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**DOES JAPAN'S QUIET APPROACH TO INTERNATIONAL INVESTMENT LAW WORK
IN A WORLD OF RECURRENT CONFLICT?**

*Marcos D. Garcia Dominguez**

ABSTRACT

One of the largest capital exporters in the world, Japan has not been a major actor in the international investment law arena. Neither as a treaty signatory and host state, nor as a seat for claimants. Japan has never been a defendant in ISDS. The other side of, perhaps, the same coin is Japanese investors' reluctance to engage in litigation or arbitration with foreign governments. Japanese companies have resorted to ISDS in a handful of cases. While the former is a goal to aspire to, we must understand the particular, maybe unique, reasons behind this. As for the latter, Japanese investors might be leaving money on the table. This paper argues that it might be difficult for other states to replicate Japan's record as host. It also suggests that, under certain conditions, Japanese companies might want to rethink their quiet, somewhat deferential stand against governmental actions which damage their investments abroad, and choose to arbitrate international disputes more often.

1. INTRODUCTION

Japan is the third largest economy in the world, and a net capital exporter, having the fourth-largest FDI outflows.² At the same time, Japan is predicted to be the thirteenth most attractive destination for multinational companies in the next two years.³ However, its role in international investment law has been described as passive.⁴ Is this description accurate? If so, how can we explain Japan's government's and investors' attitude towards international investment law and dispute resolution?

On the one hand, Japan needs more inflowing FDI.⁵ There are at least three sectors where Japan is aiming at attracting foreign money: renewable energy, life sciences, and the information and communication industry (ICT).⁶ First, after the 2011 earthquake and tsunami, the Japanese government focused on replacing nuclear power plants with renewable energy sources. Second, many foreign pharmaceutical and medical devices companies have recently entered or want to enter Japan because it is the second-largest market globally. Third, ICT represents 11% of the Japanese market, and needs funds to expand data traffic, big data analysis, and ERP. These large scale investments require foreign funds. At the same time, investors will demand legal protection for their money.

* I am grateful for the interviews with several Japanese government officials, judges, practitioners, and academics in Tokyo and Osaka during March 2016.

¹ Japanese proverb. Meaning: 'A word of mediation at the right time is blessed.'

² Third if Hong Kong and China are counted as one. Otherwise, Japan had the fourth largest FDI outflow in 2013-2014. Previously, Japan ranked second. See 2015 UNCTAD's Report on World Investment, figure 1.8, at 8, at unctad.org/en/PublicationsLibrary/wir2015_en.pdf

³ For 2015-2017. See 2015 UNCTAD's Report on World Investment, Id., figure 1.28, at 26.

⁴ Shotaro Hamamoto, *A Passive Player in International Investment Law. Typically Japanese?*, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 53 (Vivienne Bath and Luke Nottage eds., Routledge, 2012).

⁵ The Abe administration wants to double the outstanding amount of FDI in Japan to ¥35 trillion by 2020. See Japan's Revitalization Strategy, Revised in 2014, Jun. 24, 2014, at www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf See also *Increasing FDI in Japan*, The Japan Times, Jul. 23, 2014, at www.japantimes.co.jp/opinion/2014/07/23/editorials/increasing-fdi-japan/#.VwqMDvkrLIU

⁶ Japan External Trade Organization (JETRO), Attractive Sectors, at www.jetro.go.jp/en/invest/attract.html

On the other hand, Japanese investors are increasing their FDI share in developing countries in Asia and Africa.⁷ And they also have the intention of strengthening their presence in Latin American countries facing the Pacific Ocean.⁸ Several of these economies are in the process of opening, or have recently opened, to foreign markets. The rule of law might still be weak there. Japanese investors will want to increase the levels of protection of their investments.

Other capital exporting countries have opted to approach FDI growth by engaging in international law and signing more international investment agreements (IIAs). Likewise, their investors have increasingly filed ISDS claims. Is Japan's current role in international investment law adequate to protect outflowing and inflowing FDI in a contentious world?

