RIETI Discussion Paper Series 24-E-023

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The Research Institute of Economy, Trade and Industry
https://www.rieti.go.jp/en/

RIETI Discussion Paper Series 24-E-023
February 2024

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Abstract

Japan has been actively negotiating and concluding international investment agreements (IIAs) with a view to protecting and promoting investments by Japanese investors overseas. The Japanese government's pro-investor, pro-investment IIA policy is strongly supported by the Japanese industry. However, the time may have finally come for Japan to revisit and review its IIA policy as climate change challenges are increasingly urgent and national security has become an essential element in the economic policy and diplomacy of states. These trends have important policy implications for Japan, not only as the home state of investors but also as the host state of foreign investments. It is essential to make sure that Japan's IIAs not only protect Japanese investors' investments overseas, but also preserve the Japanese government's right to regulate climate change and national security at home. This short paper examines whether Japan's major IIAs properly preserve Japan's right to regulate climate change and national security.

Keywords: international investment agreements (IIAs), free trade agreements (FTAs), economic partnership agreements (EPAs), sustainability, climate change, national security
JEL classification : F21, F53, F55, K33, P45

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* This study is conducted as a part of the project "Restructuring international trade law system based on sustainability" undertaken at the Research Institute of Economy, Trade and Industry (RIETI). The draft of this paper was presented at the DP seminar of the Research Institute of Economy, Trade and Industry (RIETI). I would like to thank the participants of the RIETI DP Seminar for their helpful comments. The research for this paper was partly supported by JSPS KAKENHI Grant Numbers B1K501427401 and B1KT00646201.

I. Introduction

Japan has been actively negotiating and concluding international investment agreements (IIAs)[1] with a view to protecting and promoting investments by Japanese investors overseas. IIAs also constitute an essential part of Japan's diplomacy to maintain and strengthen the rules-based free and open international order and bring new developments toward (Free and Open Indo-Pacific), which is the first of the five pillars of the "Kishida Vision for Peace."[2]

In 2016, the Japanese government put together an "Action Plan Aiming to Facilitate an Investment Environment Through Promoting the Conclusion of Investment-Related Treaties," under which it accelerated the conclusion of IIAs.[3] The goal was to have in force investment-related treaties with 100 countries and regions by 2020.[4] As of the end of January 2024, Japan has ratified 53 IIAs with 78 countries and regions.[5] According to the Assessment of the Progress and the Future Plan, released in March 2021, the government expects that its investment-related treaties would cover 94 countries and regions, if all the currently ongoing IIA negotiations were concluded successfully.[6]

The Japanese government's IIA policy is strongly supported by Japanese industry. For example, Keidanren calls for the adoption of new IIAs and the upgrading of existing ones to not only protect, promote and facilitate but also liberalize investment.[7] In addition, Keidanren insists on the continued inclusion of investor-state dispute settlement (ISDS), including investment

[1] In this paper, IIAs mean bilateral investment treaties (BITs), investment chapters in free trade agreements (FTAs) or economic partnership agreements (EPAs) and the Energy Charter Treaty (ECT).

[2] Prime Minister's Office of Japan, Keynote Address by Prime Minister Kishida Fumio at the IISS Shangri-La Dialogue, June 10, 2022, https://japan.kantei.go.jp/101_kishida/statement/202206/_00002.html. See also Srabani Roy Choudhury, Japan's "Free and Open Indo-Pacific": The Economic Calculation, in Srabani Roy Choudhury ed., Engagements and Alignment: Japan and its Partners in the Indo-Pacific 14 (Routledge, 2023), at 18-22.

[3] Ministry of Internal Affairs and Communications (MIC), Ministry of Justice (MOJ), Ministry of Foreign Affairs (MOFA), Ministry of Finance (MOF), Ministry of Agriculture, Forestry and Fisheries (MAFF), Ministry of Economy, Trade and Industry (METI) and Ministry of Land, Infrastructure, Transport and Tourism (MLIT), https://www.mofa.go.jp/mofaj/ecm/ec/page24_000606.html. [*Japanese*]

[4] WTO Trade Policy Review Report by the Secretariat: Japan: Revision, WT/TPR/S/397/Rev.1 (6 November 2020), at 49.

[5] MOFA, Current Status of IIAs (September 2023), https://www.mofa.go.jp/mofaj/files/100062901.pdf.

[6] MIC, MOJ, MOFA, MOF, MAFF, METI and MLIT, https://www.meti.go.jp/policy/trade_policy/epa/investment/actionplun-kensho.pdf. Three of the signed treaties, including the original Trans-Pacific Partnership (TPP) Agreement, have not become effective as of the end of January 2024.

[7] Keidanren, Policy Proposal on Investment Treaties, http://www.keidanren.or.jp/en/policy/2019/082_proposal.html.

arbitration, in IIAs.[8] This is despite the fact that there are only six known treaty-based ISDS arbitration cases brought by Japanese investors, four of which have been brought under the Energy Charter Treaty (ECT) in relation to Spain's renewable energy reforms.[9] An empirical study suggests that Japan's IIAs have contributed to encouraging Japanese investors' direct investment overseas, particularly when IIAs include high-level investment protection provisions.[10]

Japan's continued pro-investor, pro-investment IIA policy is notable considering that criticism is mounting against IIAs and investment arbitration in the rest of the world,[11] but the time may have finally come for Japan to revisit and review its IIA policy given the following emerging trends.

