about the WTO system and free trade or investment more generally.

\(^{26}\) See S Urata, ‘Japan’s Free Trade Strategy’ (2009) 36 The Japanese Economy 46, pp 56-60. However, this may now be changing, presumably now that most Asian countries are covered by FTAs (or indeed BITs) with Japan. As indicated in Appendix A, all but three of Japan’s nine FTAs (except for those with Mexico, Chile and Switzerland) are with Asian countries. Japan also conducted FTA negotiations with Korea that were suspended in 2004, and has repeatedly called for these to be resumed (most recently by Prime Minister Naoto Kan on 14 November 2010). Japan is also negotiating FTAs with India, Australia, Peru and the Gulf Cooperation Council, and has agreed to ‘discuss’ an FTA at the ministerial level with the European Union. There is now also considerable discussion within Japan – and abroad – about possibly joining negotiations to accede to an expanded Trans-Pacific Partnership agreement: see, for example, “Japan Urged to Join TPP Within a Year” Japan Times (16 November 2010) at <http://search.japantimes.co.jp/cgi-bin/nb20101116a4.html>.

The balance of income (bottom line) was quite flat over 1996-2000 but had more than doubled by 2007. The balance on goods (top line) declined significantly over 1998-2001, rebounded and stabilised until 2007, but then dropped again sharply in 2008.

Yet Pekkanen argues that already from the late 1990s there was strong support by business interests for the government to pursue a broader foreign investment policy agenda in the interests of Japan’s most “trade-dominant industries” – especially automobiles, electronics and steel. She points for example to various policy proposals since 1996 by Nippon Keidanren, the most powerful business federation particularly in international affairs, including one in 2002 that emphasised the need for Japan to conclude EPAs and BITs. Indeed, in April 2003 the government included that proposal in the last of 17 official communications submitted since 1997 to the WTO’s Working Group on the Relationship Between Trade and Investment (WGTI), which had tried to incorporate broader investment issues in the Doha Round. The Keidanren also released a survey in 2002 that showed that its member firms most wanted to see “high level” BITs especially with ASEAN countries.28 Pekkanen views these developments as an extension of Japan’s growing “aggressive legalism” in international economic law, evident also in the nation’s engagement both in shaping rules and in contesting cases in the WTO – as claimant and as respondent.29

28 S M Pekkanen, *Japan’s Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO*, Stanford University Press, Stanford, 2008, pp 256-9. She also mentions (at p 254) that that in an (undated) “JETRO survey of 1170 Japanese firms invested in Asia – 51 per cent pointed to ‘political and social stability’ as the most critical determinant of their investment decisions” (followed by low labour costs, with 44 per cent; and future potential of the host state market, 42 per cent).
29 For some similar tendencies in Korea and China, see S Pekkanen, H Gao and D Ahn, ‘From Rule Takers, Shakers to Movers: How Japan, China and Korea Shaped New Norms in International Economic Law’ (1-2 August 2009) *Second Biennial General Conference of the Asian Society of International Law, Tokyo*. In these
II. Japan’s Domestic Law on Foreign Investment

II.A The Constitutional Framework

Although the 1947 Constitution of Japan contains no provision specifically dealing with the status of aliens, the Supreme Court considers that the protection of rights and freedoms under the Constitution applies to foreign nationals staying in Japan unless the nature of the right in question militates against this.

Property rights are guaranteed under Article 29 of the Constitution. However, paragraph 2 allows the Diet to restrict property rights by way of legislation “in conformity with the public welfare”, and several statutes restrict property rights in one way or another. Most of them, however, apply to every holder of property rights irrespective of nationality. One important exception is the Alien Land Law (No. 42 of 1925), which was enacted under the now abrogated Constitution of the Empire of Japan and stays valid under the current Constitution. However, although the Act empowers the Government to restrict foreign nationals’ land property rights by way of decree, no such decree has ever been adopted.

Article 29(3) provides that “[p]rivate property may be taken for public use upon just compensation therefor”. The first condition is that “takings” occur “for public use”, which is widely accepted to mean “for public interests”. Yet Japanese courts have never declared that a particular expropriation has been carried out not for public use. Since any restriction of private property must be imposed by legislation, it will be extremely difficult for courts to find a legislation enacted by the Diet to have been against public interests. Anyway, statutes often establish exhaustive lists of expropriatory measures that are considered to be in conformity with public interests (for example, Art. 3, Land Expropriation Law, No. 219 of 1951).

Secondly, expropriation must be carried out in a due process. It is generally considered that administrative measures must comply with the due process requirement according to Articles 13 and/or 31 of the Constitution. Several statutes provide detailed procedures, including administrative complaint procedure (for example, Art. 50, City Planning Law, No. 100 of 1968). Thirdly, discrimination based on nationality cannot be justified with regard to expropriation. This follows because foreign nationals enjoy property rights under the Constitution, although Article 14 of the Constitution does not explicitly prohibit discrimination based on nationality.

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31 The Supreme Court, Judgment, 4 October 1978, Minshu, vol. 32, p 1223 (McLean case); English translation in Japanese Annual of International Law, No. 23 [1979-80], p 176.

Fourthly, compensation must be paid. This is clear in cases of the transfer of property rights to the State (direct expropriation). However, an exception is the removal of samples necessary for sanitary testing, as provided in Article 28 of the Food Sanitation Law (No. 233 of 1947). And it is unclear when compensation is required if the exercise of property rights is restricted by the State’s “police powers” (lois de police) in the absence of specific legislations (as with Arts 51 and 53 of the Law on Protection of Cultural Properties, No. 214 of 1950). The Supreme Court has held that the Government were not required to pay compensation where the cultivation of the embankment of an irrigation pond was prohibited\(^{33}\) and in another case in which gravel digging in a riverside area was restricted.\(^{34}\) According to the Supreme Court, such regulations were inevitable to prevent natural disaster and to maintain public welfare. However, in the latter case, the Court added that compensation might nevertheless have been necessary in that particular case if the appellant company could have proven that the damages caused to the gravel digging company had exceeded the permissible limit, taking into account the fact that the company had made a considerable amount of investment in gravel digging in the area in question.\(^{35}\) In all of these cases, the Supreme Court’s reasoning assumes that police power regulations affecting the exercise of property rights constitute “takings” under Article 29(3) of the Constitution.

Nonetheless, Japanese courts have never had to determine what constitutes “just compensation” in such cases of alleged indirect expropriation. Regarding direct expropriation, the Supreme Court has held that the amount was to be determined in a reasonable manner in light of the price of the expropriated property in the context of the economic situation at the time of the expropriation.\(^{36}\) This means that the amount of the just compensation does not necessarily correspond exactly to the market price. This case was related to a nation-wide agrarian reform carried out following the end of WWII. In another case involving an expropriation carried out in an urban planning project, the Supreme Court held that full compensation exactly covering the financial value of the expropriated property was required under Article 72 (now amended) of the Land Expropriation Law (No. 219 of 1951).\(^{37}\) However, the Supreme Court recently held that Article 71 of that statute, which grants compensation in an amount that does not necessarily correspond to the market price of the expropriated land, was in conformity with Article 29 (3) of the Constitution, on the basis of the “jurisprudence” established by the above-quoted agrarian reform judgment.\(^{38}\)

Article 98(2) of the Constitution provides that “treaties concluded by Japan and established laws of nations shall be faithfully observed”, but it does not specify the hierarchical order between international and domestic norms. The Supreme Court considers that the Constitution prevails over treaties in the Japanese legal order.\(^{39}\) The Government instead considers that certain types of treaties, such as peace treaties and treaties modifying

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\(^{33}\) Supreme Court, Grand Bench, judgment, 26 June 1963, Keishu, vol. 17, no. 5, p 521.
\(^{34}\) Supreme Court, Grand Bench, judgment, 27 November 1968, Keishu, vol. 22, no. 12, p 1402.
\(^{35}\) Ibid., p 1405.
\(^{36}\) Supreme Court, Grand Bench, judgment, 23 December 1953, Minshu, vol. 7, no. 13, p 1523.
\(^{37}\) Supreme Court, judgment, 18 October 1973, Minshu, vol. 27, no. 9, p 1210.
\(^{38}\) Supreme Court, judgment, 11 June 2002, Minshu, vol. 56, no. 5, p 958.
\(^{39}\) See the Supreme Court, Judgment, 16 December 1959, Keishu, vol 13, no. 13, p 3225.
territories, are superior even to the Constitution.40 In any case, investment treaties are
certainly inferior to the Constitution. By contrast, it is well established that treaties approved
by the Diet (Parliament) enjoy a higher rank than statutes.41 While the hierarchical status of
treaties concluded without the approval of the Diet (“executive agreements”) remains unclear,
treaties relating to foreign investment usually fall into the category of treaties requiring the
Diet’s approval.42

The Constitution has no explicit provision dealing with the direct applicability of treaties in
the Japanese legal order. The courts generally consider that treaty provisions that are
sufficiently clear and precise are directly applicable and can be invoked by private persons
therefore by foreign investors) before Japanese courts.43 As the clearness or precision of a
given treaty provision is a matter of degree, it is up to the courts that determine whether a
given treaty provision is directly applicable or not. One Japanese lower court once held that
various provisions of the General Agreement on Tariffs and Trade (GATT) were not directly
applicable due to the specific nature of the dispute settlement procedure of the GATT.44

Although there is no judicial precedent dealing with BITs or EPAs, the Japanese
jurisprudence on the direct applicability of treaties suggests that most of the investment-
related provisions in such treaties are directly applicable.

II.B The FEFTL and Other Statute Law Affecting Foreign Investors

Japan has no legislation comprehensively regulating foreign investment as such. Thus, for
example, local governments may enact ordinances affecting foreign investment in fields such
as environmental protection, maintenance of public order or consumer protection, pursuant to
Article 94 of the Constitution granting local autonomy to “enact their own regulations within
law”.

More important are various national statutes, especially the FEFTL. Article 26(1) defines
“foreign investor” as those undertaking “inward direct investment” who fall within these
categories:

(i) a non-resident individual;
(ii) a legal entity established overseas with its principal office overseas;
(iii) a corporation “if which the ratio of the sum of the number of voting rights directly
held by [such individuals or entities] and the number of voting rights specified by

40 Director-General, Cabinet Legislation Bureau, in Committee on Budget, House of Councillors, 17 November
1959.
41 The courts thus refuse to apply domestic legislations incompatible with treaties. See, for example, Matsue
District Court (Hamada Branch), judgment, 15 August 1997, Keishu, vol 53, no. 8, p 1101.
42 The Government considers that three categories of treaties require the Diet’s approval: those requiring the
enactment or maintenance of laws; those requiring financial expenses; and politically important treaties. Foreign
Minister Ohira, in Committee of Foreign Affairs, House of Representatives, 20 February 1974, English
43 A large number of judicial precedents can be quoted in this sense. See generally Y Iwasawa, International
Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law, Oxford University
44 Kyoto District Court, judgment, 29 June 1984, Shomu Geppo, vol 31, p 207, p 234. See Y Iwasawa,
International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law,
Cabinet Order as those indirectly held through other corporations in the number of voting rights of all shareholders or members of the corporation is 50 per cent or higher⁴⁵;
(iv) a legal entity in which non-resident individuals form the majority of directors or officers empowered to represent the entity.

Article 28(2) defines “inward direct investment” to encompass (subject to various limitations mainly based on specific categories of “foreign investors”):

(i) Acquisition of equity in an unlisted corporation;
(ii) Transfer of equity in an unlisted corporation held by a person prior to becoming a non-resident;
(iii) Acquisition of at least 10 per cent of shares in a listed corporation;
(iv) Consent to substantial change in the business purposes of a corporation (for a business corporation, limited to consent given by those holding one-third or more of the voting rights of all shareholders of the business corporation);
(v) Establishment of branches, plants and other business offices in Japan or substantial change therein;
(vi) Large-scale loans for terms of over one year;
(vii) Acts specified as equivalent by Cabinet Order (acquisition of corporate bonds or capital certificates).⁴⁵

These definitions indicate that the regulatory regime does not generally apply to portfolio investments.