2. JAPAN'S INTERNATIONAL INVESTMENT AGREEMENTS

2.1. A Net Capital Exporter with a Somewhat Quiet Role in Investment Protection

Japan has lagged behind other capital exporting nations in concluding IIAs. Before 2000 it had BITs with only 6 countries.⁹ And to date it has signed only 28 BITs,¹⁰ and 13 EPAs.¹¹ This is a huge contrast with several other developed countries, whose IIAs range above 100.¹²

⁷ JETRO, Japan's FDI Flow, By Country and Region, Outward, at www.jetro.go.jp/en/reports/statistics/

⁸ *Pacific Pumas*, THE ECONOMISTS, Nov. 15, 2014, at www.economist.com/news/special-report/21631801-america-backyard-pacific-economies-are-learning-east-asia-pacific-pumas

⁹ Louis T. Wells & Chieko Tsuchiya, *Japanese multinationals in foreign disputes: Do they behave differently, and does it matter for host countries?*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 727 (Karl P. Sauvant ed., Oxford, 2012).

¹⁰ 11 of them were in force by March 2016.

¹¹ 24 of them were in force by March 2016.

¹² Germany has signed 156 BITs, plus other 73 IIAs. The United Kingdom has signed 110 BITs and other 73 IIAs. And the United States, 47 BITs and other 67 IIAs.

Japanese arbitrators are also nearly unknown in the investment arbitration world¹³ in spite of Japan being a member of ICSID since 1965¹⁴ and having designated people to the ICSID panels of arbitrators and conciliators.

There might be a few reasons behind Japan's limited role in the international investment field. First, Japan has advocated for a multilateral pact, in the hope to obviate the need for bilateral treaties. Second, Japan has focused on liberalization or pre-establishment agreements. Third, the Japanese government has shown reluctance to engage in litigation or arbitration.

2.2. Japan's Support for Multilateral Agreements

Japan expressed its preference for multilateral agreements in several occasions.¹⁵ The country was actively involved in the failed OECD's Multilateral Agreement on Investment and suggested the need for a global investment treaty in other opportunities.¹⁶ It also put substantial effort in negotiating the ASEAN Comprehensive Investment Agreement.

After the lack of success of its global approach, Japan moved to promote FTAs (in a fashion similar to that of the US and the UE) in 2002.¹⁷ Additionally, Japan reconsidered its opposition to BITs and bilateral EPAs. Then again, its approach has differed from that of major BIT promoters.

2.3. Japan's Focus on Liberalization Agreements

Since 2002 the Japanese government has focused on signing liberalization agreements with developing economies. Unlike traditional IIAs, liberalization treaties aim at setting up the conditions for

¹³ In 2013 ICSID nominated for the first time a Japanese national, Yasuhei Taniguchi, to sit in an ICSID annulment proceeding (EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23).

¹⁴ The Convention came into effect for Japan in 1967. See Yoshimi Ohara & Shuji Yanase, *Japan*, ASIA ARBITRATION HANDBOOK 49 (Michael Moser & John Choong eds., Oxford, 2012).

¹⁵ See Japan's submission on Article XXIV of GATT in the 1989 Uruguay Round.

¹⁶ Japanese Government's Communication, *Consideration of Necessity of Multilateral Investment Rules from Diversified Viewpoints*, April 11, 2003, WT/WGTI/W/158 (WTO Doha Round).

¹⁷ See Ministry of Foreign Affairs, *Japan's Basic Strategy for the WTO New Round Negotiations*, Oct. 4, 2002 and *Japan's FTA Strategy*, Oct. 2002.

new investments by protecting the pre-establishment commitments, frequently in formerly closed economies.