First, climate change challenges are increasingly urgent so that IIAs are required to reflect climate considerations in the protection and promotion of investment. In this regard, Article 2(1)(c) of the Paris Agreement provides that the Agreement "aims to strengthen the global response to the threat of climate change" by "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development." In addition, the surge of climate-related investment cases brought against European states, such as Spain and Italy, highlights the need to preserve the right of states to regulate climate change while protecting investors and investments. In fact, recently adopted IIAs often contain provisions to promote mutual supportiveness of investment and sustainability.[12]

Second, amid growing geographical tensions, national security has become an essential element in the economic policy and diplomacy of states. An increasing number of states, including Japan,[13] have tightened investment screening regulations and blocked foreign direct investment

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[8] Id.

[9] The four cases against Spain are: *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain* (ICSID Case No. ARB/15/27); *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4); *Itochu Corporation v. Kingdom of Spain* (ICSID Case No. ARB/18/25); and *Mitsui & Co., Ltd. v. Kingdom of Spain* (ICSID Case No. ARB/20/47). The other two cases are *Nissan Motor Co., Ltd. v. Republic of India* (PCA Case No. 2017-37) and *Macro Trading Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/20/22).

[10] Shujiro Urata & Youngmin Baek, Impact of International Investment Agreements on Japanese FDI: A firm-level analysis, RIETI Discussion Paper Series 22-E-038 (2022), https://www.rieti.go.jp/jp/publications/dp/22e038.pdf, at 4 & 11-13.

[11] See, e.g., Gus Van Harten & Anil Yilmaz Vastardis, Special Issue: Critiques of Investment Arbitration Reform: An Introduction, 24 Journal of World Investment & Trade 363 (2023), at 363.

[12] See, e.g., Crina Baltag, Riddhi Joshi & Kabir Duggal, Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?, 38 ICSID Review 381 (2023), at 397-410.

[13] See, e.g., Tomoko Ishikawa, Investment Screening on National Security Grounds and International Law: The Case of Japan, 1 Journal of International and Comparative Law 70 (2020), at 79-84.

(FDI) for security reasons.[14] Although the number of investment disputes related to security interest has been relatively limited so far,[15] it could increase in the future.[16] For example, in January 2022, Huawei commenced arbitration against Sweden under the China-Sweden bilateral investment treaty (BIT), claiming that Sweden banned it from participating in the rolling-out of Sweden's 5G on "vague and unsubstantiated" security grounds.[17] To preserve states' right to regulate security, an increasing number of IIAs contain security exception clauses.

These trends have important policy implications for Japan, not only as the home state of investors but also as the host state of foreign investments. Although Japan is one of the largest capital-exporting countries, the Japanese government has been making efforts to promote inward FDI since the Abe Administration.[18] According to the Japan External Trade Organization (JETRO), FDI stock in Japan (asset liability principle) is gradually growing and reaching its highest level ever.[19] Moreover, in 2021, the first known ISDS case was brought against the Japanese government under the Japan – Hong Kong BIT regarding its renewable energy policy.[20] Although the case was conducted and concluded in favor of the government with little or no public notice,[21] more cases might come in the future as inward FDI increases.

Thus, it is essential to make sure that Japan's IIAs not only protect Japanese investors' investments overseas, but also preserve the Japanese government's right to regulate climate change and national security at home.

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[14] See, e.g., National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments, UNCTAD Investment Policy Monitor (2019), at https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf.

[15] There have been several security-related investment cases against Argentina and India. Cheng Bian, The Essential Security Interest Clause in International Investment Agreements and Arbitration, in Yuwen Li, Feng Lin & Cheng Bian eds., National Security in International and Domestic Investment Law: Dynamics in China and Europe 27 (Routledge, 2024), at 39-46.

[16] Cf. Tania Voon & Dean Merriman, Incoming: How International Investment Law Constrains Foreign Investment Screening, 24 Journal of World Investment & Trade 1 (2022), at 15-22.

[17] Request for Arbitration (7 January 2022), *Huawei Technologies Co., Ltd. v. Kingdom of Sweden* (ICSID Case No. ARB/22/2), reproduced in IA Reporter (Lisa Bohmer) (24 January 2022), China's Huawei Lodges ICSID Arbitration against Sweden over 5G Ban, https://www.iareporter.com/articles/chinas-huawei-lodges-icsid-arbitration-against-sweden-over-5g-ban/.

[18] Mark Manger, Foreign Direct Investment in Japan: Growth, Trends, and Policy Efforts, in Robert J. Pekkanen & Saadia M. Pekkanen eds., The Oxford Handbook of Japanese Politics 600 (Oxford University Press, 2020), at 613-615.

[19] JETRO Invest Japan Report 2022, Chapter 1, FDI Trends in the World and Japan, Section 2 Trends in Inward FDI to Japan, https://www.jetro.go.jp/en/invest/investment_environment/ijre/report2022/ch1/sec2.html.