Since the 1991 amendments, the FEFTL only requires ex post notification of foreign investments in most cases (Art 55-5; see also Art 6-3 of the Cabinet Order on Inward Direct Investment). In several cases, neither prior nor ex post notification is required (Art 3(1) of the Cabinet Order). However, foreign investors are still obliged to give prior notification to government ministries regarding planned investments falling under certain categories: investments likely to impair national security, to disturb the maintenance of public order, to hinder the protection of public safety or to bring significant adverse effect to the smooth management of the Japanese economy (FEFTL Arts 27(1), 27(3)(i)(a) and (b); Art. 3(2) of the Cabinet Order). The ministries can order foreign investors to change or discontinue investments if contrary to these categories, which correspond to the exceptions admitted by the 1962 OECD Code of Liberalisation. Fields for investments that must be notified in advance are listed in a Public Notice.⁴⁶ These basically cover investments related to:

- National security: aircraft, weapons, nuclear power, spacecraft and gunpowder;

• Public order: electricity, gas, heat supply, telecommunications, broadcasting, water, railroads, passenger transport;
• Public safety: biological chemicals, security services;
• Smooth management of the economy: primary industries, oil, leather, air and maritime transport.\textsuperscript{47}

Investors whose States are not considered as guaranteeing reciprocal treatment to Japanese investors are also required to make prior notification even when they intend to make investments falling under Article 55-5 (Art. 27(3)(ii)). States that are considered as guaranteeing reciprocal treatment to Japanese investors are listed in Table 1 appended to the Order on Inward Direct Investment, etc. (Ordinance No. 1 of 20 November 1980, last revised by Ordinance No. 2 of 3 August 2010) and currently number 163.

Prior notification required under FEFTL Article 27 shall be given within six months before the investment (Art. 3(3) of Cabinet Order). The Act imposes sanctions upon foreign investors who fail to make required prior (or ex post) notifications (Arts. 70, 71). The notification shall be submitted to the Bank of Japan (Art. 3(6) of Ordinance No. 1 of 20 November 1980). A foreign investor who has given the notification shall not make the investment for 30 days after the notification (Art. 27(2) FEFTL). Such notifications were provided in 462 cases in 2007, and in 641 in 2008. According to METI, in most cases (95 per cent) the competent ministries declare within two weeks that the planned investment does not require further examination pursuant to Art. 27(3) FEFTL so that the foreign investor does not have to wait for 30 days.\textsuperscript{48} In all remaining cases but for the J-Power case outlined below, the examination pursuant to Art. 27(3) FEFTL ended within 30 days.\textsuperscript{49} Investments requiring prior notification may be subject to a recommendation to be changed or discontinued. If the foreign investor receiving such a recommendation refuses to accept it, the competent ministry may order the investor to change or discontinue its investment (Art. 27(5)-(10)). This procedure has been followed so far only once, in the following case.

J-Power, the Japan’s biggest electricity wholesaler, was established as a government-affiliated company in 1952 and fully privatised in 2004. On 15 January 2008, the Children’s Investment Fund (TCI), a UK-based fund that then held a 9.9 per cent shareholding in J-Power, notified the Japanese authorities in advance of its plan to raise this to 20 per cent. The Government extended the period in which TCI was prevented from carrying out the investment plan until 14 May 2008, pursuant to FEFTL Art. 27(3). After six rounds of hearings, it concluded that the TCI’s planned investment fell under FEFTL Art. 27(3)(i)(a) and thus recommended TCI to discontinue the investment on 16 April 2008.\textsuperscript{50} After TCI’s

\textsuperscript{48} METI, “Gaikokukawase oyobi Gaikokuboeki Ho ni Motozuku Tainai Tyokusetsu Toshi Kisei ni Tsuite [Regulations on Direct Inward Investment Based on FEFTL]” (May 2009) [in Japanese].
\textsuperscript{49} METI, “Gaikokukawase oyobi Gaikokuboeki Ho ni Motozuku Tainai Tyokusetsu Toshi Kisei ni Tsuite [Regulations on Direct Inward Investment Based on FEFTL]” (May 2009) [in Japanese].
rejected this recommendation, the Government ordered TCI to discontinue its investment on 13 May 2008.\textsuperscript{51} Although TCI reportedly planned to contest the order before the Japanese courts, it announced on 14 July 2008 that it would accept the order after all because it was “not in the interests of any of the parties to pursue an appeal or a lengthy judicial process”.\textsuperscript{52}

Anyone wishing to contest the validity of an administrative act may follow the non-judicial procedure provided by the Administrative Appeals Law (No. 160 of 1962). If unsatisfied with the ruling, the complainant is still able to file the case with a competent court. In most cases, the complainant has a choice whether to follow the administrative appeal procedure or to directly go to the court (Art. 8(1) of the Administrative Case Litigation Law, No. 139 of 1962). The Japanese courts and tribunals are open to everybody, under Article 32 of the Constitution, and claims claims against the State are subject to the Administrative Case Litigation Law.\textsuperscript{53} However, legislation may oblige the complainant first to follow the administrative appeal procedure before filing suit. This is true for the FEFTL (Art. 57).

Article 9 FEFTL also authorises the competent minister to order the suspension of transactions, acts or payment in a situation “[w]here a drastic change has taken place in international economic conditions.” Similar restrictions may be imposed on capital transactions (Arts. 21(2) and 24(2); see also Article 3 of the Foreign Exchange Order). This exceptional suspension, temporary closing of the Tokyo Foreign Exchange Market, has been ordered three times so far, over 1972-1974. Involving temporary closing of the Tokyo Foreign Exchange Market. Article 10 further authorises the Cabinet to take necessary measures “when it is particularly necessary in order to maintain peace and security in Japan”, after obtaining the Diet’s approval. Article 16 authorises the competent minister to impose obligations to obtain permission for payments, “[w]hen the competent minister finds it necessary for sincerely fulfilling obligations under the treaties and other international agreements”, for example, to implement United Nations Security Council resolutions imposing sanctions on terrorists. Similar restrictions may be imposed on capital transactions and service transactions (Arts. 21, 24 and 25).


\textsuperscript{52} “TCI Heeds Japan Govt Order Not to Raise J-Power Stake”, \textit{Jiji Press Ticker Service}, 14 July 2008. See further S Kozuka, ‘Foreign Direct Investment, Public Interest and Corporate Governance: Japan’s Recent Experience’, \textit{Paper presented at the 6th Asian Law Institute Conference, Hong Kong, 29-30 May 2009} (updated in 2010 via \texttt{www.ssrn.com}) regarding this case. He also discusses the investment of almost 20 per cent in Japan Airport Terminal Co. Ltd. (JAT, operator of Haneda Airport facilities) built up by Australia’s Macquarie Bank by late 2007 (but eventually sold anyway). Public debate about that situation led to a Transport Ministry study group recommending in December 2008 no further regulation regarding JAT, but that a cap should be imposed on any one shareholding in the newly-privatised Narita International Airport Corp. (operator of Tokyo’s major international airport). Kozuka points out that such a regulation would be (formally) non-discriminatory, but would reduce potential for the market to discipline corporate governance through the threat of takeovers – a concern felt more in the US and even recently in the EU and the US regarding such restrictions on ownership.

There are also other specific laws constraining foreign investors. Article 17 of the Mining Law (No. 289 of 1950) provides that only Japanese nationals are qualified to hold mining rights. But foreign investors may invest in mining activities through Japanese companies, which may be subject the general scheme of the FEFTL. In addition, Article 5(1) of the Radio Law (Act No. 131 of 1950) provides that only Japanese nationals may hold a radio licence. Further, while foreign investors may invest in Japanese companies operating radio stations, this is subject not to the general scheme of the FEFTL but to the special regulations established by the Radio Law (No. 14 of 1950). The Broadcast Law (No. 132 of 1950) sets forth similar restrictions (Arts. 52-13 and 52-30). The Ship Law (No. 46 of 1899) provides that cabotage – the transport of goods or passengers from one port to another within Japan – is limited to Japanese vessels (Art. 3). Art. 1 defines a Japanese ship as one possessed by a State organ, by a Japanese national, by a company established under the Japanese law (if all of its representatives and more than two-thirds of its officers are Japanese nationals), or by a foreign company if all of its representatives are Japanese nationals. Similar restrictions are found in the Civil Aeronautics Law (No. 231 of 1952) and the Cargo Forwarder Service Law (No. 82 of 1989).

Article 6 of the Nippon Telegraph and Telephone Corporation Law (No. 85 of 1984) provides that this former government monopoly shall not enter the names and addresses of non-Japanese nationals in its register of shareholders if the aggregate ratio of the voting rights held by non-Japanese nationals reaches or exceed one-third. Similar restrictions are found in some other legislation regarding transport and communication. The Civil Aeronautics Law (Art. 4(iv)), the Cargo Forwarder Service Law (Art. 6(v)(4)) and the Radio Law (Art. 5(iv)) provide that no Japanese company is allowed to engage in activities regulated by each of them if more than one-third of its voting rights are held by non-Japanese. The Broadcast Law raises this threshold to one-fifth (Arts. 52-13 (v)(2) and 52-30(v)). When the aggregate of the ratio of the voting rights held by non-Japanese nationals in a company regulated by one of these laws reaches or exceed these thresholds, the company is authorised not to enter the names and addresses of non-Japanese nationals in its register of shareholders (Civil Aeronautics Law Art. 120-2, Broadcast Law Arts. 52-8 and 52-32).54

Lastly, Japan’s deposit insurance scheme only covers financial institutions having their head office in Japan, and not branches of foreign institutions.55

54 However, these statutes refer to the proportion of the voting rights enjoyed by foreign investors and not to the number of shares held by them. Thus, a Japanese broadcast company decided in 2008 that, after refusing to enter the names and addresses of foreign investors in its register of shareholders due to the already important proportion of foreign shareholders (19.99 per cent), it would pay dividends to those foreign investors whose registration had been refused. The non-registered foreign investors remain prevented from enjoying voting rights. See “Dividend Payments to Foreigners who were Denied the Registration of Stock Ownership Transfers because the Foreign Ownership Ratio of Fuji Media Holdings, Inc. Became No Less than 20%”, Fuji Media Holdings, Press release, 25 December 2008: <http://www.c-direct.ne.jp/public/english/ue/pdf/10114676/20081225165352.pdf>.

55 See APEC, ‘Guide to the Investment Regimes of the APEC Member Countries’ (2007) 6th edition Asia Pacific Economic Cooperation (sixth edition,
III. Japan’s BIT and FTA (EPA) Program

Japan’s domestic law regime is increasingly subject to bilateral and indeed regional or multilateral treaties dealing with investment. Alongside the WTO Agreements and the Energy Charter Treaty (signed and ratified in 2002), Japan has taken its BIT program to new levels and turned increasingly to FTAs (or EPAs) over the last decade, as explained above. As indicated in Appendix A, nine FTAs containing investment chapters were signed over 2002-09, with four more under negotiation – two of which were basically agreed upon in late 2010. Only nine BITs were signed between 1977 (with Egypt) and 2001 (Mongolia), compared to six “new generation” BITs since 2002 (Korea), with six more under regular negotiations and four others under consideration in late 2010.

Nonetheless, the expansion of Japan’s investment treaty program remains comparatively belated and limited compared to other FDI-exporting states, such as Germany. Partly for this reason, Japan does not yet have a “Model BIT”. However, Pekkannen suggests that Japan’s recent investment treaty provisions have been:

determined to a significant degree by the interests of Japan’s trade-dominant industries. …Nippon Keidanren, speaking on behalf of exactly such industries, had come up with “model” investment-related provisions that left no doubt as to what was desirable from a business point of view. … There is a clear link between the specifications by Nippon Keidanren and the actual provisions in formal legal instruments between Japan and its trade partners.56

Our own more recent research, however, suggests that the role of the Keidanren was and is less significant – particularly when it comes to drafting specific provisions. It is true that a decade or so ago a few senior figures within Keidanren began pressing the government to include more investment treaties, including stronger protections for investors. Yet, although this was enough to lead to a working group being formed within Keidanren and papers being forwarded to the government, it is difficult to infer that the organisation as a whole took a strong interest in the topic or that it had a large impact on the government. Rather, the Keidanren urged the government to take a range of measures to assist Japanese firms in achieving better investment environments particularly in specific countries or sectors, with treaty protections representing only one aspect. The business sector also called for greater involvement from the Japanese government in conferences and so on with counterparts in host states, for example, and such informal measures do appear to have become more common – alongside greater activity in negotiating investment treaties. In fact, calls by the Keidanren and the business sector for more efforts to improve investment environments

56 S M Pekkanen, Japan’s Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO, Stanford University Press, Stanford, 2008, at p 258. Her footnote 117 highlights a 2002 Nippon Keidanren report, pointing out that its outline is reproduced as Table 2 of the Communication from Japan – Consideration of the Necessity of Multilateral Investment Rules From Diversified Viewpoints (WTO WT/WGT/W/158, 11 April 2003). The footnote also states: “Of importance in this Nippon Keidanren document are Annexes 1-3, which specify investment provisions of interest to Japanese businesses. These include Annex 1, Model WTO Investment Agreement; Annex 2, Model Bilateral Investment Agreement; and also Annex 3, Outline of Results of Investment Questionnaire”.
abroad initially had to be fielded by parts of METI responsible for particular sectors; it took some years to bolster a section dedicated specifically to FTA negotiations, and even now that is also involved in more informal investment promotion measures. Further, despite a much expanded investment regime, even Japan’s largest companies probably still have limited knowledge of – or interest in – treaty protections currently or potentially available to them.

