

Japan's Investment Treaty Practice

The Scope and Function of Investment Treaties between Japan and ASEAN Countries



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Outline of the Seminar



Part I

- Overview of Investment Treaties between Japan and ASEAN Countries
- Overview of the Structure and Content of Reservations

Part II

- Function of a MFN Clause – in the context of reservations

Part I-1: Overview of Investment Treaties



Two Main Pillars of Investment Treaties

Investment Protection Provisions

- Fair and Equitable Treatment/Full Protection and Security
- Most Favoured Nation Treatment
- National Treatment
- Compensation against Expropriation
- Prohibition of Performance Requirement
- Umbrella clause

Dispute Settlement Mechanism

- Reference to Investor-State Arbitration in BITs
- Forums of Arbitration: ICSID, ICSID Additional Facility, ICC, the Arbitration Institute of the Chamber of Commerce of Stockholm, *ad hoc* tribunals under UNCITRAL etc.

Part I-2: Investment Treaties between Japan and ASEAN Countries



Bilateral Investment Treaties (BITs)		Economic Partnership Agreements (EPAs)	
Japan and:	Year of the Entry into Force	Japan and:	Year of the Entry into Force
Viet Nam	2004	Singapore	2002
Cambodia	2008	Malaysia	2006
Lao PDR	2008	Thailand	2007
		Indonesia	2008
		Brunei Darussalam	2008
		Philippines	2008

Part I-3: Two Types of Investment Treaties: Traditional model and Admission model



Traditional Model

- Contracting Parties retain the right to exercise power to control and regulate the admission of foreign investment
- Admission clause
Article 2.1 Japan-Mongolia BIT
“Each Contracting Party shall, **subject to its rights to exercise powers in accordance with the applicable laws and regulations**, encourage and create favourable conditions for investors of the other Contracting Party to make investment in its territory, and, subject to the same rights, **shall admit such investment.**”

Admission Model

- Contracting Parties undertake the obligations of national treatment, most favoured nation treatment, the prohibition of performance requirement etc. with respect to the admission of investment
- List of reservations/exceptions

Part I-4: Reservations in Admission Model Japan-Malaysia EPA



Article 9: Taxation

1. Unless otherwise provided for in this Agreement, the provisions of this Agreement shall not apply to any taxation measures.
2. Nothing in this Agreement shall affect the rights and obligations of either Country under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

Article 80: Reservations and Exceptions

1. Articles 75 and 76 and paragraph 1 of Article 79 shall not apply to:
 - (a) any existing non-conforming measure that is maintained by the following, as set out in sectors, sub-sectors or activities listed in Annex 4 and indicated with an asterisk (“*”):
 - (i) the central government of a Country; or
 - (ii) a prefecture of Japan or a state of Malaysia, as set out in Annex 4 in accordance with paragraph 5 of this Article;
 - (b) any existing non-conforming measure that is maintained by a local government of a Country other than prefectures and states referred to in subparagraph (a)(ii);
 - (c) the continuation or prompt renewal of any nonconforming measure referred to in subparagraphs (a) and (b); or
 - (d) an amendment or modification of any measure referred to in subparagraphs (a) and (b), provided that the amendment or modification does not decrease the level of conformity of the measure, as it existed immediately before the amendment or modification, with Articles 75 and 76 and paragraph 1 of Article 79.
2. Each Country reserves the right to adopt or maintain any measure not conforming with the obligations imposed by Articles 75 and 76 and paragraph 1 of Article 79, for sectors, sub-sectors or activities listed in Annex 4 other than those referred to in paragraph 1 of this Article.
3. Any amendment or modification of an existing measure or adoption of a new measure for sectors, sub-sectors or activities referred to in paragraph 2 of this Article, shall not be more restrictive to existing investors and existing investments than the measure applied to such investors and investments immediately before such amendment or modification or adoption, unless such sectors, subsectors or activities are indicated with the symbol “+” in Annex 4.

Part I-5: Reservations in Admission Model

Japan-Malaysia EPA



Article 80: Reservations and Exceptions (contd.)

4. For the purposes of this Article:
 - (a) the terms “existing investors” and “existing investments” mean respectively investors whose investments are present in a Country, and investments that are present in a Country, immediately before the modification or amendment of existing measures, or adoption of new measures; and
 - (b) any expansion or diversification of existing investments by existing investors after the modification or amendment of existing measures or adoption of new measures shall not be regarded as existing investments to the extent of such expansion or diversification.
5. Each Country shall set out in Annex 4, within six months after the entry into force of this Agreement, any existing non-conforming measure, with an asterisk (“*”), maintained by a prefecture or a state as referred to in subparagraph 1(a)(ii) of this Article and shall notify thereof the other Country by a diplomatic note.
6. Neither Country may, under any measure adopted pursuant to paragraph 2 of this Article after the entry into force of this Agreement, require an investor of the other Country, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective, unless otherwise specified in the initial approval by the relevant authority.
7. In cases where a Country makes an amendment or modification of existing measures or adopts new measures with respect to sectors, sub-sectors or activities listed in Annex 4:
 - (a) that Country shall notify the other Country to the extent possible, the amendment or modification or new measures, and whenever possible prior to implementation, if not, as soon as possible thereafter; and
 - (b) that Country upon the request by the other Country shall hold consultation in good faith with that other Country with a view to achieving mutual satisfaction.