To date, Japan's has signed 11 liberalization BITs¹⁸ (that is, more than half of the post-2002 BITs include pre-establishment commitments.) These treaties vary significantly in content. One of the reasons for this is that Japan does not have a model BIT; and it is not so easy to identify common patterns in Japan's IIAs. This indicates Japan might be accommodating to each of its partners' specific demands during negotiations.¹⁹

Japan has also preferred EPAs and FTAs over BITs. EPAs have the purpose of engaging its signatories in economic integration; are tailor-made to suit specific circumstances; focus on development; take account of socio-economic circumstances; allow transition periods; provide scope for wide-ranging trade co-operation on regulatory standards; create institutions which monitor the implementation of the agreements and address trade issues; among other things. EPAs also usually include an investment chapter and always have pre-establishment commitments. Given the extensive coverage of EPAs/FTAs, they supersede the need of BITs. Currently, Japan has signed EPAs/FTAs with 13 countries,²⁰ and is negotiating another 7 treaties.²¹

When consulted about the elements they consider when approaching new partners to sign IIAs, Japanese government officials pointed to: actual investments from Japan and the prospects of expansion; the need to improve the investment environment; requests made by Japanese investors; the counterparty's

¹⁸ BIT liberalization agreements include those with Korea, Vietnam, Cambodia, Laos, Uzbekistan, Peru, Kuwait, Myanmar, Mozambique, Colombia and Uruguay. All of them are currently in force, except for the Japan-Uruguay BIT signed in January 2015.

¹⁹ Officials at the Ministry of Economy, Trade and Industry (METI) expressed their view that it is essential to establish a win-win relationship with partners through a mix of policies which maintain the sustainability of investment protection.

²⁰ Singapore, Mexico, Malaysia, Chile, Thailand, Brunei, Indonesia, Switzerland, Philippines, Vietnam, India, Peru, Australia, Mongolia and TPP. All of them are in force, except the last two.

²¹ ASEAN, Canada, China and Korea, EU, RCEP and Turkey.

importance as a source of energy and mineral resources; political stability and governance capacity in the trade partner; and the political and diplomatic significance of the IIA.

This policy might also explain why Japan signed the Trans-Pacific Partnership. Japan formally joined negotiations to establish a Trans-Pacific Partnership in July 2013,²² six years after the initial talks started. Despite considerable domestic opposition by the farm, fishery, and forestry sectors, as well as consumer protection groups, Japan still chose to join TPP.²³ This appears to be consistent with Japan's historic preference for multilateral agreements, as well as its current policy advocating for comprehensive integration agreements, as oppose to BITs.

3. JAPAN AS HOST STATE

3.1. Initial Access to the Market Presents Certain Difficulties

Japan's inward investment is rather lower than one would expect given the size of its economy. One of the reasons is the relative difficulty in entering the Japanese market and the ease of doing business. Japanese law requires notification of foreign investments (before²⁴ or after²⁵ an investment is made). And it prohibits access of foreign investment to certain markets.²⁶ The government can also block specific investments (though rarely does so).²⁷ Nevertheless, these rules are not unusual for several developed and developing countries across the globe.

²² William H. Cooper & Mark E. Manyin, *Japan Joins the Trans-Pacific Partnership: what are the implications?*, U.S. CONGRESSIONAL RESEARCH SERVICES, Aug. 13, 2013, at www.fas.org/sgp/crs/row/R42676.pdf

²³ *Abe Declares Japan Will Join TPP Free-trade Agreement*, THE JAPAN TIMES, Mar. 16, 2013, at www.japantimes.co.jp/news/2013/03/16/business/abe-declares-japan-will-join-tpp-free-trade-process/#.Vwrnm_krLIU

²⁴ For investments that might affect national security, disturb public order, hinder the protection of public safety or bring significant adverse effect to the management of the Japanese economy. *See* Article 27(1), (3)(i)(a) and (b) of the Foreign Exchange and Foreign Trade Act (No. 28 of 1949).

²⁵ This is the general rule under Article 55-5 of the Foreign Exchange and Foreign Trade Act (No. 28 of 1949).

²⁶ E.g. see Article 3 of the Ship Act (No. 46 of 1899); Article 17 of the Mining Act (No. 289 of 1950); Article 5(1) of the Radio Act (No. 131 of 1950); and Articles 52-13 and 52-30 of the Broadcast Act (No. 132 of 1950).