The Keidanren proposals on investment treaties a decade or so ago seemed to have served more as a checklist (or perhaps even wishlist), and to have had limited direct impact on what ended up being drafted into Japan’s treaties. Instead, the Japanese government (like many governments elsewhere, particularly in states lacking a “Model BIT”) has maintained a practice of generally taking its most recently concluded treaty as a template to begin negotiations. This is submitted to the counterpart country, which typically proposes its own (often most recent) treaty by simultaneous exchange. For the first few formal meetings between both side’s negotiating teams, both drafts may be referred to as they match up major similarities and then focus on resolving remaining differences between the two texts. (When dealing with a developing country, less familiar with investment treaties, this process may be accelerated and Japan’s draft can play a more significant role.) This is mainly a quite technical process.

In fact, Japan’s Ministry of Foreign Affairs (MOFA) has formal and considerable de facto leadership in negotiating investment treaties. It is the official point of contact for counterpart countries and therefore coordinates the government’s response, as well as taking responsibility for drafting the treaty text. (Often MOFA submits a draft set of provisions – based on the last or a recent treaty – and receives simultaneously an extensive draft provided by the other state, with both then providing a framework for negotiations at least over the first few meetings.) However, the Ministry of Economy, Trade and Industry (METI) certainly plays a very major role particularly regarding current or foreseeable activities of the Japanese government or firms for which it has primary jurisdiction (such as mining or minerals), and regarding – more narrowly circumscribed – BITs. With FTAs, more directly encompassing trade and other issues, there is more scope for other influential parts of the government (such as the Ministry of Agriculture) to become involved. In recent years, the Cabinet Secretariat (Naikaku Kanbo) plays a stronger leadership role, albeit primarily in setting overall strategic direction and kick-starting the study and negotiation process.57

IV. Commentary on Key Provisions in Japan’s BITs and FTA Investment Chapters

The book chapter version of this paper presents a comprehensive analysis of both substantive and procedural treaty provisions. Those are summarised in the following Table, before this paper moves on to a detailed analysis of the provisions on inter-state dispute settlement procedures (Part IV.A below) and investor-state arbitration etc (Part IV.B).

58 Translated from METI, ‘2010-nen-ban Fukosei Boeiki Hokokusho [2010 Report on Compliance by Major Trading Partners with Trade Agreements]’ via <http://www.meti.go.jp/report/data/g100402a01j.html>, p 559. Our book chapter version of this paper also adds a brief commentary on Japan’s treaty provisions regarding Subrogation, and Joint Committees or related treaty mechanisms which can play a role in dispute prevention (and improving the investment environment more generally) and even sometimes dispute settlement.
## Investment Liberalisation

<table>
<thead>
<tr>
<th></th>
<th>‘Old Generation’ BITs</th>
<th>Singapore FTA (IC)</th>
<th>Korea BIT</th>
<th>Vietnam BIT</th>
<th>Mexico FTA (IC)</th>
<th>Malaysia FTA (IC)</th>
<th>Philippines FTA (IC)</th>
<th>Chile FTA (IC)</th>
<th>Thailand FTA (IC)</th>
<th>Cambodia BIT</th>
<th>Brunei FTA (IC)</th>
<th>Indonesia FTA (IC)</th>
<th>Laos BIT</th>
<th>Uzbekistan BIT</th>
<th>Peru BIT</th>
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### Note:
- ‘Y’ means complete prohibition; ‘A’ means permitted on condition of grant of other benefits.
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<th>’Officer to be local national’ requirements</th>
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<td>Fair and Equitable Treatment</td>
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<td>Transfer of capital</td>
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<tr>
<td>Subrogation</td>
<td>Y Y Y Y Y Y Y Y Y Y Y Y Y Y Y</td>
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<tr>
<td>Investment treaty arbitration (Investor-State Arbitration)</td>
<td>Y Y Y Y Y S(^{E1}) N(^{N}) Y S(^{E2}) Y S(^{E3}) Y Y Y Y Y S(^{E3})</td>
</tr>
<tr>
<td>Settlement of disputes between States Parties</td>
<td>Y Y Y Y Y Y Y Y Y Y Y Y Y Y Y</td>
</tr>
</tbody>
</table>


Abbreviations:

IC: Investment Chapter
MFN: Most Favoured Nation
N: No
Ne: Negative
NT: National Treatment
N\(^{N}\): But to be negotiated
Po: Positive
PR: ‘Performance Requirements’
P\(^{P}\): Provided in Preamble
S: Some
SA: Reservation in Annex
SE1: Except NT or PR
SE2: Except pre-establishment obligations, or PR
SE3: Except pre-establishment obligations
Y: Yes
Yc: Confirmation of TRIMs obligations
IV. A Provisions on Inter-State Dispute Settlement

In respect of this more traditional dispute resolution mechanism, almost all Japan’s BITs have specified a two-tiered process along the lines of the (most recent) 2008 BIT with Peru (Art 17):

Settlement of Investment Disputes between the Contracting Parties

1. Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Contracting Party may make with respect to any matter affecting the operation of this Agreement.

2. Any dispute between the Contracting Parties as to the interpretation or application of this Agreement, not satisfactorily adjusted by diplomacy, shall be referred for decision to an arbitration board. Such arbitration board shall be composed of three arbitrators, with each Contracting Party appointing one arbitrator within a period of 30 days from the date of receipt by either Contracting Party from the other Contracting Party of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon as President by the two arbitrators so chosen within a further period of 30 days, provided that the third arbitrator shall not be a national of either Contracting Party.

3. If the third arbitrator is not agreed upon between the arbitrators appointed by each Contracting Party within the further period of 30 days referred to in the provisions of paragraph 2, the Contracting Parties shall request the President of the International Court of Justice to appoint the third arbitrator who shall not be a national of either Contracting Party.

4. The arbitration board shall within a reasonable period of time reach its decisions by a majority of votes. Such decisions shall be final and binding.

5. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the President of the arbitration board in discharging his or her duties and the remaining costs of the arbitration board shall be borne equally by the Contracting Parties.

One major exception is found in the Russia BIT, which only sets out (in Art 13) the wording of the first paragraph and therefore does not provide advance consent for inter-state arbitration. The other exception is the Korea BIT, which requires (Art 14):

1. the Parties to consult “promptly … to resolve any dispute in connection with this Agreement” or relating to its interpretation or application “or to the realization of the objectives” of the BIT; otherwise

2. a request “in writing” for “a binding decision rendered on the basis of the applicable rules of international law”, following (in principle) “the UNCITRAL Arbitration Rules”;

3. the ICSID Secretary-General then to be the authority for default appointments of arbitrators;

59 The Uzbekistan BIT (2008) refers to “diplomatic channels” (Art 15(2)).

60 The Hong Kong BIT (1997) provides for a further period of 60 days, and provides that the President shall be a “national of a State which can be regarded as neutral in relation to the dispute”.

61 The Hong Kong BIT requires the President of the International Court of Justice (ICJ) to make the appointment (within another 30 days) “in a personal and individual capacity”, and specifies that other ICJ judges may be requested to make the appointment if the President or others cannot be regarded as neutral or is unavailable.

62 The qualification “within a reasonable period of time” first appears in the Turkey BIT (1992, Art 13(4)).

63 The China BIT (Art 13(5)) adds: “The arbitral procedures shall be determined by the arbitration board”. The Hong Kong BIT adds that subject to contrary agreement “the tribunal shall determine the limits of its jurisdiction and establish its own procedure” (Art 11(4)); and that it “shall use its best endeavours to reach a decision within sixty days” of completing hearings or representations by the states (Art 11(5)).

64 This paragraph on costs does not appear in the BITs with Egypt or Sri Lanka. The Laos BIT adds that the specifications on costs apply “unless the Contracting Parties agree otherwise”, which would be so anyway. The Hong Kong BIT includes the costs of the relevant ICJ judge related to appointing the arbitrator(s) among the costs to be borne equally.
4. all submissions of documents and hearings to be completed within six months from appointment of the third arbitrator, with (final and binding) decisions rendered within two months of final submissions or close of hearings (whichever is later);
5. costs to be shared equally, but with discretion to the tribunal to “decide that a higher proportion of the costs be paid by one” state.

This unusual provision needs to be understood in the context of the Republic of Korea consistently refusing to submit any dispute with Japan to the ICJ. It can be speculated that one reason for that general stance is the Takeshima / Dokto Island territorial dispute.

**IV.B Provisions on Investor-State Arbitration (ISA) etc**

More importantly, from a practical point of view, all of Japan’s BITs and its FTAs containing Investment Chapters contain ISA provisions. The exception is the Philippines FTA (2006), which provides that “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” (Art 107). There exists much greater variance compared to the inter-state dispute settlement provisions in Japan’s BITs. Further, like its investment treaties more generally (as indicated above), the ISA provisions have evolved in two major stages. The nine “old generation” BITs concluded through to 2001 (especially from the late 1990s) contained more basic provisions. These became more detailed from 2002 (in the Korea BIT) and especially from 2007 (in the Cambodia BIT). Curiously, however, the Uzbekistan BIT (2008) instead follows earlier and simpler treaty provisions such as those found in the Vietnam BIT (2003), even though negotiations for the former commenced as late as February 2008.

Provisions added in the BIT with Korea and especially Cambodia (mostly replicated in the BITs with Laos and Peru in 2008) have parallels with elaborate provisions built up from the first FTA, concluded with Singapore – also in 2002 – and FTAs with other Asian states. The Mexico FTA (2004) adds some additional provisions, mostly with parallels in the Chile FTA (2007), but those have generally not been reflected directly in other FTAs – let alone BITs.

The shift in treaty practice from around 2002 is also evidenced by the full titles of all Japan’s “new generation” BITs referring to “Liberalisation” (Korea, Laos, Peru) or “Liberalization” (Vietnam, Cambodia, Uzbekistan), not just the “Promotion” or “Protection” of investment.

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65 Japan did then request negotiations, but the Philippines responded that it wished to consider ISA provisions as part of a ‘general review’ of the entire FTA (which must be done in 2011 and then every five years, pursuant to Art 161). Japan’s FTA with ASEAN (2008) omits an Investment Chapter and therefore ISA provisions, which might otherwise have bound a state like the Philippines to ISA brought by a Japanese investor. The ASEAN Comprehensive Investment Agreement (Art 33 Note 14) and the FTAs between ASEAN and China or Korea (all signed in 2009) have a carve-out just for the Philippines regarding submission to ICSID procedures. There is no such carve-out under the FTA between ASEAN, Australia and New Zealand (also signed in 2009), although there is a carve-out between Australia and New Zealand as they were negotiating a protocol on Investment under their 1983 FTA.

66 See <http://www.mofa.go.jp/mofaj/press/release/h20/1/1177404_900.html> (in Japanese). In other words, the Cambodia BIT (2007) was available as a template for negotiations regarding the ISA provisions, but it was not used.

67 The titles of two of Japan’s earliest BITs (Egypt and China) refer to “Encouragement” of investment rather “Promotion”; those (and the old-generation BIT with Turkey) also refer to “Reciprocal” protection etc. Japan
Because the Cambodia BIT seems to be the closest to a ‘model’ treaty nowadays for Japan, Appendix B of this paper sets out in full its provisions on ISA and Dispute Settlement, and the following Commentary highlights (in bold) how they compare with provisions in other treaties. This Commentary tries to show how provisions on ten sets of topics have gradually evolved since the first investment treaty was concluded with Egypt (1977), with Appendix C providing a further concise summary of features and historical development across all fifteen BITs (but not all FTAs containing ISA provisions).

(i) Consent to arbitration etc

The ISA provisions in the Japan’s first BIT (with Egypt, 1977, Art 11) comprise only three sentences. The first provides sentence provides that each state “shall consent to submit any legal dispute that may arise out of investment made by a national or company” of the other state to arbitration or conciliation, “at the request of” the foreign investor. The Sri Lanka BIT (1982, Art 11) separates such consent into a different paragraph, after providing that a foreign investor or either state may submit a legal dispute to ICSID arbitration or conciliation.\(^68\)

Many later BITs also provide that the host state “shall consent” to ICSID procedures.\(^69\) Some eminent commentators have suggested that if the host state refuses to give consent despite such wording:

\[\text{“it would be in breach of its obligation under the BIT, but a mere promise to give consent will hardly be accepted as amounting to consent. Therefore, in such a situation any remedy must, in the first place, lie with the treaty partner to the BIT” (that is, under inter-state dispute resolution processes).}\]


\(^68\) Unusually, such wording seems also to envisage the host state possibly having underlying substantive rights vis-á-vis the investor. Or the provision may allow the host state to initiate the procedure, then get a award binding the investor, in an attempt to preclude an inter-state dispute resolution claim. However, the parties to that dispute would be different so the former award may well have no res judicata effect.