[20] *Shift Energy Japan KK v. Japan*.

[21] IA Reporter (Lisa Bohmer) (13 February 2023), Japan Prevails in its First Known Treaty Arbitration, https://www.iareporter.com/articles/japan-prevails-in-its-first-known-treaty-arbitration/.

However, the need to balance these potentially conflicting purposes has not been addressed sufficiently in Japan's IIA policy. For example, the Assessment of the Progress and the Future Plan, mentioned above,[22] merely notes that the IIA strategic policy has to take into account the need to properly balance the protection of investors and the state's right to regulate "national security and so on" and stops short of providing specific policy directions. In addition, Keidanren keeps insisting that investment disputes related to public policy, such as environmental protection, should not be excluded from the scope of investment arbitration because, in its view, investment arbitration does not require the respondent to change the policy.[23] It has to be said that the emerging trends in IIAs in the rest of the world have not been properly taken into account in Japan's IIA policy until now. It is imperative for Japan to revisit and review its IIA policy in terms of the right to regulate public matters, particularly climate and security concerns.

Against this background, this short paper examines whether Japan's major IIAs properly preserve Japan's right to regulate climate change and national security. For this purpose, it takes up Japan's four IIAs that cover major countries and regions of origin of FDI in Japan: the Japan-China-Korea Investment Agreement (JCKIA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Regional Comprehensive Economic Partnership (RCEP) Agreement and the Agreement between Japan and the European Union for an Economic Partnership (JEEPA). The purpose is not to categorize the existing IIAs adopted by Japan,[24] but to review exceptions and other provisions relevant to the right to regulate, particularly on environmental sustainability and national security policy under these IIAs, and assess whether and how they can properly balance the need to protect and promote Japanese investors' investment overseas and the need to preserve Japan's right to regulate climate and security policies at home. As discussed below, the existence of exception clauses for climate and security policies in an IIA may suggest that the parties to the IIA have more policy space.[25] Even without exception clauses, substantive obligations may be stipulated in a manner to allow policy flexibility for the parties to adopt public policies.

II. JCKIA

The JCKIA was signed by Japan, China and Korea on 23 My 2012 and became effective on 17

[22] See supra note 6.
[23] See supra note 7, at 10.
[24] This was done to some extent elsewhere. See, e.g., 森肇志・小寺彰「国際投資協定における「一般的例外規定」について」、RIETI Discussion Paper Series 14-J-007 (2014), https://www.rieti.go.jp/jp/publications/dp/14j007.pdf.
[25] Cf. Levent Sabanogullari, General Exception Clauses in International Investment Law: The Recalibration of Investment Agreements via WTO-Based Flexibilities (Nomos, 2018), at 156-165. Necessity under customary international law may also be invoked, but jurisprudence suggests that the conditions for necessity are extremely difficult to meet.

May 2014.

Japan had concluded bilateral IIAs with these countries respectively, but the JCKIA expanded the scope and level of investment protection, especially in relation to China. It has typical provisions on investment protection, such as expropriation and fair and equitable treatment (FET). The provisions do not explicitly incorporate ISDS jurisprudence and are stipulated without specifications or clarifications of terms.

Under Article 15 of the JCKIA, an investor of a contracting party may refer a dispute with another contracting party regarding its loss or damage caused by an alleged breach of any of the obligations of the latter party under the JCKIA to arbitration if the dispute cannot be settled amicably through consultation between the parties.

A) Environmental sustainability

The JCKIA does not refer explicitly to the right to regulate, but notes in its Preamble that the objectives of investment promotion, facilitation and protection and progressive liberalization can be achieved without relaxing health, safety and environmental measures of general application. Also in the Preamble, the parties recognize the importance of investors' complying with the laws and regulations of a host contracting party, which contribute to economic, social and environmental progress.

The JCKIA does not include exceptions for environmental policies although it encourages the parties to ensure mutual supportiveness of investment and the environment. Article 23 confirms the parties' recognition that "it is inappropriate to encourage investment by investors of another Contracting Party by relaxing its environmental measures" and provides that the parties "should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of investments in its territory."

Its investment protection provisions use vague language similar to other conventional IIAs. For example, Article 5(1) requires each party to accord investments of investors of another contracting party fair and equitable treatment (FET), and merely adds that the concept of "fair and equitable treatment" does "not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law" and that "A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach" of the FET.

Considering that the Preamble of the JCKIA implicitly acknowledges the importance of environmental protection, the FET under the JCKIA may be interpreted and applied in harmony with the right to regulate climate change. In any event, given the vague language of the JCKIA, how to balance the need to protect foreign investments and the need to respect the host state's

right to regulate is left in the hands of arbitral tribunals if any dispute under the JCKIA is referred to investment arbitration.

