

Japan-EU EPA and TPP①

(NAKAMURA Kazuhiko)

Economic partnership agreements (EPAs) between Japan and OECD member States (all containing an investment chapter)

(Out of 13 EPAs concluded in total)

- Japan-Mexico EPA (2005) (OECD Membership) (1994)
- Japan-Chile EPA (2007) (2010)
- Japan-Switzerland EPA (2009) (1960)

Kyoto Seminar on International Investment Law

Afternoon Session 2: What Use of Investment Treaties between Developed States?

Japan-EU EPA and TPP②

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Little substantial difference from the bilateral investment agreements(BITs)
Japan has concluded with developing countries

【Japan-Mexico EPA】

Article 69

Relation to Other Chapters

In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

Japan-EU EPA and TPP③

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As for Japan-Mexico EPA, inclusion of an investment chapter could have intended to facilitate Japanese enterprises (particularly manufacturers) to establish their “foothold” in NAFTA market. BUT ...

【Japan-Mexico EPA】

Article 66

Reservations and Exceptions

2. Each Party shall set out in its Schedule to Annex 6, within 6 months of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or a prefecture as referred to in subparagraphs 1(b)(i)(AA) and 1 (b)(ii)(AA) above, and shall notify thereof the other Party by a diplomatic note.

Japan-EU EPA and TPP④

(NAKAMURA Kazuhiko)

THEN why is investment chapter included in Japan-developed State EPA ?

→(1) “Comprehensiveness” matters.

【Japan-Mexico EPA: chapters】

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|--|--|--|
| 1 Objectives | 7 Investment | 13 Improvement of the Business Environment |
| 2 General Definitions | 8 Cross-Border Trade in Services | 14 Bilateral Cooperation |
| 3 Trade in Goods | 9 Financial Services | 15 Dispute Settlement |
| 4 Rules of Origin | 10 Entry and Temporary Stay of Nationals for Business Purposes | 16 Implementation and Operation of the Agreement |
| 5 Certification of Origin and Customs Procedures | 11 Government Procurement | 17 Exceptions |
| 6 Bilateral Safeguards Measures | 12 Competition | 18 Final Provisions |

Japan-EU EPA and TPP⑤

(NAKAMURA Kazuhiko)

THEN why is investment chapter included in Japan-developed State EPA?

→(2) Service chapter which (potentially) covers service supply through “commercial presence” should be complemented by the rules which governs the commercial presence (investments) related to trade in goods.

【Japan-Switzerland EPA】

Article 43

Scope and Coverage

1. This Chapter shall apply to measures by a Party affecting trade in services taken by central, regional or local governments and authorities as well as by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. It shall apply to all services sectors.

Japan-EU EPA and TPP⑥

(NAKAMURA Kazuhiko)

THEN why is investment chapter included in Japan-developed State EPA?

→(2) Service chapter which (potentially) covers service supply through “commercial presence” should be complemented by the rules which governs the commercial presence (investments) related to trade in goods.

【Japan-Switzerland EPA(cont'd)】 Article 44 Definitions

- (t) “trade in services” means the supply of a service:
- (i) from the Area of a Party into the Area of the other Party (“cross-border supply mode”);
 - (ii) in the Area of a Party to the service consumer of the other Party (“consumption abroad mode”);
 - (iii) by a service supplier of a Party, through commercial presence in the Area of the other Party (“commercial presence mode”);
 - (iv) by a service supplier of a Party, through presence, in the Area of the other Party, of natural persons of a Party (“Presence of natural persons mode”); ...

Japan-EU EPA and TPP⑦

(NAKAMURA Kazuhiko)

THEN why is investment chapter included in Japan-developed State EPA?

→(2) Service chapter which (potentially) covers service supply through “commercial presence” should be complemented by the rules which governs the commercial presence (investments) related to trade in goods.

【Japan-Mexico EPA】

Article 106

Definitions

(a) the term “cross-border trade in services” means the supply of a service:

(i) ...;

(ii) ...; or

(iii);

but does not include the supply of a service by an investment of an investor of a Party, as defined in Article 96 in the Area of the other Party;

Aspects of investment (in service sector) not covered by the services chapter

▪ Expropriation and Compensation

▪ Performance requirement

▪ Transfer of capital

▪ ISDS

etc.

Japan-EU EPA and TPP⑧

(NAKAMURA Kazuhiko)

Basically for the same reasons, Japan is in favor of the inclusion of investment chapter in Japan-EU EPA and TPP.

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Particular significance

- ① Not all of the negotiating partners are developed States.
- ② Investment rules binding federal/decentralized developed partner could serve as an “anchor” for investment-related behavior of the regional/local governments in such partner.
- ③ Negotiations among developed States provide a good occasion to elaborate some investment rules that require further clarification/improvement.

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① Not all the negotiating partners are developed States.

【Non-OECD member negotiating partners】

(Japan-EU EPA) Bulgaria, Croatia, Cyprus, Latvia, Lithuania, Malta, Romania

(TPP) Brunei Darussalam, Malaysia, Peru, Singapore, Vietnam

→ Their involvement in negotiations side-by-side with more developed partners could foster their commitment to, and implementation of, a higher level of investment protection.

(scope of reservations, performance requirement, “umbrella clause” etc.)

Japan-EU EPA and TPP^⑩

(NAKAMURA Kazuhiko)

② Investment rules binding federal/decentralized developed partner could serve as an “anchor” for investment-related behavior of the regional/local governments in such partner.

(provided that regional/local governments' measures are neither excluded from the scope nor subject to reservation.)

(EU) EU – member State – regional/local government

(TPP) Australia, United States, Canada, Mexico = federal States

Japan-EU EPA and TPP^⑪

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③ Negotiations among developed States provide a good occasion to elaborate some investment rules that require further clarification/improvement.

【Rules expected to be further clarified/improved】

(from European Commission, “Investment Protection and Investor-to-State Dispute Settlement in EU Agreements” (November 2013))

- indirect expropriation
- fair and equitable treatment
- ISDS (transparency of proceedings etc.)