²⁷ There has only been one case in which the Japanese government recommended to change or discontinue the investment. *See* Shotaro Hamamoto, *Japan's National Report*, in THE LEGAL PROTECTION OF FOREIGN INVESTMENT 456 (Wenhua Shan ed., Hart Publishing, 2012).

The significant presence of regulation in many areas means the regulatory environment is less conducive to doing business than other major economies.²⁸ Additionally, the practice of administrative guidance²⁹ might seem unusual and discouraging to some foreign investors.³⁰

However, some authors suggest caution against attributing the low level of inward FDI to domestic regulations, by pointing out that 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.³¹

3.2. Japan Has Never Been a Respondent in Investment Claims

Foreign investors have not filed ISDS claims against Japan as a host state. This is remarkable given the importance of Japan's economy. And although developed countries are not often on the receiving end of investment claims, most major economies have been respondents at some point.³²

There are several possible initial explanations to Japan's record. First, foreign investors might not be protected by IIAs. Second, investors might come from countries without a contentious approach to dispute resolution. Third, the industries in which foreign investments are focused might not typically be object of ISDS. Let us analyze these hypotheses below.

The main foreign investors in Japan come from the United States, the Netherlands, France, Singapore, the United Kingdom, Cayman Islands, and Switzerland. Together they hold 82.5% of current

²⁸ In 2015, Japan ranked 34th in the World Bank's Ease of Doing Business Index (where 1=most business-friendly regulations), at data.worldbank.org/indicator/IC.BUS.EASE.XQ

²⁹ K. Yamanouchi, *Administrative Guidance and the Rule of Law*, in JAPANESE LEGAL SYSTEM 176-178 (Merryl Dean ed. Cavendish, 2002); and Merryl Dean, *Administrative Guidance in Japanese Law: A Threat to the Rule of Law*, in JAPANESE LEGAL SYSTEM, Id., at 178-180.

³⁰ That is, depending on the nationality of the foreign investors. Several other countries have less friendly forms of administrative agency's informal suggestion on the way of conducting their business.

³¹ Luke Nottage & Shotaro Hamamoto, *Japan*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 347-348 (Oxford, 2013).

³² E.g., there are 17 cases filed against the United States of America under NAFTA. *See Cases Filed Against the United States of America*, U.S DEPARTMENT OF STATE, at www.state.gov/s/l/c3741.htm

investments.³³ The main invested sectors are finance, insurance, information, telecommunication and real estate.³⁴

Japan has not signed IIAs with any of those countries, with the exception of the EPA with Switzerland.³⁵ That is to say, investors from those countries will not have the alternative of ISDS should a controversy arise. However, this is not the case for most of the remaining investors, particularly those from Asia. Apart from this, it is worth mentioning that given the need and option to do so, American, British, French and Dutch investors are highly likely to use ISDS.³⁶

As regards the economic areas of investment, globally, finance and construction each account for 7% of all the cases registered in ICSID, and information and communication for another 6%. However, foreign investment in Japan is not as strong in the energy, infrastructure, and other more contentious industries, which add up to nearly 50% of ICSID's caseload.³⁷

This analysis could change: if and when the TPP enters into force, American and Canadian investors could file claims against Japan; if foreign investors focused on the energy industry, since Japan is a member of ECT; and if Chinese investors increase their presence in Japan, once the trilateral investment treaty with China and Korea enters into force.

Another hypothesis that could explain Japan's actions as host could reside in its legal culture. According to Japanese legal tradition, foreign investors are likely to find government's actions to be redressed through conciliation.

³³ JETRO, *supra* note 7, FDI Flow by Country and Region, 2014.

³⁴ JETRO, *Id.*, FDI Flow by Industry.

³⁵ In effect since September 2009.