B) National security

The JCKIA has a security exception clause, which is similar to Paragraphs 1(b) and 1(c) of Article XIV bis of the General Agreement on Trade in Services (GATS).[26]

Article 18(1) of the JCKIA provides that each party may take any measure:

> (a) which it considers necessary for the protection of its essential security interests;
>
> > (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
> >
> > (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
>
> (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article 18(1)(b) uses almost the identical language as Article XIV bis:1(c) of GATS, but the scope of Article 18(1)(a)(i) may be potentially broader than that of Article XIV bis:1(b)(iii) of GATS because the former addresses not only emergency in international relations but also that in a contracting party. The scope of Article 18(1)(a)(ii) may also be slightly different from that of Article XIV bis:1(b)(ii), which addresses action "relating to fissionable and fusionable materials or the materials from which they are derived."

It is also notable that Article 18(2) provides that a party taking any JCKIA-*inconsistent* measure pursuant to Article 18(1) "shall not use such measure as a means of avoiding its obligations." It remains to be seen how this paragraph works in reality, but it is expected to ensure that the parties would not abuse the security exception clause.

In addition to the security exception, Article 3(2) provides that the national treatment obligation does not apply to any non-conforming measures existing at the date of entry into force of the JCKIA maintained by each Contracting Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. At the same time, Article 3(3) requires each Contracting Party to take, where applicable, all appropriate steps to progressively remove all the non-conforming measures under

[26] The JCKIA security exception does not have paragraphs equivalent to Paragraph 1(a) of Article XIV bis concerning the disclosure of information and to Paragraph 1(b)(i) of Article XIV bis relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment.

Article 3(2).

Article 3(2) allows additional policy space for the contracting parties to take security measures, but its scope of non-application is limited compared to the IIAs discussed in the following sections.

III. CPTPP

The CPTPP was signed on 8 March 2018 by 11[27] of the 12 countries that had signed the Trans-Pacific Partnership (TPP) Agreement, after the United States withdrew from the TPP. It became effective for Japan on 30 December 2018 and for all 11 original signatories by July 2023. On 16 July 2023, the United Kingdom (UK) signed the Protocol of Accession to the CPTPP, which is expected to become effective in the second half of 2024. China, Taiwan, Ecuador, Costa Rica, Uruguay and Ukraine have also applied to join the CPTPP.

The CPTPP has a chapter on investment, which includes both investment protection and liberalization. The CPTPP has incorporated some of the jurisprudence in recent ISDS cases relating to substantive investment protection obligations,[28] as mentioned below, which could potentially allow more policy space for the contracting parties.

An investment dispute arising under the CPTPP may be referred to ISDS, including arbitration. Under Art.9.19(1)(a)(i)(A), an investor of a contracting party may commence arbitration, claiming that another contracting state has breached any of the substantive obligations provided under the investment chapter of the CPTPP and has incurred loss or damage by reason of, or arising out of, that breach.[29] However, some of the contracting parties, such as New Zealand and Australia, have exchanged side letters with several other contracting parties to remove or limit recourse to investment arbitration under the CPTPP.[30] In addition, Canada and Chile have issued a Joint Declaration of Investment Treaty Practice, where the two contracting parties have agreed to "Promote the continued improvement of the operation of the Investment Chapter of the CPTPP within the framework of the review mechanisms of the CPTPP."[31]

It should also be noted that the Trans-Pacific Partnership Commission, composed of

[27] Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam.

[28] Chapter 9 (Investment), *in* Japan Tariff Association, Commentary to the TPP (2019).

[29] Articles 9.1(1)(a)(i)(B) and (C) provide that an investor may submit a breach of an investment authorization or a breach of an investment agreement to investment arbitration, but these provisions are suspended under the CPTPP.

[30] For New Zealand, see https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/#bookmark4. For Australia, see https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents.

[31] Government of Canada, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/declaration_itp-pmti.aspx?lang=eng.

government representatives of each Party and established by Article 27.1 of the CPTPP, is mandated under Article 27.2(1)(b) to "review, within three years of the date of entry into force of" the CPTPP, the economic relationship and partnership among the Parties. Article 27.3 further provides that "the Commission shall review the operation of this Agreement with a view to updating and enhancing this Agreement, through negotiations, as appropriate, to ensure that the disciplines contained in this Agreement remain relevant to the trade and investment issues and challenges confronting the Parties." At the CPTPP Ministerial meeting on 15 November 2023, the Ministers of the CPTPP parties endorsed the "Terms of Reference for Conducting the General Review" of the CPTPP.[32] The Review aims, among others, to "Reinforce the links between trade, the CPTPP, and evolving global environmental issues including climate change and biodiversity loss"; "Explore opportunities to promote inclusive and sustainable outcomes, including with respect to trade and Indigenous Peoples, where applicable to the Members"; "Support global value chains, and strengthen supply chain resilience to help Members to withstand external shocks and disruption" "Further reflect on Members' interests in the context of the CPTPP's Investor-State Dispute Settlement mechanism" "Further complement the rules based multilateral trading system, with the World Trade Organisation (WTO) at its core, including as a means for responding to economic coercion"[33]

A) Environmental sustainability

In Paragraph 9 of the Preamble, the CPTPP explicitly recognizes the parties' "inherent right to regulate" and the need to "preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals," In addition, Paragraph 11 of the Preamble reaffirms the parties' commitment to "promote high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices."