\(^69\) Namely, those with Turkey (1992), Pakistan (1998), Bangladesh (1998), Mongolia (2001: “the dispute shall at the request of the investor concerned be submitted” to ICSID procedures, or indeed UNCITRAL Arbitration Rules arbitration, and the host state “shall give its consent” to the submission), and Vietnam (2003: “shall give its consent”).

\(^70\) R Dolzer and C Schreuer, Principles of International Investment Law, Oxford University Press, Oxford [UK]; New York, 2008, p 242, giving as an example Art 10(2) of the Japan-Pakistan BIT. See also C Schreuer, The ICSID Convention: A Commentary, 2nd edn, Cambridge University Press, Cambridge, 2009, pp 208-9 (mentioning further the Japan-Egypt BIT as well as a chapter written by Aaron Broches, and adding that “the Secretary-General of ICSID will in all likelihood reject a request for conciliation or arbitration under these circumstances in accordance with his or her screening powers under Arts 28(3) or 36(3)” of the Convention. However, as explained in (ii) below, several of Japan’s treaties providing that the host state “shall give consent” also provide for arbitration or other procedures outside the ICSID Convention. This raises the possibility that arbitrators and national courts dealing at least with non-ICSID arbitrations might give a more expansive interpretation to such treaty provisions, finding that host states had concluded a valid arbitration agreement that can be enforced (along with the resultant award) at least under the New York Convention or domestic arbitration law.
investment treaties do not make this distinction.\textsuperscript{71}

By contrast, and somewhat ironically, the host state’s immediate consent to ICSID procedures might be inferred from a BIT like that with Hong Kong (1997, Art 9), which states that the dispute “\textit{may, after … written notification by either of the parties to the dispute, be submitted}” to arbitration.\textsuperscript{72} The same should also be true for the China BIT (1988, Art 11) and the Russia BIT (1998, Art 10), which provide that the investment dispute “\textit{shall, at the request of the [foreign investor], be submitted}” to arbitration.\textsuperscript{73}

The point is clarified in some but not all “new generation” BITs, such with Korea (2002) and \textbf{Cambodia}. After providing that “the investor may submit the investment dispute” for arbitration (Art 15(2)), the Korea BIT adds explicitly that the host state “\textit{hereby gives its consent} to the submission of an investment dispute to international arbitration”.\textsuperscript{74} [Emphasis added.] The same applies to Japan’s FTAs that allow investors to submit ISA claims; beginning with the Singapore FTA (2002, Art 82(4)), all have separate provisions in which the host state “consents” or “hereby consents” to such submission.

\textbf{(ii) Arbitration, Conciliation etc}

The Egypt BIT, like almost all Japan’s BITs, provides for arbitration “in accordance with” the ICSID Convention. From the Sri Lanka BIT onwards, this option is applicable “so long as” (or “as long as” or “if”) the Convention is in force between the states. Unusually, the China BIT provides for “a conciliation board or arbitration board to be established with reference to the Convention” (albeit with some qualifications discussed below), and for “the arbitral procedures also to be determined by the board “with reference to the Washington Convention” (Art 11(5)).\textsuperscript{75}

From the Russia BIT (1998) onwards, there is usually provision also for arbitration under ICSID Additional Facility Rules (even though those were published back in in 1978) so long as the Convention is not in force between the states. But this extra option is not always provided (compare for example, Bangladesh BIT, Art 10; or even the “new generation”

\textsuperscript{71} See, for example, METI, ‘2010-nen-nan Fukosei Boeiki Hokokusho [2010 Report on Compliance by Major Trading Partners with Trade Agreements]’ via <http://www.meti.go.jp/report/data/g100402a01j.html>, pp 559-72 (Part III Chapter 5 translated at <http://www.meti.go.jp/english/report/data/gCT10_1coe.html>). See also Yanase, ‘Bilateral Treaties of Japan and Resolution of Disputes with Respect to Foreign Direct Investment’, who seems to assume that all Japan’s BITs allow investors directly to access the ICSID procedures where provided. The authoritative text of Japan’s investment treaties is in English; but the Japanese language versions generally state that the state ‘consents to submit the dispute to arbitration etc ‘(\textit{chusai ni futaku suru koto ni doi suru}’: see Art 10(2) of the Pakistan BIT, available with other translations via <http://www.meti.go.jp/policy/trade_policy/epa/index.html>). This seems to suggest that immediate consent was intended in all these treaties at least by the Japanese government.

\textsuperscript{72} See also the Peru BIT (2008, Art 18(4)).

\textsuperscript{73} The Mongolia BIT (2001, Art 10) uses the same wording, but immediate inferred consent seems to be undermined by a separate provision stating that the host state “shall give its consent” to the submission.

\textsuperscript{74} See also the \textbf{Cambodia BIT} (Art 17(7)(a), Laos BIT (2008, Art 17(7)(a)) and the Uzbekistan BIT (2008, Art 17(4)): all provide that the state “hereby consents” to submission. The Peru BIT does not add this express provision.

\textsuperscript{75} This BIT was signed on 27 August 1998, but China only signed the ICSID Convention on 9 February 1990 (in force from 6 February 1993: see <http://icsid.worldbank.org/>).
Korea BIT (2002), Art 15).

The Russia BIT and most subsequent BITs also allow investors to choose the UNCITRAL Arbitration Rules. The Hong Kong BIT (1997, Art 9) was actually the first to provide for this (only\(^{76}\)), adding that these Rules were to be those “as … in force” when the investor requested arbitration. This would mean henceforth the UNCITRAL Arbitration Rules as revised in 2010, as may also be the case with requests under treaties that refer to the UNCITRAL Rules “as may be amended” (Cambodia BIT Art 17; Laos BIT Art 17).\(^{77}\) By contrast, investors are restricted to the original 1976 UNCITRAL Arbitration Rules if the treaty specifically refers to them,\(^{78}\) or if they simply refer to the “UNCITRAL Arbitration Rules” (for example, Russia BIT, Korea BIT or Peru BIT Art 18).\(^{79}\)

The Hong Kong BIT provided for UNCITRAL Rules arbitration (and, unusually, no ICSID arbitration) as the default procedure if the disputing parties did not agree on other “procedures for settlement” within six months of the claim being notified (by either party). Only from the “new generation” Korea BIT do we find treaties adding the option of agreeing to “any other arbitration institution” or arbitration “under any other arbitration rules” (provided also by the Cambodia BIT, for example, but not the Vietnam BIT).\(^{80}\)

Very few of Japan’s treaties give the investor (alone) the right to invoke arbitration outside UNCITRAL or ICSID Rules. Admittedly, the Singapore FTA (2002) allows not only ICSID arbitration or conciliation, or for the 1976 UNCITRAL Arbitration Rules to apply; the investor may also “request the establishment of an arbitral tribunal in accordance with the procedures set out in Annex V C and submit the investment dispute to that tribunal” (Art 82(3)(a)). As of late 2010, however, no such Annex was available.\(^{81}\) The only present

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\(^{76}\) Hong Kong is not party to the ICSID Convention. It does not have autonomous status within the World Bank system, unlike its position in the WTO.

\(^{77}\) Article 1(2) of the 2010 Rules provides: “The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.” The “offer” of arbitration is understood as being contained in the investment treaty. The formal revision process for the UNCITRAL Rules had commenced back in 2006: see C Croft and C Kee, ‘The UNCITRAL Arbitration Rules Revision: Implications for Australia’ in L Nottage and R Garnett, International Arbitration in Australia, Federation Press, Sydney, 2010, p 137.

\(^{78}\) (Mongolia BIT (2001) Art 10, but also – in the “new generation” – Vietnam BIT (2003) Art 11 and Uzbekistan BIT (2008) Art 16, as well as several FTAs beginning with Singapore FTA (2002) Art 82(3). Note also that the Swiss FTA (2009, Art 94(3)) also specifies the 1976 Rules as an option, for arbitration by an “ad hoc tribunal”. That arguably allows for UNCITRAL Rules arbitration administered by an arbitral institution (that is, not completely ad hoc). Compare also more generally, for example, Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24, which upheld parties’ agreement specifying arbitration under ICC Rules but administered by SIAC.

\(^{79}\) However, the disputing parties anyway may negotiate a separate agreement in writing to “upgrade” to the 2010 Rules.

\(^{80}\) Likewise, from the Mexico FTA (2004, Art 79), but not the Thai FTA (2007) or the Switzerland FTA). Anyway, the parties may negotiate a separate agreement in writing providing for other arbitration rules.

\(^{81}\) From 2011 this text has been made available at METI, ‘Japan-Singapore Economic Partnership Agreement’ <http://www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/singapore.html>, it also can be found at <http://www.fta.gov.sg/has_jsepa_legal.asp>. Curiously, Art 2 of Annex V C allows the ‘legal expert’ appointed by the relevant state for the inter-state ‘Consultative Committee’ (see Art 140, and our book chapter version of this paper on ‘Joint Committees’ more generally) to become the arbitrator if a party fails to nominate
exception therefore is the Malaysia FTA (2005, Art 85(4)), which provides the option of arbitration or conciliation through the Kuala Lumpur Regional Centre for Arbitration, as well as under ICSID or UNCITRAL Rules.\(^{82}\)

By allowing parties to agree on any “procedures for settlement” other than UNCITRAL Rules arbitration, the Hong Kong BIT clearly allows the possibility of any type of formal mediation or conciliation (or, indeed, any other procedure conducive to settlement – such as non-binding “early neutral evaluation”\(^{83}\)). Most BITs and EPAs, starting with the Egypt BIT, give investors the option of conciliation (not just arbitration) in accordance with the ICSID Convention (or “with reference to” it, in the China BIT); but none provide for the UNCITRAL Conciliation Rules (available from 1980). The Korea BIT and Malaysia FTA, however, do not provide for ICSID conciliation. Thus, investors wishing to initiate that (or another mediation) process would have to negotiate a separate submission agreement with the relevant host state – in the shadow of a right to initiate arbitration anyway.\(^{84}\)

**(iii) Scope of ‘investment dispute’**

Japan’s first BIT, with Egypt, provided consent to arbitration for “any legal dispute that may arise out of investment” by the foreign investor. The same wording is used in most other BITs, but the HK BIT refers to “any dispute … concerning an investment” by the investor “in the area” of the host state. From the Korea BIT onwards, an “investment dispute” is basically defined as one between the host state and home state’s investor “that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred in this Agreement with respect to an investment of an investor” from the home state. This wording may not necessarily be broad enough to bring customary international law claims within the ISA procedures provided in the treaties, but such claims are anyway nowadays unlikely to be

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\(^{83}\) See generally N Blackaby, et al., *Redfern and Hunter on International Arbitration*, 5th edn, Oxford University Press, Oxford, Eng.; New York, N.Y., 2009, pp 46-9. See also Art 88 of the Chile FTA, which states that “consultation and negotiation … may include the use of non-binding third-party procedures”.

\(^{84}\) However, formal ICSID Conciliation has only been used in six cases anyway, none of which has involved Asian parties: see L Nottage and J R Weeramantry, ‘Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice’ in V Bath and L Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*, Routledge, London, 2011, forthcoming.
more expansive than the substantive law obligations specified in contemporary treaties.\(^85\) More importantly, this wording prima facie restricts the host state’s consent to arbitration to violations only of the BIT’s substantive standards, to the exclusion of claims arising from a contract in connection with the investment.\(^86\) The same issue arises with Japan’s FTAs, which generally adopt similar wording to the BITs with Korea onwards.\(^87\) The only way that arbitration provisions could then be opened up to contract-related claims is if the treaties include a separate “umbrella clause”, and it is true that such clauses mean that violations of a contract relating to the investment become treaty violations. The latter point has proved contentious among tribunals and commentators.\(^88\) But at least it can be said that some of Japan’s treaties do include umbrella clauses, making this a live issue in the Japanese context.\(^89\)

The China BIT also referred to “any dispute … with respect to investment” being settled amicably through mutual consultation (see (v) below), but then only allows a right to arbitration with reference to the ICSID Convention if “a dispute concerning the amount of compensation” for expropriation cannot be so settled. Such provisions (also in BITs with other former or present communist states, but not found in any other BITs with Japan) have

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85 Compare generally C McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 International and Comparative Law Quarterly 361. Anyway, treaty interpretation principles are likely to prove more liberal than Anglo-Australian contract law principles, for example, which until recently excluded non-contractual (for example, tort) claims from arbitration if the dispute resolution agreement referred to disputes “arising from” the underlying contract: see generally L Nottage and R Garnett, ‘The Top 20 Things to Change in or around Australia’s International Arbitration Act” in L Nottage and R Garnett, International Arbitration in Australia, Federation Press, Sydney, 2010, p 149, p156. In addition, the ICSID Convention requires a “legal dispute arising directly out of an investment” (Art 25(1)), although this additional requirement has generally been construed quite widely and only applies to ICSID arbitrations: R Dolzer and C Schreuer, Principles of International Investment Law, Oxford University Press, Oxford [UK]: New York, 2008, pp 231-2.