³⁶ As shown by the large number of claims filed by investors from these countries in ICSID. See *Investor-State Dispute Settlement: Review of Developments in 2014*, UNCTAD, IIA Issue Note, No. 2, May 2015, at 3.

³⁷ ICSID Caseload – Statistics (Issue 2016-1), at 12, at [icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](http://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf)

3.3. A Culture of Conciliation

Japanese government officials have expressed in more than one occasion that they always prefer an amicable settlement rather than being a respondent in ISDS or litigation. That is, if a conflict were to arise between an investor and Japan as a host state, the government would try and find a solution for the investor's claims. This willingness to hear the investor's petitions is utterly different to the approach many other host states adopt, where it is usual that government officials will not respond to investors' requests for meetings to discuss any problems investors might face.

The Japanese frequently use conciliation methods rather than adjudication. This choice can take place both out-of-court and in-court. Procedures used in Japanese courts are often court-annexed mediation instead of adjudication.³⁸ During the proceedings of a case, Japanese courts will invite and encourage the parties to settle their dispute.³⁹ If there is litigation, a consent-based settlement is expected to be reached in court under the supervision of a judge (often referred to as voluntary resolution). A moderate estimate reckons that 65% of cases in district courts and summary courts are resolved by conciliation or settlements with some form of judge intervention.⁴⁰ And in 2014 34.5% cases were settle during litigation.⁴¹

Nevertheless, some argue that Japanese are often mislabeled as being non-contentious, where in fact there might be institutional barriers to litigation.⁴² While others focus on Japanese's preference for compromise as a means for solving a dispute.⁴³

4. JAPANESE OUTFLOWING INVESTMENT

³⁸ Hiroshi Takahashi, *Towards an Understanding of the Japanese Way of Dispute Resolution: How is it Different from the West?*, in THE CHANGING ROLE OF LAW IN JAPAN 98 (Vanoverbeke, Maesschalck, Nelken & Parmentier eds, Elgar, 2014).

³⁹ Settling is such an integral part of the Japanese legal system that citizens without legal training are allowed to participate as conciliation commissioners to encourage the parties to reach an amicable solution in various types of civil and domestic disputes; and judicial commissioners to assist summary court judges to arrange a settlement.

⁴⁰ Takahashi, *supra* note 38, at 107.

⁴¹ 141,006 civil and administrative cases and 48,683 were resolved by settlements in 2014. *See* Courts in Japan, at www.courts.go.jp/app/files/toukei/908/007908.pdf (in Japanese).

⁴² Takahashi, *supra* note 38, at 100.

⁴³ Y. Kusano, *A Discussion of Compromise Techniques*, in JAPANESE LEGAL SYSTEM, *supra* note 29, at 427.

4.1. Japan's Large FDI Outflow Is Not Accompanied by a High Number of Disputes

In 2014 Japan's outward FDI amounted to \$119.7 billion, compared to the \$9 billion of inflow.⁴⁴ The main investment destinations were the United States (\$42.1 billion), the UK (\$8.2 billion), Singapore (\$7.5 billion), China (\$6.7 billion), Thailand (\$5.1 billion), and Indonesia (\$4.4 billion).⁴⁵ Japanese companies have also diversified the location of their investments and increased their presence in South East Asia (\$20.3 billion) and Africa (\$1.4 billion).

While Japan's FDI outflow currently ranks fourth in the world, after the United States, China and Hong Kong, Japanese investors have very rarely used ISDS. This is in spite of the tremendous growth of ISDS in the last 15 years.⁴⁶

Currently there are only three cases where Japanese investors have brought investment claims against sovereign states: two against Spain,⁴⁷ and one against Ecuador.⁴⁸ While a few others concluded recently.⁴⁹ None of these claims, however, had been brought pursuant to a Japanese BIT, EPA or FTA. The cases against Spain rely on the ECT, and the one against Ecuador was commenced under a contract clause.

What follows is a brief analysis of how Japanese investors deal with conflicts abroad, and whether that is always the best approach.