The CPTPP does not include an exception for environmental policies. It does incorporate Article XX of GATT and its interpretative notes for chapters related to trade in goods,

[32] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Joint Ministerial Statement 15 November 2023, San Francisco, USA, https://www.cas.go.jp/jp/tpp/tppinfo/2023/pdf/20231120_cptpp_seimei_en.pdf

[33] Terms of Reference for Conducting the General Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) endorsed at CPTPP Ministerial meeting on 15 November 2023 PST, https://www.cas.go.jp/jp/tpp/tppinfo/2023/pdf/20231120_cptpp_tor_en.pdf.

and Article XIV, Paragraphs (a), (b), and (c) of GATS for chapters on trade in services, but these provisions do not apply to Chapter 9 on investment. For the investment chapter, Article 9.16 of the CPTPP merely confirms that a party may adopt, maintain or enforce any CPTPP-*consistent* measures that it considers appropriate for an environmental objective, but the provision cannot be invoked to justify a CPTPP-*inconsistent* investment measure taken for an environmental objective.[34]

However, the absence of exception clauses should not be considered as an indication that the CPTPP prevents the parties from taking investment measures for the purpose of environmental sustainability. In fact, it is not uncommon that IIAs do not have a GATT Article XX or GATS Article XIV type of general exception clause. Despite that, IIAs have been interpreted in a flexible manner to accommodate, at least to some extent, environmental sustainability-related measures taken by the host state. In particular, the jurisprudence in ISDS has revealed that climate policy measures may not amount to a breach of the FET obligation as long as they are reasonable and proportionate.[35]

Flexibility in the ISDS jurisprudence is incorporated in the texts of the CPTPP. For example, Article 9.6(2) of the CPTP states that the FET obligation under Article 9.6(1) prescribes the customary international law minimum standard of treatment of aliens and does not require treatment in addition to or beyond that which is required by that standard. Moreover, Article 9.6(4) states that the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the FET obligation. In other words, the FET obligation only protects the *legitimate* expectations of foreign investors. Even if a measure taken to tackle climate change incurs an economic loss to an investor, it would be difficult for the investor to argue that it had a legitimate expectation that the host state would *not* adopt the measure to address urgent climate challenges.

It is also relevant that the preamble recognizes environmental protection as a legitimate public welfare objective. Although the preamble does not itself produce specific obligations, it may be taken into account in the interpretation of substantive obligations, including the FET obligation.[36]

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[34] Chapter 29 (Exceptions and General Provisions), in Japan Tariff Association, Commentary to the TPP (2019). See also Ashley Chandler, Investor-state Dispute Settlement in the CPTPP: Perspectives from Australia, Japan and New Zealand, 16 New Zealand Yearbook of International Law 3 (2018) at 28-30.

[35] See, e.g., Filip Balcerzak, Renewable Energy Arbitration – Quo Vadis?: Implications of the Spanish Saga for International Investment Law (Brill, 2023), at 187-345.

[36] Lars Markert and Shimpei Ishido, The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, in The Investment Arbitration Review (2023), Ch.42.

B) National security

The security exception of the CPTPP is provided in Article 29.2. While Article 29.2(a) of the CPTPP generally follows the text of Article XXI(a) of GATT or Article XIV bis:1(a) of GATS, Article 29.2(b) of the CPTPP is different from Article XXI of GATT or Article XIV bis:1 in several aspects.

First, while Article XXI(c) of GATT and Article XIV bis:1(c) of GATS specifically mention the "obligations under the United Nations Charter for the maintenance of international peace and security," Article 29.2(b) of the CPTPP merely states the "obligations with respect to the maintenance or restoration of international peace or security." The omission of the "United Nations Charter" may allow the parties to justify measures taken outside the United Nations.

Second, the subparagraphs of Article XXI(b) of GATT and those of Article XIV bis:1(b) of GATS are not incorporated into Article 29.2(b) of the CPTPP, which merely provides that a party shall not be precluded from "applying measures that it considers necessary for … the protection of its own security interests." The WTO jurisprudence suggests that whether the conditions in the subparagraphs are met is subject to an objective examination while a WTO member enjoys wide discretion as to what it considers necessary for the protection of its own security interests.[37]

It might be argued that the omission of the subparagraphs makes Article 29.2(b) self-judging. However, the exception is not without limits given that the good faith obligation still applies.[38]

It should also be noted that, according to Article 9.12(1)(a), Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: "any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I; (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or (iii) a local level of government." According to (b) and (c) of Article 9.12(1), The above-mentioned provisions shall not apply to the continuation or prompt renewal of any non-conforming measure or an amendment to it "to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment" with the provisions. Japan lists a wide variety of sectors and sub-sectors, such as heat supply; telecommunications and internet based services; drugs and medicines manufacturing; security guard services; railway transport; road passenger transport; water supply and waterworks; aerospace industry in its schedule. Furthermore, Article 9.12(2)

[37] Panel Report (5 April 2019), *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, paras.7.101&.131.

[38] Id, para.7.132.

provides that these provisions "shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II." Japan lists security-related sectors, such as the arms industry, explosives manufacturing industry, electricity utility industry, gas utility industry, and nuclear energy industry. Articles 9.12(1) and (2) leave wide discretion to the parties to take investment measures for security purposes, although the FET obligation, which reflects the minimum standard under customary international law, still applies to the sectors and subsectors listed in the schedules.