87 Indeed, the FTAs with Mexico and Chile follow instead the NAFTA approach of providing for arbitration where the investor claims that the host state has breached “an obligation under Section 1” of the respective FTA, which has “incurred loss or damage by reason of, or arising out of, that breach”.

88 See R Dolzer and C Schreuer, Principles of International Investment Law, Oxford University Press, Oxford [UK]: New York, 2008, pp 153-62. M Mangan, ‘Australia’s Investment Treaty Program and Investor-State Arbitration’ in L Nottage and R Garnett, International Arbitration in Australia, Federation Press, Sydney, 2010, p 191, p203 suggests that “the arbitral winds appear to be blowing increasingly in the direction of the broader approach to interpreting umbrella clauses”, but points out that even so “a claim could be practically extinguished if the underlying contract contains a dispute resolution clause that provides an alternative avenue of redress”. This is because in SGS v. Philippines (ICSID Case No ARB/02/06, Decision on Jurisdiction, 29 January 2004), exemplifying the broader approach, the tribunal found that the claimant first had to establish contractual rights in the exclusive forum specified in the contract before claiming under the BIT containing the umbrella clause.

89 See the BITs with Hong Kong Art 2(3)), Russia Art 3(3), Cambodia Art 4(2), Laos Art 5(2), Uzbekistan Art 3(3) as well as the Switzerland FTA Art 86(2). On various wording therein, see further the book chapter version of this paper.
recently been interpreted to allow arbitrators to determine not just quantum but also liability—that is, whether expropriation has incurred.\textsuperscript{90} The China BIT, like many other older Chinese treaties, added that “any dispute concerning other matters … may be submitted by mutual agreement” to the specified arbitration or conciliation process.

Limitations on investment disputes open to ISA resurface—at least specifically within the treaty provisions on ISA—only from the “new generation” Korea BIT. Article 7(7) prevents the investor submitting the dispute to arbitration procedures under Art 7(3) (and indeed “any applicable, previously agreed dispute-settlement procedures” otherwise provided in Art 7(2), for measures falling within the scope of Arts 17-18.\textsuperscript{91} However, the home state can request consultations “as to the application of the provisions” of this Art 7(7), which might encourage the host state to provide consent to arbitration after all or to alter the measures taken. If ISA is not forthcoming, it seems that the home state may invoke the inter-state process (under Art 14) or possibly seek a consensus recommendation from the “Joint Committee” comprising representatives of both states.\textsuperscript{92} Anyway, even this sort of investment dispute still “shall, if possible, be settled by consultation or negotiation” between the investor and the host state (Art 15(2) first sentence).

No other BITs provide for exceptions to ISA per se,\textsuperscript{93} but some provisions are included in Art 85 of the Malaysia FTA dealing with investor-state dispute resolution. A note to its Art 85(1) clarifies that Art 85 does apply to disputes about “taxation measures, where Article 81 [on expropriation] applies to taxation measures”.\textsuperscript{94} But Art 85(17) excludes the dispute settlement procedures for disputes about “any right or privileges conferred or created” by Arts 75 and 79: National Treatment and Prohibition of Performance Requirements. Further, an investor whose investments “are not made in compliance with the laws and regulations of the [host state] which are not inconsistent with this Agreement” cannot “submit an investment dispute” (presumably related to the illegal investment) or even resort to inter-state “dispute settlement procedures” as provided in Art 85(17).


\textsuperscript{91} These cover, respectively, exceptional interference with cross-border capital transactions (if notified, temporary, proportionate and consistent with the IMF Agreement) and prudential measures with respect to financial services (if the non-conforming measure does not serve as means of avoiding obligations on the host state).

\textsuperscript{92} There exist similar provisions regarding a Joint Committee in subsequent BITs (for example, Art 23 of the Cambodia BIT), and in FTAs beginning with the Singapore FTA (Art 88).

\textsuperscript{93} S M Pekkanen, \textit{Japan’s Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO}, Stanford University Press, Stanford, 2008, p 261 suggests that in Japan’s newer BITs provisions for exceptions “have been made even clearer, perhaps stemming from the common regional experience of the 1997 Asian Financial Crisis”.

\textsuperscript{94} See also, for example, Art 77 of the Singapore FTA: provisions on ISA (Art 82), as well as the Joint Committee (Art 88 – including the option of including the private sector in Committee deliberations) and access to local courts (Art 74), apply to taxation measures that could amount to expropriation (under Art 77). On Joint Committees generally in Japan’s treaties, see the book chapter version of this paper.
procedures under Chapter 13 as a means to settle the investment disputes” (Art 85(18)).

The Malaysia FTA also includes various general exemptions and safeguards provisions, which are also generally found – albeit outside the investor-state dispute settlement sections – in the other FTAs and some BITs. In particular, ISA and other procedures are not available to investors regarding prohibitions on performance requirements under the Thailand FTA (Art 97), nor regarding pre-establishment National Treatment under the FTAs (referring to “an investment made”) with Thailand (Art 106(15)), Brunei (Art 67(6)) or Switzerland (Art 94(4)).

(iv) Scope of ‘investor’

Beginning with the Egypt BIT, Japan’s treaties have generally included a provision stating that any company of the host state “which was or is controlled by nationals and companies” of the home state “prior to or on the date on which the parties to such a dispute consent to submit the dispute to conciliation or arbitration shall in accordance of Article 25(2)(b) of the [ICSID] Convention be treated for [its] purposes … as a company of the home state”. This is not found in the BITs with China or Hong Kong (where ICSID per se is not applicable), and from the Turkey BIT the issue of control is decided only on the date the investor seeks arbitration or conciliation. But the “new generation” BITs, with Korea etc, omit this provision completely – except for the BIT with Vietnam (referring to a legal person or other defined entity, rather than a “company”, of the host state). The Chile FTA is similar to the Vietnam BIT, referring to a “juridical person” in the host state, but adds that the home state’s investor can own or control it “directly or indirectly”.

The Singapore FTA includes a provision that seems to limit “forum shopping” (Art 82(7)). Arbitration is unavailable “if an investor which is an enterprise of a Party owned or controlled by persons of non-Parties submits a dispute with respect to its investments in the territory of the other Party, unless the investments concerned have been established, acquired or expanded in the territory of that other Party” (that is, the host state).

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95 A Note elaborates that for Malaysia, this includes “investments that are not made in compliance with national policies endorsed by the Cabinet and announced and made publicly available in a written form by the Government”.

96 See the book chapter version of this paper. The Mexico FTA is the only other treaty to include specifically “Exceptions from Dispute Settlement Procedure” (Art 95), relating primarily to a host state’s “decision to prohibit or restrict the acquisition of an investment” in its area “or its investment” pursuant to Art 169 (dealing with National Security). But this extends also to inter-state dispute resolution under Chapter 15 thereof. Section 2 of the Chile FTA, which usually follows the Mexico FTA provisions, does not include such a provision.

97 This section (iv) of our commentary only deals with definitions of ‘investor’ contained within or added to the investor-state dispute settlement provisions of Japan’s investment treaties. For further (more general) definitions of ‘investor’ (and indeed of ‘investment’), see the book chapter version of this paper.

98 R Dolzer and C Schreuer, Principles of International Investment Law, Oxford University Press, Oxford [UK]; New York, 2008, pp 42 and 52-4. None of Japan’s BITs or FTAs provides that foreign control must exist before the dispute arises, as for example under Art 26(7) of the Energy Charter Treaty.

99 Nor does can this liberal provision be found in the definition of “investor” in the BIT with Korea (Art 1(1)) or, for example, the Cambodia BIT (Arts 1(2)-(1(4)).

100 See generally M Skinner, C Miles and S Luttrell, ‘Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty-Shopping’ (2010) 3(3) Journal of World Energy Law and Business 260-85. All Japan’s “new generation” treaties (except the FTA with Switzerland) include “denial of benefits” provisions, a further means to limit forum-shopping. See the book chapter version of this paper.
(v) **Amicable settlement**

The China BIT was the first requiring “any dispute … with respect to investment” in the host state to “as far as possible, be settled amicably through consultation” among the disputing parties. It also allowed claims related to expropriation to be submitted to arbitration or conciliation on the foreign investor’s request, if the dispute “cannot be settled within six months from the date either party requested consultation”. But under the Hong Kong BIT, any dispute that “has not been settled amicably may, after a period of six months from written notification of the claim”, by either disputing party, be submitted to arbitration or a different agreed procedure. This seems to result in a longer period before being able to commence arbitration in that the parties may unsuccessfully negotiate settlement terms for a few months, for example, but then have to provide a written notice of claim before actually commencing arbitration or other agreed formal procedures.

There is a similar divergence in approach may be evident in other treaties. The Korea, Vietnam, Laos and Uzbekistan BITs follow the China BIT – allowing arbitration if the dispute cannot be settled, albeit within three months. FTAs with Singapore, Malaysia, Brunei and Indonesia specify five months; the Switzerland FTA (like the Peru BIT) specifies six months. By contrast, for example, the Thai FTA not only allows arbitration if the dispute cannot be settled within six months of the investor requesting consultations in writing (Art 106(3)); it also requires the investor provides the host state with “written notice of intent” to commence arbitration “at least 90 days before the claim is submitted” (Art 106(5); see also the Peru BIT Arts 18(4) and 18(6)). One interpretation is that these periods run concurrently (that is, the investor provides the request and the notice of intent at the same time, or the notice of intent within three months of the request for consultations, to be able to commences arbitration after six months of the request. But another interpretation is that the specified minimum periods (six months and 90 days) run consecutively and must both elapse before arbitration can get underway.

A third possibility is that these periods (especially the six-month minimum) are not jurisdictional requirements anyway in relation to arbitration. However, that possibility is less plausible for a treaty like the Mexico FTA, which sets only one minimum period – “at least 180 days” for consultations before the arbitration claim can be submitted (Art 78(1)) – but adds that submitting the claim is “subject to the compliance of the requirements established under Article 78” (Art 79(1)).

(vi) **‘Fork in the road’ etc**

The China BIT excludes the treaty mechanism for arbitration (without mentioning conciliation) if the foreign investor “has resorted to administrative or judicial settlement within the territory” of the host state. The same wording is found in the Turkey and Hong Kong BITs, and raises the possibility of the investor losing the right to arbitration by filing

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101 Also, many BITs (mostly old-generation ones like Turkey BIT, but also the Cambodia BIT) indicate no timeframes at all for amicable settlement attempts.

but then abandoning a claim before the host state’s courts or agencies. By contrast, in the BIT for Pakistan (and Bangladesh, Pakistan, Vietnam etc) the exclusion applies “so long as” either state is pursuing such settlement or “in the event that a final judicial settlement has been made” (but without mentioning final administrative settlement).

A similar issue arises under the Russia BIT, preventing ICSID arbitration “so long as” either state is “seeking” administrative or judicial settlement – or indeed an “arbitral decision in accordance with any applicable previously agreed dispute-settlement procedure”. The Korea BIT instead limits the investor to its original choice once it has commenced arbitration under ICSID, UNCITRAL Rules, or another agreed procedure for arbitration, unless both parties agree otherwise (Art 15(3)). The Cambodia BIT omits such a provision and simply provides that the investor dispute “may submit the investment dispute to one of the following alternatives” listed in Art 17(4)(a) – perhaps indicating that only one of the five can ever be pursued, but certainly without clarifying that issue.

Curiously, the Korea BIT does not provide a clear “fork in the road” provision regarding administrative or judicial proceedings. Article 15(8) simply states that nothing in that whole Article prevents an investor from pursuing such proceedings, and a similar provision is found in the Cambodia BIT and Laos BIT. By contrast, the Peru BIT adds that if the investor has submitted the dispute under one of the specified “conciliations or arbitrations”, it “shall not be submitted for resolution under courts of justice, administrative tribunals or agencies or any other binding dispute settlement established under the national law” (of the host state). The Turkey and Russia BITs merely provide that heeding the obligation to settle disputes amicably as far as possible, in lieu of arbitration or conciliation, shall not prevent the foreign investor seeking administrative or judicial settlement. The FTAs with Malaysia, Brunei and Indonesia have similar provisions. The FTA with Mexico instead clarifies that if the investor has initiated certain “proceedings before any administrative tribunal or court”, those proceedings must be withdrawn in accordance with the laws of the host state before an ISA claim can be commenced.103 By contrast, the FTA with Chile has a strict “fork in the road” provision: Art 91(2)(a)(iii) does not permit an ISA claim if the claimant has “initiated any proceedings before any administrative tribunal or court … For greater certainty, if the investor elects to initiate such proceedings, that election shall be definitive and the investor may not thereafter submit the claim to arbitration”.