4.2. The Government Still Espouses Investors' Claims

⁴⁴ JETRO, *supra* note 7, Japan's FDI Flow, By Country and Region, Outward and Inward.

⁴⁵ JETRO, *Id.*

⁴⁶ E.g., between 2000 and 2015 there have been 480 cases registered by ICSID under the ICSID Convention and another 41 under the Additional Facility Rules. *See* ICSID Caseload, *supra* note 37, at 7.

⁴⁷ JGC Corporation v. Kingdom of Spain (ICSID Case No. ARB/15/27); and Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/4).

⁴⁸ Ecuador TLC S.A. (Ecuador), Cayman International Exploration Company S.A. (Panamá), and Teikoku Oil Ecuador (Islas Caimán) v. República del Ecuador, Secretaría de Hidrocarburos del Ecuador, and Empresa Pública de Hidrocarburos del Ecuador EP Petroecuador, (PCA 2014-32).

⁴⁹ Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15) in 2014; Saluka Investments B.V. v. The Czech Republic (UNCITRAL) in 2008.

Japanese government officials have acknowledged they espouse claims by Japanese investors abroad. Investors report the difficulties they have experienced to the Japanese embassy in the host country, as well as to the Ministries of Economy (METI) and Foreign Affairs (MOFA). Embassies frequently send letters to host states on behalf of investors, if needed. Lobbying, the intervention of the Japanese External Trade Organization, and the use of sub-committees created by EPAs/FTAs are other available options.⁵⁰ The Japanese government might also provide temporary financial assistance to companies facing regulatory or other type of pressure by the host state.

Once an investor has filed a request for arbitration, the government will stop advocating for the company's claim or providing advice. At that point, the investor will exclusively depend on their attorneys.

4.3. Japanese Investors are Leaving Money on the Table

There are several reasons why one could expect that at this point there would have been more ISDS cases where Japanese companies were claimants. First, until 2013 Japan had the second largest FDI in the world. Second, Japanese companies have investments in dispute-prone industries,⁵¹ and in countries that have been respondents in ISDS.⁵² Third, Japanese companies have faced problems amounting to breach of standards of investment protection in several occasions.⁵³ However, almost every time they have decided to renegotiate, or accept the change to the original terms and conditions of the investment. Even at a loss.

Japanese companies' attitude towards Investor-State dispute resolution ranges from caution to total rejection. Some of the reasons mentioned by businessmen and in-house counsel to their lawyers and to government officials to justify their reluctance to resort to international arbitration include: concerns about

⁵⁰ Wells & Tsuchiya, *supra* note 9, at 736.

⁵¹ Including energy, ports, water-supply. *See* Wells & Tsuchiya, *Id.*, at 721.

⁵² Particularly, in South East Asia and Latin America.

⁵³ According to practitioners and in-housed counsels interviewed for the purpose of this paper.

worsening the relations with the host state, the cost and time of arbitration, and worries that the company's image might be damaged should they lose a case.

Finally, if there were desire to use IIAs, there might not be one applicable with the host state (given the significantly smaller number of IIAs signed by Japan). Of the main destinations of Japanese FDI's, Japan current does not have an IIA in force with the United States, the UK, Brazil, Germany, France, The Netherlands, Luxemburg, Sweden, South Africa, Canada, Cayman Islands, and New Zealand. Similarly, in a few cases, an existing treaty might not provide enough protection.⁵⁴

Corporate culture might also have a role to play here. Some authors comment that if a Japanese business person fails to prevent a disagreement from evolving into a dispute, or to find a solution to an existing controversy, and thus has to resort to conciliation by a third party, arbitration or litigation, their managers or supervisors will deem this as a failure in the performance of their obligations.⁵⁵

Above all, Japanese companies come from a culture where the relationship with the government is cemented on prudence, administrative guidance, conciliation, and settlement, where the fear of losing might be the greater than in the West.

But, in order to have a cordial relationship with the host states, Japanese companies are leaving money on the table. When interviewed, top practitioners in Japan mentioned that when they understand their client has a good case, more often than not they advise to pursue ISDS in one of the several international arbitration venues, under an IIA or a contract. Clients, however, almost always discard this alternative.