IV. RCEP

RCEP was signed on 15 November 2020 by 15 countries[39] and became effective for 14 of them by July 2023.[40]

RCEP has a chapter on investment with provisions on investment protection, liberalization, promotion and facilitation, but it does not include ISDS.[41]

RCEP does not exclude the possibility of including ISDS in the future. Article 10.18(1) provides that the Parties shall, without prejudice to their respective positions, enter into discussions on the settlement of investment disputes between a Party and an investor of another Party no later than two years after the date of entry into force of this Agreement, the outcomes of which are subject to agreement by all Parties. Article 10.18(2) further provides that the Parties shall conclude the discussions within three years from the date of commencement of the discussions. However, it would be overly optimistic to expect that the parties will agree to incorporate ISDS into RCEP in the foreseeable future. It has been nearly two years since RCEP first entered into force on 1 January 2022, but the parties have not commenced discussions on ISDS.

Chapter 19 of RCEP on interstate dispute settlement does not exclude from its scope disputes arising under the investment chapter, but Article 17.11 limits the scope of investment disputes that can be brought to interstate dispute settlement by providing that "A decision by a competent authority, including a foreign investment authority, of a Party on whether or not to approve or admit a foreign investment proposal, and the enforcement of any conditions or requirements that an approval or admission is subject to shall not be subject to the dispute

[39] Japan, China, Korea, Australia, New Zealand and 10 ASEAN Member States.

[40] Myanmar deposited an instrument of ratification in August 2021 but was not accepted by the Secretary-General of ASEAN, the Depositary for RCEP, due to concerns over the legitimacy of the military government after a coup d'état in February 2021. However, some of the RCEP parties have started to treat Myanmar as an RCEP party. 助川成也「進むミャンマーの既成事実化とマレーシアの危機回避行動」世界経済評論 IMPACT(2022 年 5 月 30 日), http://www.world-economic-review.jp/impact/article2550.html.

[41] Chapter 10 (Investment), in Japan Tariff Association, Commentary to RCEP (2022).

settlement provisions under Chapter 19." [footnotes ommitted][42] In any event, considering that interstate dispute settlement procedures are hardly used to settle investment disputes, the likelihood that Chapter 19 is used to settle investment disputes is significantly limited.

A) Environmental sustainability

In Paragraph 9 of the Preamble, RCEP parties explicitly recognize that the three pillars of sustainable development[43] are interdependent and mutually reinforcing, and that economic partnership can play an important role in promoting sustainable development.

Chapter 10 (Investment) of RCEP incorporates some of the jurisprudence in ISDS to clarify the standards of protection that have to be extended to investors. For example, Article 10.5(2)(c) provides that the FET obligation provided under Article 10.5(1) does not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and does not create additional substantive rights. However, it does not refer to the relevance of expectations of investors, unlike the CPTPP.

Article 17.12(2) of RCEP incorporates into Chapter 10 (Investment) Article XIV (General Exceptions) of GATS, including its footnotes, which provides, among others, that "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures" "(b) necessary to protect human, animal or plant life or health." [footnote omitted] Moreover, Footnote 6 to Article 17.12(2) of RCEP confirms the Parties' understanding that the measures referred to in subparagraph (b) of Article XIV of GATS include environmental measures necessary to protect human, animal or plant life or health.

Thus, a measure taken for the purpose of environmental sustainability that may otherwise be inconsistent with obligations under the investment chapter of RCEP may be justified by Article XIV(b) of GATS, which is incorporated by Article 17.12(2) of RCEP.[44] Although Article XIV(b) of GATS has never been tested in WTO dispute settlement, Footnote 6 to Article 17.12(2) suggests that measures related to climate change may be justified by subparagraph (b)

[42] Footnote 4 to the provision provides that, among others, for Japan, "a decision by a competent authority, including a foreign investment authority" means: "a decision under the Foreign Exchange and Foreign Trade Law (Law No. 228 of 1949), as may be amended, regarding an investment that requires prior notification under that law, including an order to alter the content of investment or discontinue the investment process."

[43] Environmental, social and economic sustainability.

[44] Chapter 17 (General Provisions and Exceptions), in Japan Tariff Association, Commentary to RCEP (2022).

as long as the other relevant conditions are met.

If the investment chapter were subject to ISDS in the future, the potential question would be to what extent jurisprudence in ISDS can be useful to clarify the meaning of the standards of protection under RCEP, particularly because most jurisprudence is concerned with IIAs without a general exception clause. Many tribunals have interpreted substantive obligations, such as the FET obligation, under IIAs without a general exception clause in a flexible manner so as to ensure that the legitimate policies of the host state would not be found to breach the obligations. Should tribunals adopt a flexible interpretative approach even with respect to IIAs with a general exception? Given that a legitimate public policy measure can be justified by the application of the exception even if it is found to breach the obligations, should tribunals take a different approach to the interpretation and application of the substantive obligations? The answer has to wait for the accumulation of jurisprudence.[45]

B) National Security

Article 10.15: Security Exceptions provides that nothing in the investment chapter shall be construed to:

> (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
> (b) preclude a Party from applying measures that it considers necessary for:
> (i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security; or
> (ii) the protection of its own essential security interests.