However, Art 91(3) goes on to state that investors may still “initiate or continue an action that seeks interim injunctive relief that does not involve the payment of monetary damages before an administrative tribunal or court under the law of the respondent”. A similar provision is found in FTAs with Malaysia, Thailand (Art 106(7), adding that the proviso that such “action is brought for the sole purpose of preserving the disputing investor’s rights and interests while the arbitration is pending”), Brunei, Indonesia, and Switzerland (with the Thailand FTA proviso). The Cambodia BIT has a similar provision (Art 17(9)), notwithstanding the investor being given five alternative procedures, which are then replicated in Japan’s BITs.

103 Similarly, Art 93(6) of the Swiss FTA allows “international conciliation or arbitration” if the investor has not initiated court or administrative proceedings or has withdrawn them (with a written waiver of any right to continue them, or initiate others).
with Laos and Peru (but not Uzbekistan).

The Thailand FTA is noteworthy also for a very limited “fork in the road” provision once an ISA claim is submitted: this is deemed made “to the exclusion of any other dispute settlement procedures specified [in this Art 106(3)] and proceedings before courts of justice or administrative tribunals under the law of the disputing Party, unless the arbitration proceedings have been terminated before a final award on the merit [sic] of the case has been rendered”. That allows the investor to await the outcome of preliminary ruling on jurisdiction or an interim award under one arbitration procedure (for example, ICSID), and then decide – based on substantive issues that may be mentioned in those decisions or the overall tenor of the proceedings so far – whether or not to abandon that process and turn to another (under UNCITRAL Arbitration Rules).

Another provision that goes back to Japan’s BIT with China is the exclusion of an investment dispute from inter-state claims “when and after it is submitted to the arbitration board” procedure specified (Art 11(8)). A similar prohibition resurfaces in the much later and more detailed Cambodia BIT: the home state may not bring an international claim or “give diplomatic protection” regarding disputes that the host state and investor “have consented to submit or submitted to arbitration” (without mentioning conciliation). However, it excludes situations where the host state does not “abide by and comply with the award rendered”; and clarifies that in this context diplomatic protection “shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the investment dispute” (Art 17(20)). BITs with Laos and Peru (but not Uzbekistan) contain identical provisions, which are based on Art 27 of the ICSID Convention. Similar provisions are also found in the FTAs with Singapore, Malaysia, Brunei, Indonesia and Switzerland (but not Thailand). All of those (including the Thai FTA) add an express requirement to comply with the award “without delay”. Although worded somewhat differently, the FTAs with Mexico and Chile also provide for compliance with the award “without delay” and, if no compliance, a possible inter-state claim as provided in the treaty.

(vii) Enforcement or execution of awards

Beginning with the China BIT, Japan’s treaties state that the arbitral decision or award shall be “final and binding”. This is already effectively provided under Art 53(1) of the ICSID Convention and can usually be inferred from submission to “arbitration” for the purposes of enforcing a (non-ICSID Rules) arbitration agreement and award instead under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). 104

In addition, the China BIT provides that “execution of the decision of the arbitration board shall be governed by the laws and regulations concerning the execution of decision [sic] in force in the State [not necessarily a Contracting Party to the BIT] in whose territories such

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execution is sought”.\textsuperscript{105} This wording differs somewhat from Art 54(3) of the Convention, which refers to execution of the “award” being so governed by the laws on “execution of judgments” in any ICSID member state where execution is sought.

By contrast, the “new generation” Korea BIT states that “each Contracting Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award in accordance with its relevant laws and regulations” (Art 15(6)).\textsuperscript{106} Not enacting such enforcement proceedings would therefore provide (additional) grounds for an ISA claim by the investor, rather than having to mobilise the home state to bring an inter-state claim. However, if the enforcement procedure enacted did not designate a court or authority for lodging an ICSID Convention award (contrary to Art 54(2) of the Convention), then the only option would be for investor’s home state to invoke the inter-state dispute resolution procedure under the investment treaty (or general international law). That would normally also be true if the ICSID member state did not “enforce the pecuniary obligations imposed by that award … as if it were a final judgment of a court” of the host state (contrary to Art 54(1)). But the Korea BIT provision above also allows an ISA claim under such circumstances – indeed, the host state must enforce or “carry out without delay” an award obtained under the treaty procedures.\textsuperscript{107}

Japan’s FTAs reveal further diversity, but an emerging common core. For example, only Singapore FTA (2002, Art 82(10)(e)) states that “the award shall be executed by the applicable laws and regulations concerning the execution of such awards in force in the Party in whose territory such execution is sought”. This aspect is similar to provisions in the China BIT and its progeny. But the Singapore FTA (and all others except the Thai FTA, as mentioned at (vi) above) also explicitly allows for inter-state claims if the award is not complied with. There are two similar provisions in the Switzerland FTA (Arts 94(12) and 94(13), except that the latter adds that the award “shall be executed without delay in accordance with the law” of the host state). All other FTAs add an express requirement to comply with the award “without delay” (wording not found in Art 27 of the ICSID Convention).

However, the Chile FTA further adds that each “Party shall provide for the enforcement of an award its Area in accordance with its relevant laws and regulations” (Art 103(8)). The Switzerland FTA also contains an extra provision found in no other FTA or BIT: “the disputing Party may not assert as a defence its immunity” (Art 94(11)). Art 55 of the ICSID Convention states that Art 54 provisions on execution do not derogate from the law in any member state relating to immunity of that state or a foreign state; but such law is subject to

\textsuperscript{105} See also the Russia, Mongolia, Vietnam and Uzbekistan BITs. However, all these provide that the award “shall be executed” in the country etc. Because only states party can assume obligations, this more clearly imposes obligations on the host state to enact execution procedures.

\textsuperscript{106} See also the BITs with Cambodia, Laos and Peru.

\textsuperscript{107} This provision may allow too an ISA claim even if the problem in enforcement arose with a non-ICSID award under the New York Convention, if adopted by the host state, but this may have limited practical relevance. But compare, for example, Saipem v Bangladesh (ICSID Case No ARB/05/07), where the tribunal found that local courts’ interference with an ICC arbitration with the seat in Dhaka amounted to illegal expropriation under the Italy-Bangladesh BIT: R Teitelbaum, ‘Case Report on Saipem v. Bangladesh’ (2010) 26 Arbitration International 313.
customary international law, which can be challenged under Art 27 if immunity is applied in the host state.©

(viii) Arbitral tribunal and procedures

The China BIT was the first treaty to give some guidance on these matters. The “arbitration board” must comprise one arbitrator appointed by each party within 60 days of the request for arbitration, who then appoints a third within another 90 days (not being a national of either state). Otherwise that President is appointed by a “third party agreed in advance” by the states, being a “national of a third country which has diplomatic relations” with both states. The arbitral procedures shall be determined by this board or tribunal “with reference to” ICSID Convention.

No subsequent BITs provide further elaboration until the Cambodia BIT. Arts 17(10)-(12) thereof provide that the presiding arbitrator (or arbitrator not appointed by a party within 60 days) shall be appointed by ICSID, but either side can specify up to three unacceptable nationalities for the ICSID-appointed arbitrator(s) – with the ICSID Secretary-General “requested not to appoint as arbitrator any person whose nationality is indicated by either of the disputing parties”.© The presiding arbitrator also cannot have usual residence in or be employed by either state, nor have “dealt with the investment dispute in any capacity”. The BITs with Laos and Peru (but not Uzbekistan) have identical provisions. This is generally subject to any further contrary agreement between the disputing parties.

These provisions seem to derive from the Singapore FTA (including its Annex V C) and especially the Malaysia FTA,© repeated in the Thailand, Brunei and Indonesia FTAs. The (most recent) Switzerland FTA has no stipulations regarding arbitrator appointment. The Mexico FTA (Art 82) requires appointment of the presiding arbitrator from a roster of 20 “experienced in international law and investment matters” agreed between the two states and “without regard to nationality”;© or “if not available, from the ICSID Panel of Arbitrators”, except that the Secretary-General may not appoint from either list a national of the investor or the host state. The Chile FTA (Art 92) only refers to the ICSID Panel of Arbitrators.

The Cambodia BIT adds various provisions (again replicated in the BITs with Laos and Peru, but not Uzbekistan) that mostly elaborate on procedural issues dealt with under Arts 41-

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© Treaty stipulations or subsequent agreements as to arbitrator appointments (and some other provisions inserted in investment treaties) may not be effective if they breach mandatory provisions of the ICSID Convention, or of applicable national laws for non-ICSID arbitrations. There has been little systematic discussion yet regarding the former in general. For the latter, see, for example, S Greenberg, C Kee and J R Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective, Cambridge University Press, Melbourne, 2010 (especially on mandatory provisions of the UNCITRAL Model Law on International Commercial Arbitration); but most states anyway allow treaty provisions to “trump” national legislation, for example on arbitration.

© See (i) above regarding the Singapore FTA’s Annex V C alternative for appointing arbitrators. Also unusual is Art 82(6): if qualified arbitrators cannot be appointed ‘the consent to arbitration by ICSID … shall be invalidated’ but then ‘a different method of dispute settlement can be chosen’ from those provided in the treaty (such as the 1976 UNCITRAL Arbitration Rules).

© As of December 2010 no roster had been agreed or disclosed, and there appears to be no plan to create one.
47 of the ICSID Convention. These mostly derive from the Mexico FTA and have strong parallels also in subsequent FTAs:

<table>
<thead>
<tr>
<th>Topic / treaty</th>
<th>Cambodia BIT</th>
<th>Mexico FTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Place (or seat) of the arbitration: in a country party to the NYC</td>
<td>13</td>
<td>88</td>
</tr>
<tr>
<td>Governing substantive law: the treaty and applicable rules of international law</td>
<td>14</td>
<td>84(1)</td>
</tr>
<tr>
<td>Host state shall deliver to home state notice of claim and all pleadings to home state + home state may make submissions “on a question of interpretation” of the treaty</td>
<td>15 + 16</td>
<td>85 + 86</td>
</tr>
<tr>
<td>Tribunal may order interim measures of protection</td>
<td>17</td>
<td>91</td>
</tr>
</tbody>
</table>

(ix) Awards and Costs

The China BIT states that the “arbitration board shall state the basis of its decision and state the reasons at the request of either party” to the dispute. Article 17(18) of the BIT with Cambodia (replicated in those with Laos and Peru) provides that the award shall include (a) a judgment whether or not the host state has breached any treaty obligation and (b) the remedy (limited to one or both of “monetary damages and applicable interest”, and “restitution or property” and interest or damages in lieu thereof if the host state so wishes). It is unclear whether “judgment” implies “reasons”, let alone the extent thereof.\(^\text{116}\) This

\(^{112}\) In the Malaysia FTA, however, the seat must be in the host state. (The seat is only relevant for non-ICSID Rules arbitrations. Specifying a NYC state is important to maximise enforceability of an award given that many states, including Japan, have made the reciprocity reservation to that Convention: see [http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). Such states only commit to enforcing awards from a state that is also party to the NYC.)

\(^{113}\) Under Arts 84(2) and 89 of the Chile FTA, however, a timely interpretation given by the states’ Commission regarding a “non-conforming measure” defence by the host state binds the tribunal. (See also Art 93(2) and 94 of the Chile FTA.) Article 93(8) of the Swiss FTA adds an interesting alternative where the dispute includes a claim under the “umbrella clause” contained in Art 86(2): the governing law is (a) “the rules of law specified in the pertinent investment contract” or other agreed rules of law, otherwise “(i) such rules of international law as may be applicable; and (ii) the law of the respondent, including its rules on the conflict of laws”. (Compare Art 42(1) of the ICSID Convention.)

\(^{114}\) Under Art 87 of the Mexico FTA, the home state can also request (at its cost) from the host state a copy of “the evidence tendered” and “the written argument” of the disputing parties. This is not provided in other FTAs, including that with Chile.

\(^{115}\) Under ICSID Convention Art 47, the power to “recommend” provisional measures has been understood as creating binding obligations on the disputing parties: see R Dolzer and C Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford [UK]; New York, 2008, pp 264-5.