Part I-6: Reservations in Admission Model

Japan-Malaysia EPA



Article 80: Reservations and Exceptions (contd.)

8. Notwithstanding the provisions of this Article, each Country may, in exceptional financial, economic or industrial circumstances, adopt exceptional measure inconsistent with Articles 75 and 76 and paragraph 1 of Article 79 in the sectors, sub-sectors or activities listed in Annex 4 with an asterisk (“*”), provided that such Country shall, to the extent possible prior to the entry into force of the measure, or as soon as possible thereafter:
 - (a) notify the other Country of the elements of the measure; and
 - (b) hold, upon the request by the other Country, consultations in good faith with the other Country with a view to achieving mutual satisfaction and take appropriate action thereafter.
9. Each Country shall endeavour, where appropriate, to reduce or eliminate the reservations specified in Annex 4.
10. Articles 75, 76 and 79 shall not apply to any measure that a Country adopts or maintains with respect to government procurement.
11. Articles 75 and 76 shall not apply to any measure covered by an exception to, or derogation from, the obligations under Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement, as may be amended (hereinafter referred to as “the TRIPS Agreement”), as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

Article 81: Expropriation and Compensation

5. This Article shall apply to taxation measures, to the extent that such taxation measures constitute expropriation.

Article 85: Settlement of Investment Disputes between a Country and an Investor of the Other Country

1. For the purposes of this Chapter, an “investment dispute” is a dispute between a Country and an investor of the other Country that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Chapter with respect to the investments of the investor of the other Country.

Note: This Article shall apply in respect of taxation measures, where Article 81 applies to taxation measures.

Part I-7: Structure of Reservations



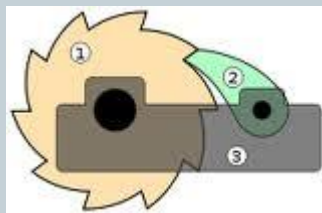
1. Categorical reservations:

- Taxation measures
- Measures concerning government procurement
- Measures of local governments

2. Sector/Measure specific reservations

- Reservations with “standstill” + “ratchet” obligation
- Reservations with “ratchet” obligation

“ratchet”



3. “Absolute” reservations

Intermission...



Part II-1: The Function of a MFN Clause (1)



1. A Typical Formation of a MFN Clause

Article 2.2 of the Japan-Viet Nam BIT

Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of any third country and to their investments with respect to investment activities.

2. Traditional function of a MFN Clause

Part II-2: The Function of a MFN Clause (2)



3. Broader function of a MFN clause: incorporation of provisions of other investment treaties

- *Maffezini v. Spain* (2000); *Siemens v. Argentina* (2004); *Gas Natural v. Argentina* (2005); *Suez v. Argentina* (2006); *White Industries Australia v. India* (2011) etc



- *Plama v. Bulgaria* (2005); *Telenor v. Hungary* (2006); *Salini v. Jordan* (2004); *Yaung Chi Oo v. Myanmar* (2003); *Impregilo v. Pakistan* (2005); *CMS v. Argentina* (2005); *ICS v. Argentina* (2012) etc

Part II-3: The Function of a MFN Clause (3)



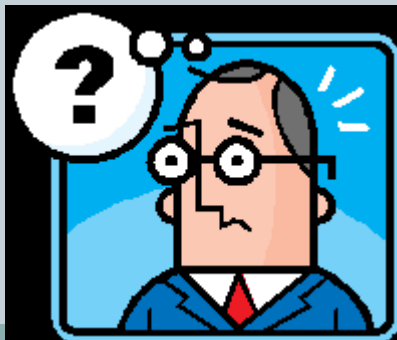
4. A MFN clause and reservations

A hypothetical case:

1. Under the Japan-Cambodia BIT (2008), Cambodia has reservations concerning:

Land Ownership; Percentage of foreigners to be employed; Manufacturing of Narcotic and Psychotropic substances; Production of poisonous chemicals, agriculture pesticide/insecticide etc; Processing and production of electricity power by using any waste imported from a foreign country; Forestry exploitation

2. Cambodia concludes a new admission model type BIT with state X, but with a reservation with respect to national treatment obligation on, e.g. broadcasting industry?





“May I employ the MFN clause in the Cambodia-X BIT to incorporate Cambodia’s national treatment obligations without reservations in the Japan-Cambodia BIT?”

Part II-4: The Function of a MFN Clause (4)



Principles of treaty interpretation

- “[I]t is the duty of the judge to resort to all available means – including rules of construction – to discover the intention of the parties.” (H. Lauterpacht)
 - The principle of effective treaty interpretation : “when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted” ([1966] YBILC, vol. II, 219)

 - What are the “objectified intention” of the parties under the Cambodia-X BIT?
 - ✓ The MFN clause
 - ✓ The reservations in the Cambodia-X BIT
 - ✓ Cambodia-X BIT postdates the Japan-Cambodia BIT
-  Letting the MFN clause trump the reservation is inconsistent with the principle of effective interpretation?



The answer is ...



Thank you for your Attention