Article 10.15 of RCEP uses almost identical language to the security exception under the CPTPP.

Also similar to the CPTPP, Article 10.8 allows the Parties to exempt certain measures from the obligations under Article 10.3 (National Treatment), Article 10.4 (Most-FavouredNation Treatment), Article 10.6 (Prohibition of Performance Requirements), and Article 10.7 (Senior Management and Board of Directors).

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[45] In *Eco Oro v. Colombia*, one of the few cases where a general exception clause of an IIA was applied, the tribunal found that the general exception clause of the applicable IIA does not operate to exclude the host state's liability to pay compensation to the claimant for its damage as a result of the host state's breach of substantive obligations under the IIA. Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), *Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41), paras.822-837. The tribunal's interpretation and application of the exception clause was criticized as "surprising." Robert Garden, Case Comment: Eco Oro v. Colombia: The Brave New World of Environmental Exceptions, 38 ICSID Review 17 (2023), at 22-23.

V. JEEPA

JEEPA was signed by Japan and the EU on 17 July 2018 and became effective on 1 February 2019.

JEEPA has a section on investment liberalization obligations, including market access, national treatment and most favoured nation treatment obligations, but it does not include investment protection and ISDS due to the failure of Japan and the EU to reach agreement because of their differences on these matters. While Japan calls for the inclusion of conventional ISDS and the high-level protection of investment, the EU prefers a more nuanced approach reflecting mutual supportiveness between sustainability and investment and the protection of the right to regulate. The two sides have agreed to continue a discussion on investment protection and the ISDS,[46] but their divergence remains unresolved.

Their divergence reemerged in the ECT modernization process. The ECT parties reached an agreement in principle on the modernization, but failed to adopt it because several European countries expressed dissatisfaction with the agreement, pointing out that fossil fuel investment would continue to be protected and ISDS would continue to apply.[47] Japan was accused by environmentalist groups of blocking the necessary reforms of the ECT.[48] The EU has decided that the EU, its Member States, and Euratom withdraw, in a coordinated manner, from the ECT, stating that the ECT "is no longer compatible with the EU's enhanced climate ambition under the European Green Deal and the Paris Agreement."[49] A non-paper from the European Commission on the ECT concludes that "modes of investment protection such as the one provided by the ECT are not required to attract investments in the EU, given the levels of access to justice and rule of law – especially not in the energy sector, where the EU energy market is dynamic and very attractive."[50]

It is noteworthy that, while the EPA between Japan and the UK does not include investment protection and ISDS either, it explicitly provides that "If, after the date of entry into

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[46] Japan-EU Summit Joint Statement, Tokyo (17 July 2018), https://www.mofa.go.jp/mofaj/files/000382201.pdf.

[47] IA Reporter (Girish Deepak) (24 November 2022), European Parliamentarians Call for Coordinated Withdrawal from the ECT, https://www.iareporter.com/articles/european-parliamentarians-call-for-coordinated-withdrawal-from-the-ect/.

[48] See, e.g., Japan blocks green reform of major energy investment treaty (8 September 2020), https://www.climatechangenews.com/2020/09/08/japan-blocks-green-reform-major-energy-investment-treaty/.

[49] European Commission, European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty (7 July 2023), https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en.

[50] Non-paper from the European Commission, Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty, https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf.

force of this Agreement, a Party signs an international agreement with an investment chapter that contains provisions for investment protection or provides for investor-to-state dispute settlement procedures, the other Party, after the date of entry into force of that agreement, may request that the Parties review this Section and Section B.1," "with a view to the possible inclusion within this Agreement of such provisions that could provide for the improvement of the investment environment." In this regard, the UK signed an FTA with investment protection provisions (but not ISDS) with Australia and New Zealand, respectively, and the FTAs entered into force on 31 May 2023. There is a possibility that the Japan – UK EPA may be reviewed in the future with a view to the inclusion of investment protection provisions.

A) Environmental sustainability

JEEPA is one of the most environmentally sustainable IIAs that Japan has concluded so far.

Having confirmed "the importance of strengthening [the parties'] economic, trade and investment relations, in accordance with the objective of sustainable development in the economic, social and environmental dimensions, and of promoting trade and investment between them, mindful" "of high levels of environmental and labour protection through relevant internationally recognised standards and international agreements to which both Parties are party," JEEPA sets forth a comprehensive chapter on trade and sustainable development (Chapter 16), some of the provisions of which have relevance to investment.

For example, Article 16.2(1) explicitly recognizes the Parties' right "to determine its sustainable development policies and priorities" and requires them to strive to "ensure that its laws, regulations and related policies provide high levels of environmental and labour protection" and "continue to improve those laws and regulations and their underlying levels of protection." Article 16.2(2) further provides that the "Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations" and that "the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties."

In addition, Article 16.5 requires the parties to strive to "facilitate and promote trade and investment in environmental goods and services, in a manner consistent with this Agreement"; "facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement"; and "promote trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of labelling schemes, and recognise the contribution of other voluntary initiatives, including private ones, to sustainability."