\(^{116}\) In ICSID Convention arbitrations, Art 48(3) anyway requires the award to “state the reasons on which it is based”, and failure in this respect has been frequently invoked (and sometimes upheld) as a ground for annulment under Art 52(1)(e): see R Dolzer and C Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford; New York, 2008, pp 284-5. For the scope of reasons required in non-ICSID arbitrations, compare generally R Garnett and K Steele, “In Search of an Appropriate Standard for Reasons in
provision goes back to the Singapore FTA (basically replicated in later FTAs), except that it contained a more elaborate provision allowing the host state to pay pecuniary compensation.\(^{117}\)

An unusual provision is found in the Chile FTA, seemingly influenced by WTO dispute resolution practice. A disputing party can generally request the tribunal to release its “proposed award”, on which the parties can make written submissions within 60 days, which the tribunal shall then consider before issuing an award within 105 days (Art 102). The exception is for awards on any “preliminary question” requested in a timely fashion by the host state, objecting “that, as a matter of law, the tribunal may not make an award against the respondent” as specified in the treaty (Art 97(2)). The host state can request such rulings on an expedited basis and the tribunal “may, if warranted, award to the prevailing disputing party reasonable costs including attorneys’ fees incurred in submitting or opposing the objection … the tribunal shall consider whether the claimant’s claim was frivolous or whether the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment” (Art 97(3)).\(^{118}\)

The Cambodia BIT and Laos BIT add that “costs may be awarded in accordance with the applicable arbitration rules”, while the Peru BIT achieves a similar result regarding the “assumption of expenses incurred by the disputing parties”. The early BIT with Turkey, which only provided for ICSID arbitration or conciliation so long as both states were party to the ICSID Convention, had specified that the cost of such proceedings was to be “in accordance with the provisions of Article 61 of the Convention”. The latter requires the tribunal to fix and allocate the arbitration expenses incurred by the parties, at its discretion unless the parties agree otherwise; but for ICSID conciliation the expenses of the mediators and the venue must be split equally, with each party bearing equally any other expenses. The China BIT contains an unusual alternative: “Each party shall bear the cost of its own arbitrator and its representation in the tribunal proceedings. The cost of the President … and the remaining costs of the arbitration board shall be borne equally by the parties” (Art 11(7)). Where the parties have not agreed specifically under other treaties, arbitral tribunals have exercised discretion in various ways, although there is some recent tendency for costs to follow the event – the general principle also under the UNCITRAL Arbitration Rules.\(^{119}\)

Japan’s FTAs with Mexico onwards provide simply that the tribunal “may also award costs in accordance with the applicable arbitration rules”.

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\(^{117}\) Under Art 82(10), the disputing parties can agree on the amount of compensation, otherwise either state or the investor can refer the matter back to the original tribunal for a final and binding decision on that amount.\(^\text{118}\) Compare also Art 20(3) of the Australia-Chile FTA (2009), allowing for preliminary objections that the claim is “manifestly without legal merit”, with a similar provision in the ASEAN-ANZ FTA (2009, Art 25(2)): see L Nottage and K Miles, ‘Revising Investor-State Arbitration Rules in Australia and Japan to Meet Public Interests’ in L Nottage and R Garnett, *International Arbitration in Australia*, Federation Press, Sydney, 2010, p 222, p 240.

(x) Other major provisions in BITs and/or FTAs

The “new generation” Korea BIT provides that “an investor may not make a claim … if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage” (Art 15(5)). This is repeated in the more detailed BIT with Cambodia (and with Laos and Peru), but with the clarification that the limitation period begins running from “whichever is the earlier” (Art 12(8)). The FTA with Singapore (concluded two months earlier in 2002) had contained a similar provision (Art 82(4)(a)), as do all other FTAs (except that the Thailand FTA specifies two years and the Switzerland FTA specifies five years).

The BIT with Cambodia (and with Laos and Peru) also provides (Art 17(7)(b)) that the host state consent given in the treaty and the investor’s submission of an ISA claim shall satisfy (i) the ICSID Convention’s requirement for “written consent” of the parties, and (ii) the NYC’s Art II requirement for an arbitration agreement “in writing”.

There also exist provisions in two FTAs, as follows, which are not found even in the elaborate BIT with Cambodia or its progeny:

<table>
<thead>
<tr>
<th>Topic / treaty</th>
<th>Mexico FTA</th>
<th>Chile FTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consolidation of multiple (ICSID) claims</td>
<td>83</td>
<td>101</td>
</tr>
<tr>
<td>At the request of one party or (unless both disapprove) on its own initiative, the tribunal may appoint “experts in the fields of environmental, health, safety or other scientific matters to report to it in writing” on factual issues of expertise</td>
<td>14</td>
<td>84(1)</td>
</tr>
<tr>
<td>Public disclosure (subject to exceptions) of all documents submitted to or issued by the tribunal</td>
<td>94(4)</td>
<td>--</td>
</tr>
<tr>
<td>Host state shall not assert as defence etc that the investor is receiving or may receive, under insurance etc, indemnification or other compensation for its claim</td>
<td>94(3)</td>
<td>98</td>
</tr>
</tbody>
</table>

Such provisions have not yet found their way into subsequent BITs and FTAs, except for a provision in the Switzerland FTA covering the last-mentioned point (Art 94(11)). It remains to be seen whether any or all these additional provisions will be added consistently in future treaties. Alternatively, they may remain a peculiarity of treaties concluded with states in the Americas, although the Japan’s recent BIT with Peru does not carry over any of these.

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provisions.

V. Conclusions

Many other provisions in Japan’s investment treaties may have a significant bearing on dispute resolution. For example, Art 14 of the Cambodia BIT, now seemingly the closest to a de facto “Model BIT” for Japan, allows for subrogation if the home state or its “designated agency” makes payments to its investor “under an indemnity, guarantee or insurance contract”. Such a contract may in turn require the investor, for example, to initiate or even conclude attempts to claim relief through formal processes such as arbitration – risking the escalation of the dispute. By contrast, there is scope for de-escalation or prevention of investment disputes through the Joint Committee process. Article 23 of the Cambodia BIT provides for structured negotiations between representatives of both states aimed at reaching consensus-based recommendations “for the more effective functioning or the attainment of the objectives” of the treaty.

If a dispute proceeds, the foregoing analysis reveals significant diversity in the wording and approach of the dispute resolution provisions contained in Japan’s investment treaties, even in its “new generation” BITs – let alone the FTAs, where more variety may generally be expected as negotiating states trade off preferred positions to achieve outcomes perceived as more important in other parts of the treaty. The same is true of the substantive and other provisions of the various treaties. The BIT provisions are particularly “path-dependent”, reflecting earlier drafting precedents, but they are also influenced now by FTA drafting as well as some idiosyncracies of the other contracting partner (for example, the treaties with China, Hong Kong and even Korea).

This complexity increases transaction costs involved in negotiating the treaties – and also perhaps in invoking them, especially in formal arbitration proceedings. For this reason alone, and to increase public understanding of Japan’s evolving investment treaty framework, it may therefore be timely to develop a “Model BIT”. However, the present situation also creates many opportunities to include innovative provisions especially regarding ISA, at a time of considerable policy debate about when and how to include such procedures.

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121 Payments then due to the home state or agency then also benefit from the BIT’s provisions on expropriation (Art 12), Most Favoured Nation treatment in the event of civil disturbances (Art 13) and transfers of capital (Art 15). See further the book chapter version of this paper, which also analyses treaty provisions on Joint Committees etc.


123 See the book chapter version of this paper, covering Scope, Substantive Standards, Exceptions and “Social Clauses”.


125 See, for example, L Nottage and K Miles, ‘Revising Investor-State Arbitration Rules in Australia and Japan
Bibliography


L Nottage and J R Weeramantry, ‘Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice’ in


### Appendix A: Japan’s BITs and FTAs (EPAs) with Investment Chapters

<table>
<thead>
<tr>
<th>BITs</th>
<th>FTAs (EPAs)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>party</strong></td>
<td><strong>signature</strong></td>
</tr>
<tr>
<td>15. Saudia Arabia</td>
<td>agreement in principle reached on 2 May 2008</td>
</tr>
<tr>
<td>16. Japan-China-Korea</td>
<td>under negotiation</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>19. Kazakhstan</td>
<td>under negotiation</td>
</tr>
<tr>
<td>21. Kuwait</td>
<td>agreement in principle reached on 26 November 2010</td>
</tr>
<tr>
<td>22. PNG</td>
<td>preparing for negotiations</td>
</tr>
<tr>
<td>23. Qatar</td>
<td>preparing for negotiations</td>
</tr>
<tr>
<td>24. Algeria</td>
<td>negotiations being considered (some steps taken)</td>
</tr>
<tr>
<td>25. Nigeria</td>
<td>negotiations being considered (some steps taken)</td>
</tr>
</tbody>
</table>


Notes:

- Shaded parts indicate treaties concluded with other Asian states.
- Treaties marked with an asterisk (*) belong to the “new generation”.
- The Philippines FTA (2006, Art 107) only requires the two states to negotiate towards establishing investor-state dispute settlement.
- It is unclear (from the JETRO report) if the FTA with the EU “under consideration” will include an investment chapter.
- This listing does not include the following FTAs:
  - the Economic Partnership Agreement among Japan and Member States of the Association of Southeast Asian Nations, concluded in 2008, which does not include investment regulations;
  - the Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, concluded in 2008, whose Article 9(4) provides that the provisions of the 2003 Japan-Viet Nam BIT “are incorporated into and form part of” the EPA.
  - the FTA with Peru, for which completion of negotiations was announced on 14 November 2010. It is reported that this FTA will also simply incorporate the 2008 Peru BIT.
Article 17
1. For the purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to investments of investors of that other Contracting Party.

2. Nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as “disputing investor”) from seeking administrative or judicial settlement within the Area of the Contracting Party that is a party to the investment dispute (hereinafter referred to in this Article as “disputing Party”).

3. An investment dispute shall, as far as possible, be settled amicably through consultation or negotiation between the disputing investor and the disputing Party (hereinafter referred to in this Article as “the disputing parties”).

4. (a) If any investment dispute cannot be settled through such consultation or negotiation, the disputing investor may submit the investment dispute to one of the following alternatives:
   (i) competent courts of justice or administrative tribunals or agencies within the Area of the disputing Party;
   (ii) conciliation or arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as may be amended (hereinafter referred to in this Article as “ICSID Convention”), so long as the ICSID Convention is in force between the Contracting Parties;
   (iii) conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, as may be amended, so long as the ICSID Convention is not in force between the Contracting Parties;
   (iv) arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, as may be amended; and
   (v) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules.
   (b) For the purpose of paragraph 4(a) above, if the disputing investor submits the investment dispute to one of the conciliations or arbitrations under subparagraph (ii), (iii), (iv) and (v), at least three months shall have elapsed before that submission from the date on which the disputing investor requested the consultation or negotiation in writing.

5. The applicable arbitration rules shall govern the arbitration set forth in paragraph 4 except to the extent modified in this Article.

6. The disputing investor who intends to submit the investment dispute to conciliation or arbitration pursuant to paragraph 4 shall give to the disputing Party written notice of intent to do so at least 90 days before the claim is submitted. The notice of intent shall specify:
   (a) the name and address of the disputing investor;
   (b) the specific measures of the disputing Party at issue and a brief summary of the factual and legal basis of the investment dispute sufficient to present the problem clearly, including the obligations under this Agreement alleged to have been breached;
   (c) conciliation or arbitration set forth in paragraph 4 which the disputing investor will choose; and
   (d) the relief sought and the approximate amount of damages claimed.

7. (a) Each Contracting Party hereby consents to the submission of investment disputes by a disputing investor to conciliation or arbitration set forth in paragraph 4 chosen by the disputing investor.
   (b) The consent given by subparagraph (a) and the submission by a disputing investor of a claim to arbitration shall satisfy the requirements of:
   (i) Chapter II of the ICSID Convention or the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, as may be amended, for written consent of the parties to a dispute; and
   (ii) Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as may be amended (hereinafter referred to as “New York Convention”), for an agreement in writing.
8. Notwithstanding paragraph 7, no claim may be submitted to conciliation or arbitration set forth in paragraph 4, if more than three years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.

9. Notwithstanding paragraph 4, the disputing investor may initiate or continue an action that seeks interim injunctive relief that does not involve the payment of damages before an administrative tribunal or agency or a court of justice under the law of the disputing Party.

10. Unless the disputing parties agree otherwise, an arbitral tribunal established under paragraph 4 shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. If the disputing investor or the disputing Party fails to appoint an arbitrator or arbitrators within 60 days from the date on which the investment dispute was submitted to arbitration, the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter referred to in this Article as “ICSID”), may be requested by either of the disputing parties, to appoint the arbitrator or arbitrators not yet appointed from the ICSID Panel of Arbitrators subject to the requirements of paragraphs 11 and 12.

11. Unless the disputing parties agree otherwise, the third arbitrator shall not be a national of either Contracting Party, nor have his or her usual place of residence in the territory of either Contracting Party, nor be employed by either of the disputing parties, nor have dealt with the investment dispute in any capacity.

12. In the case of arbitration referred to in paragraph 4, each of the disputing parties may indicate up to three nationalities, the appointment of arbitrators of which is unacceptable to it. In this event, the Secretary-General of the ICSID may be requested not to appoint as arbitrator any person whose nationality is indicated by either of the disputing parties.

13. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the New York Convention.

14. An arbitral tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

15. The disputing Party shall deliver to the other Contracting Party:
(a) written notice of the claim submitted to the arbitration no later than 30 days after the date on which the claim was submitted; and
(b) copies of all pleadings filed in the arbitration.

16. The Contracting Party which is not the disputing Party may make submissions to the arbitral tribunal on a question of interpretation of this Agreement, upon written notice to the disputing parties.

17. The arbitral tribunal may order an interim measure of protection to preserve the rights of the disputing investor, or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of either of the disputing parties. The arbitral tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in paragraph 1.