4.4. Why Japanese Investors Should Embrace International Arbitration

⁵⁴ E.g., the Japan-Philippines EPA and the Japan-Australia do not provide for ISDS.

⁵⁵ Shuji Yanase, *Bilateral Investment Treaties of Japan and Resolution of Disputes with Respect to Foreign Direct Investment*, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 434 (Albert Jan van den Berg ed. Kluwer, 2003).

The rest of the world does not look like Japan. Many host states might not respect the international protection standards, investment laws or contractual rights. Most, if not all, host states do not share the pro-conciliation culture Japanese investors are used to inside Japan.

Some Japanese companies believe that it is highly likely that ISDS will destroy their good relationship with the government and the local public.⁵⁶ However, in many cases the breach of standards of protection a Japanese company is suffering comes in a broader context, where the host state has been taking direct or indirect actions to expropriate a large group of investments in a particular industry,⁵⁷ or location. Similarly, a host state might be in a period of re-nationalization after a having concluded a privatization program for public utilities, the energy sector, or other highly regulated industries years before.⁵⁸

In most of these cases, foreign investors will be the usual targets of expropriation or other governmental actions. And if host states are aware that certain investors are unwilling to use ISDS to protect their interests, those types of investors might more often find themselves as target of governmental actions that might negatively affect their investments.

Lack of diversification of the company's investment in the host state is another good reason to resort to ISDS. If a particular company does not have multiple interests in the host state because they have only invested in one industry or business, that company should not hesitate to defend its rights through ISDS, if needed. Once a host state has caused a significant breach that affects the investors' only or main interest, fear of retaliation by the host state should be significantly reduced.⁵⁹

ISDS should not be seen as the last resort for dispute resolution. Several host states will only be willing to engage in negotiation once a request for arbitration has been filed, or a bit later, after coming to

⁵⁶ LOUIS T. WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY 291 (Oxford, 2007).

⁵⁷ As it has been the case in, e.g. the oil & gas industry in Venezuela.

⁵⁸ As in some of the cases where Argentina was a respondent.

⁵⁹ Some authors argued that Japanese investors might be constrained by diversified investments. This, however, is an empirical claim that must be analyzed in a case by case basis. See Wells & Tsuchiya, *supra* note 9, at 725.

realize during a hearing that their defenses are not likely to be successful. Filing an RFA is one of the few instruments of negotiation some hosts take seriously. And settlements after a claim has been registered are far from unusual.⁶⁰ In any case, it is important to highlight that investors' claims against foreign states have often found reception in ISDS tribunals.⁶¹

To a great extent, the question of whether it is better to renegotiate (or to suffer a temporary loss) than to resort to ISDS is an empirical one. In the long run, do Japanese companies which declined to arbitrate a dispute and stayed in the host state made more or less money than those foreign investors that filed an RFA (and sometimes left)?

However, the same problem could be seen as an analysis of the benefits of signaling that a multinational company is not willing to accept any breach of standards of investment or of the terms of a contract, and that has sufficient power (and support in the rule of law) to file a claim against a sovereign. That signal will extend beyond the respondent state in a given dispute.

Some years ago Japanese companies began expressing a desire for more protection of their international investments. The Japanese Business Federation⁶² identified a list of countries which currently receive investments from Japan and where there is no protection,⁶³ others where there is an strategic need to promote liberalization in views of future investments,⁶⁴ and finally, some others with which a review of

⁶⁰ Among the disputes settled and proceedings otherwise discontinued under the ICSID Convention and Additional Facility Rules: 15% are settlement agreements embodied in an award at parties' request; and 47% are discontinued at the requests of both parties. *See* ICSID Caseload, *supra* note 37, at 14-15.