Similarly, a chapter on investment liberalization affirms the parties' "right to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives" including the protection of the environment (Article 8.1(2)). Moreover, the chapter includes exceptions for environmental policies. Articles 8.3(1) and (2) provide that "A party shall not be prevented from adopting or enforcing measures "necessary to protect human, animal or plant life or health," which include environmental measures necessary to protect human, animal or plant life or health, provided "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on establishment or trade in services."

JEEPA does not have the FET obligation clause or an expropriation clause due to the disagreement between Japan and the EU, although it has provisions on national treatment and most favoured nation treatment with respect to the establishment and operation of economic activities by entrepreneurs or covered enterprises (Articles 8.8 and 8.9).

Ironically, the absence of investment protection provisions and of ISDS allows the parties' policy space to adopt and maintain climate related measures. The EU's approach to IIAs provides useful guidance for Japan in making IIAs more climate friendly.

B) National Security

The security exception clause (Article 1.5) of JEEPA, which applies to most parts of the agreement, including its section on investment, uses almost the same language as the security exceptions under GATT (Article XXI) and GATS (Article XIV bis).

Article 8.12 of JEEPA provides that investment facilitation provisions do not apply to certain existing or future measures listed in each party's respective schedule.

VI. Conclusion

The preceding chapters reveal that Japan's major IIAs in fact allow some policy space for Japan as the host state to adopt and maintain climate and security policies. For example, the CPTPP and RCEP have provisions that clarify the meaning of substantive obligations regarding investment protection. In addition, RCEP and JEEPA do not have ISDS, which could potentially restrain the host state's regulatory autonomy if it is not used properly. It can be said that Japan's IIAs have been gradually modernized over the years so that IIAs properly preserve the right to regulate of the host state while protecting investors' economic interests. However, this modernization took place because of changes in the negotiating partners' IIA policy rather than those in Japan's own IIA policy.[51]

[51] This has resulted in the diversity of Japan's IIAs, as pointed out by several scholars. See, e.g., Luke Nottage & Nobumichi Teramura, Japan's International Investment, Evolving Treaty

This paper shows that it is becoming increasingly difficult for Japan to maintain its conventional pro-investor, pro-investment policy as climate change and security are becoming more important and more closely connected to investment than ever. As pointed out in the Introduction of this paper, the time has come for Japan to review and modernize its IIA policy.[52]

The paper concludes with two policy recommendations.

First, Japan should reexamine the pros and cons of ISDS. ISDS, including investment arbitration, can be a useful tool for Japanese investors overseas to obtain a remedy in case they incur loss due to a breach of an IIA by the host state. However, it also has systemic problems such as the lack of consistency, coherence and transparency. The limited use of ISDS by Japanese investors raises a question as to the validity of ISDS for Japanese investors. Moreover, the potential abuse and the uncertainty of outcomes render ISDS could undermine Japan's right to regulate climate change and security. While Japan does not necessarily have to seek the abolishment of ISDS, it should review how ISDS should be improved for the benefit of Japanese investors and the Japanese government.

Second, Japan should consider how to align the substantive rules of its IIAs with legitimate public policy objectives such as climate change and security. In this regard, the annotated model clauses for BITs released by the European Commission in September 2023[53] have important implications for Japan, particularly in terms of mutual supportiveness of investment and climate. In addition to clarifying the meaning of investment protection obligations[54] and providing general exceptions,[55] it includes a provision on investment and environment, which recognizes "the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental protection it deems appropriate, and to adopt or modify its environmental laws and policies."[56] It also recognizes

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Practice and Arbitration Related to Corruption and Illegality, 55 Journal of Japanese Law 63 (2023); Shotaro Hamamoto, Debates in Japan over Investor-State Arbitration with Developed States, CIGI (Centre for International Governance Innovation) Investor-State Arbitration Series (2016), https://www.cigionline.org/static/documents/isa_paper_no.5.pdf; Tomoko Ishikawa, A Japanese Perspective on International Investment Agreements: Recent Developments, in Julien Chaisse & Luke Nottage eds., International Investment Treaties and Arbitration across Asia 513 (Brill, 2018).

[52] Anne van Aaken, Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same, 26 Journal of International Economic Law 166 (2023), at 174-176.

[53] European Commission, Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries, https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/f9a070c6-16dd-41e6-8fec-d2ce67473870/details?download=true.

[54] Id., at 9-12 (Article: Treatment of Investors and of Covered Investments & Article: Expropriation).

[55] Id., at 17-18 (Article: General Exceptions).

[56] Id., at 21-22 (Paragraph 1 to Article: Investment and Environment).

“the importance of taking urgent action to combat climate change and its impacts, and the role of investment in pursuing this objective” and requires each party to effectively implement the Paris Agreement, promote investment for climate change mitigation and adaptation and work together to strengthen their cooperation on investment-related aspects of climate change policies and measures.[57]

In the long term, IIAs that are compatible with sustainable development are expected to benefit both investors’ economic interests and the host state’s legitimate public interests.

[57] Id., at 22 (Article: Investment and Climate Change).