18. The award rendered by the arbitral tribunal shall include:
(a) a judgment whether or not there has been a breach by the disputing Party of any obligation under this Agreement with respect to the disputing investor and its investments; and
(b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:
(i) payment of monetary damages and applicable interest; and
(ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.
Costs may also be awarded in accordance with the applicable arbitration rules.

19. The award rendered in accordance with paragraph 18 shall be final and binding upon the disputing parties. The disputing Party shall carry out without delay the provisions of the award and provide in its Area for the enforcement of the award in accordance with its relevant laws and regulations.
20. Neither Contracting Party shall give diplomatic protection, or bring an international claim, in respect of an investment dispute which the other Contracting Party and an investor of the former Contracting Party have consented to submit or submitted to arbitration set forth in paragraph 4, unless the other Contracting Party shall have failed to abide by and comply with the award rendered in such investment dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the investment dispute.
### Appendix C: Key Features and Historical Development of Japan’s BITs

<table>
<thead>
<tr>
<th>Party, year of signature (and of entry in force, if different), title of BIT, Article</th>
<th>A. Access to courts, negotiations, ‘cooling off’ etc</th>
<th>B. Arbitration etc</th>
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<th>D. (1) Scope of ‘investor’ (2) Scope of disputes subject to third-party dispute resolution</th>
<th>E. Other features</th>
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<tbody>
<tr>
<td>1. Egypt, 1977 (1978), Encouragement and Reciprocal Protection of Investment (E&amp;RP), Art 11</td>
<td>Conciliation or arbitration ‘in accordance with the provisions of’ the ICSID Convention</td>
<td></td>
<td>(1) foreign investor includes company of the host state that it controls or did control before parties ‘consent to submit the dispute to conciliation or arbitration’ (‘in accordance with’ ICSID Art 25(2)(b))</td>
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<td>2. Sri Lanka, 1982, Promotion and Protection of Investment (P&amp;P), Art 11</td>
<td>ICSID (same as for Egypt BIT); but ‘so long as such provisions are in force between’ both states</td>
<td></td>
<td>(1) Same as for Egypt BIT</td>
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<td>3. China, 1988 (1989), E&amp;RP, Art 11</td>
<td>If cannot settled within <strong>six months</strong> from when consultations requested by either conciliation or arbitration by board ‘established with reference to’ the but not ‘in the event that’ the investor ‘has resorted to administrative or (2) only if ‘dispute concerning the amount of compensation’ for (Art 5)</td>
<td></td>
<td>‘Arbitration board’ to comprise one arbitrator appointed by each party within 60 days of request for arbitration, who then appoint a third within another 90 days (not a national of either state) – otherwise President appointed by ‘third party agreed in advance’</td>
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<td>party (Art 11(2)) … ICSID Convention and if arbitration ‘no claim concerning such case shall be made between states’</td>
<td>judicial settlement within the territory’ of the host state …; expropriation; other disputes ‘may be submitted by mutual agreement’</td>
<td>by states (‘national of a third country which has diplomatic relations’ with both states) Arbitral procedures determined by the board ‘with reference to’ ICSID Convention Each party bears cost of ‘own arbitrator and its representation’; President and other costs of the board borne equally Board shall ‘state the basis of its decision and state the reasons at the request of either party’ Execution of the (final and binding) decision governed by ‘laws and regulations … in force in the state in whose territories such execution is sought’</td>
<td>4. Turkey 1992 (1997), Reciprocal Promotion and Protection, Art 11 Any dispute ‘shall, as far as possible, be settled amicably through consultation’ but without preventing ‘investors … from seeking administrative or judicial settlement within the territory’ ICSID [same as for Sri Lanka BIT] (Art 11) Same as for China BIT (1) Same as for Egypt BIT, except that control decided ‘on the date’ of request for arbitration etc ‘Each party … shall bear the cost of such conciliation or arbitration proceedings in accordance with the provisions of Article 61 of the [ICSID] Convention’</td>
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<td>of the host state (Art 11(1))</td>
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<td>5. Hong Kong, 1997, P&amp;P, Art 9</td>
<td>Same as for Turkey BIT (Arts 9(1) and 9(3)); [arbitration etc] if cannot settled within six months from ‘written notification of the claim by either’ party</td>
<td>Settlement following ‘such procedures … as may be agreed’ – or ‘if no such procedures agreed within that six months period’, UNCITRAL Arbitration Rules ‘as then in force’</td>
<td>Same as for China BIT</td>
<td>(1) Same as for Egypt BIT, except that capacity to commence arbitration etc depends on whether host state company ‘is owned or controlled by investors of the other’ (home) state</td>
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<td>6. Pakistan, 1998 (2002), P&amp;P, Art 10</td>
<td>Same as for Turkey BIT (Art 10(1))</td>
<td>ICSID [as for Sri Lanka BIT] (Art 10(2))</td>
<td>No arbitration ‘so long as’ either state ‘is pursuing administrative or judicial settlement’ or ‘a final judicial settlement’ has been made</td>
<td>(1) Same as for Turkey BIT</td>
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<td>7. Russia,</td>
<td>Same as for Turkey</td>
<td>ICSID [as for Sri</td>
<td>No arbitration so</td>
<td>(1) Same as for Turkey BIT</td>
<td>The ‘final and binding’ decision ‘shall be executed by</td>
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<tr>
<td>1998 (2000), P&amp;P, Art 10</td>
<td>BIT (Art 10(1)), but through ‘negotiations’ (not ‘consultation’)</td>
<td>Lanka BIT] or ICSID Additional Facility Rules if ICSID Convention not in force between the states or UNCITRAL Arbitration Rules (Art 11(2))</td>
<td>long as either state ‘is pursuing administrative or judicial settlement’ or arbitral decision in accordance with any applicable previously agreed dispute-settlement procedures, or in the event that a final judicial settlement’ has been made [not an arbitral award?!]</td>
<td>Turkey BIT</td>
<td>the applicable laws and regulations in force in the country in whose territories such execution is sought’</td>
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<tr>
<td>8. Bangladesh, 1998 (1999), P&amp;P, Art 10</td>
<td>Same as for Turkey BIT (Art 10(1))</td>
<td>ICSID [as for Sri Lanka BIT] (Art 10(2))</td>
<td>Same as for Pakistan BIT</td>
<td>(1) Same as for Turkey BIT</td>
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<td>9. Mongolia, 2001 (2002),</td>
<td>Same as for Turkey</td>
<td>Same as for Russia BIT; but option of</td>
<td>Same as for</td>
<td>(1) Same as for</td>
<td>Same as for Russia BIT</td>
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<tr>
<td>P&amp;P, Art 10</td>
<td>BIT (Art 10(1))</td>
<td>UNCITRAL Arbitration Rules ‘as adopted … 1976’</td>
<td>Pakistan BIT</td>
<td>Turkey BIT</td>
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<tr>
<td>10. * Korea, 2002 (2003), Liberalisation, Promotion and Protection, Art 15</td>
<td>(a) Similar to Turkey BIT: ‘nothing … construed so as to prevent an investor from seeking judicial or administrative settlement’ (Art 15(8))</td>
<td>Arbitration [not conciliation?] submitted to ICSID if both states party to Convention, or under ‘UNCITRAL Arbitration Rules’, or ‘if agreed … to any other arbitration institution’ or under ‘any other arbitration rules’</td>
<td>No arbitration if investor has submitted dispute for settlement under ‘any applicable, previously agreed’ procedure, or for ‘judicial or administrative settlement’</td>
<td>(a) Each state ‘shall carry out without delay the provisions of any [final and binding] award and provide in its territory for the enforcement of such award in accordance with its relevant laws and regulations’. (b) Investor cannot claim if more than three years from when first knew or ought to have known of loss (c) No arbitration for investment disputes involving capital transaction measures during financial crises (Art 17) or prudential measures for financial services (Art 18); but - such dispute [still] ‘shall, if possible, be settled by consultation or negotiation’ (Art 15(2)) - upon request of the other (home) state, the host state ‘shall consult as the application of this paragraph (Art 15(7))</td>
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| (b) The ‘investment dispute shall, if possible, be settled by consultation or negotiation’; can seek to arbitrate if ‘cannot be settled within 3 months from’ when the investor requested in writing consultation or | |

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| negotiation  
(c) Investor must provide ‘written notice of intent’ to arbitrate at least 90 days before submitting claim, including measures at issue, grounds, relief sought (including damages amount), selected arbitration procedure |  |  |  |  |  |
Same as (a) under Korea BIT  
Same as (b) under Korea BIT | Same as (a) under Korea BIT  
Same as (b) under Korea BIT | Arbitration or conciliation under ICSID Convention (if parties) or under Additional Facility Rules (if Convention not in force between states) or 1976 UNCITRAL Arbitration Rules | Same as for Pakistan BIT | (1) Same as for Turkey BIT | Same as for Russia BIT (that is, refers to execution) |
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| 12. **Cambodia, 2007 (2008), Liberalization [sic], Promotion and Protection, Art 17** | Same as (a) under Korea BIT | Same as Viet Nam BIT but:  
- UNCITRAL Arbitration Rules ‘as may be amended’, plus two more options:  
  - if host state agrees, arbitration under ‘other arbitration rules’  
    - ‘competent courts of justice or administrative tribunals or agencies’ in host state;  
    And if arbitration, no diplomatic protection (not including ‘informal diplomatic exchanges for the sole purpose of facilitating a settlement’) or inter- | Investor may invoke one of those five procedures; but notwithstanding that, ‘may initiate or continue an action that seeks interim injunctive relief’ that does not involve the payment of damages before an administrative tribunal or agency or a court of justice’ under the law of the host state | Same as (a) in Korea BIT | Same as (a) in Korea BIT |
<p>|  | Same as (b) in Korea BIT, but ‘at least three months shall have elapsed’ before submission to (conciliation or) arbitration | | | | but clarifies that limitation period commencement begins ‘whichever is the earlier’ |
|  | Same as (c) under Korea BIT | | | ‘The applicable arbitration rules shall govern the arbitration [selected] except to the extent modified in this [Art 17]’, for example, |
|  | | | | - Arts 17(10)-(12) re arbitrator appointments: similar to China BIT; but President (or arbitrator not appointed by party within 60 days) appointed by ICSID, either side can specify up to three unacceptable nationalities for ICSID-appointed arbitrator(s), President also cannot have usual residence in or be employed by either state nor have ‘dealt with the investment dispute in any capacity’. |
|  | | | | - Art 17(7) re ‘writing’ requirement |
|  | | | | Art 17(13) re arbitral seat |
|  | | | | Art 17(14) re applicable substantive law |
|  | | | | Art 17(15)-(16) re involvement of home state |
|  | | | | Art 17(7) re interim measures from arbitrators |</p>
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<td>13. ** Laos, 2008, Liberalisation, Promotion and Protection, Art 17</td>
<td>Same as (a) under Korea BIT</td>
<td>Same as Cambodia BIT, but no option of ‘competent courts of justice or administrative tribunals or agencies’ in host state</td>
<td>Same as Cambodia BIT</td>
<td>Same as Cambodia BIT</td>
<td>Art 17(18) re award ([reasoned?] ‘judgment’ of whether breach plus relief; ‘costs may also be awarded in accordance with the applicable arbitration rules’)</td>
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<tr>
<td>14. * Uzbekistan, 2008 (2009), Art 16</td>
<td>Same as Viet Nam BIT</td>
<td>Same as Viet Nam BIT</td>
<td>Same as Viet Nam BIT</td>
<td>Same as Viet Nam BIT (in referring to ‘execution’ of decisions)</td>
<td>Each state ‘hereby consents’ to submission to conciliation or arbitration (compare Viet Nam BIT: ‘shall consent’ accordingly)</td>
</tr>
<tr>
<td>15. ** Peru, 2008 (2009), Art 18</td>
<td>Same as Laos BIT, but <strong>six months</strong> (not three months)</td>
<td>Same as Laos BIT, but simply UNCITRAL Arbitration Rules (not: ‘as may be amended’)</td>
<td>Same as Laos BIT; but adds that if investor has selected a specified arbitration or conciliation</td>
<td>Same as Laos BIT, but:</td>
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<td>- investor to give ‘consultations and negotiations’ request and ‘notice of intent’ to MOFA in Japan and Peru’s Ministry of Economy and Finance (Art 18(7))</td>
<td>- ‘expenses incurred’ by parties in arbitration or</td>
</tr>
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<td>procedure, cannot submit same dispute to courts, tribunals, agencies ‘or any other binding dispute settlement mechanism established under the national law’</td>
<td>conciliation to be assumed in accordance with the applicable procedural rules (or, if non-existent, as agreed by the parties)</td>
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Notes:
- Asterisked treaties are more detailed “new generation” treaties: those marked ** are especially detailed
- Shaded rows represent treaties with other Asian states