⁶¹ 46% of the disputes decided by arbitral tribunals under the ICSID Convention and Additional Facility Rules have final awards upholding the claims in part or in full. *See* ICSID Caseload, *Id.*

⁶² *On the Improvement of Japan's Global Investment Environment Toward the Creation of a Legal Framework for Japanese Foreign Investment*, Nippon Keidanren, April 15, 2008; and *Requests on the International Operation by Small and Medium-Sized Enterprises*, Tokyo Chamber of Commerce and Industry, July 10, 2014.

⁶³ Brazil, South Africa, UAE (ongoing negotiations), Argentina, Venezuela, Colombia (BIT in force in 2015), Poland, Czech Republic, Hungary, Slovakia, and Rumania.

⁶⁴ Algeria (ongoing negotiations), Nigeria, Iran (BIT signed in 2016), Kuwait (BIT in force in 2014), Oman (BIT signed in 2015), Bahrain, Qatar (ongoing negotiations), Peru (BIT in force in 2009), Panama, Bolivia, Ukraine (BIT in force 2015), Kazakhstan (BIT in force 2015), Israel (ongoing negotiations), and Angola (agreement in principle).

the existing agreements would be desirable.⁶⁵ The Japanese government has taken notice of the request and signed or is in the process of signing treaties with some of these countries.⁶⁶ But, as pointed out, this has not materialized in a significant number of ISDS cases yet.

5. WHAT THE FUTURE MIGHT HOLD FOR JAPAN

Up until now it appears that IIAs have not influenced FDI outflows' allocation and protection. However, this might be because only large Japanese companies are the ones investing internationally. These companies have easier access to discuss with government officers the problems they face abroad. But in a world where start-ups are driving part of the economy, Japan might want to consider providing a legal framework of protection for new Japanese companies putting their abroad. IIAs might be a means of doing that. The other would be to make the Japanese aware of ISDS as an available tool to protect their investments, even if solely to use ISDS as a bargain chip to settle a dispute.

As regards inflowing FDI, Japan is trying to attract more investments in the energy sector. However, it currently limits foreign investment in that industry based on national security reasons.⁶⁷ Japan also reserves the right to restrict non-residents' investments in several other industries.⁶⁸ In the meantime, in 2015 the country imported 3.37 million barrels of crude oil per day, and 85.05 million tons of natural gas.⁶⁹ A more flexible regulation of foreign investment in the energy sector could be of help.

Finally, while Japan has never been a respondent in ISDS, if the TPP is approved and enters into force, this might change. Chapter 9 establishes a list of standards of investment that parties must abide by

⁶⁵ China, Russia.

⁶⁶ See brackets in notes 63-64 above.

⁶⁷ NAKATANI, KAZUHIRO, *Limiting Foreign Investment in the Energy Sector for National Security Reasons: the Case of Japan*, in PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES 315 (McHarg, Barton, Bradbrook & Godden eds., Oxford, 2010).

⁶⁸ Agriculture, forestry and fisheries; mining; oil; leather and leather products manufacturing; investment in air transport; investment in maritime transport; as well as foreign capital participation, direct and/or indirect, in Nippon Telegraph and Telephone Corporation (NTT) exciding one-third. See *OECD Code of Liberalization of Capital Movements*, 2013, Article 2 and Japan's List of Reservations, at 10 & 90.

⁶⁹ Ministry of Economy, Trade and Industry, Agency for Natural Resources and Energy, Japan's Energy Situation, March 2016, at 5.

and provides for dispute settlement proceedings, including ISDS.⁷⁰ The United States' companies are at the top of the list of claimants,⁷¹ and come from a litigious culture. In the event of disagreement with a government, it would be possible that they resort to international arbitration against their counterparties in the TPP, including Japan.⁷² In any case, Japanese government officials have expressed that their culture of conciliation will not change.

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⁷⁰ Articles 9.19 to 9.30.

⁷¹ On aggregate, United States' investors rank first in number of cases filed by 2014 (more than 120 known cases). See *supra* note 36, at 3.

⁷² This was one of the main arguments made by pro-consumer attorneys who currently oppose TPP in Japan.

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