

Why no investor–state arbitration in the Australia–Japan FTA?

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Australia and Japan finally concluded a [bilateral free trade agreement](#) ^[1] on 7 April 2014.



Some Australian media outlets had prior inklings that negotiations had achieved significant breakthroughs, especially for agricultural market access into Japan, but a frequent assumption was that Australia must have ‘given up’ something major in return. Concerns were expressed that this included measures favouring Japanese investors into Australia, especially protections from investor–state dispute settlement (ISDS, especially arbitration) provisions. These provide an extra avenue for foreign investors to enforce the substantive treaty rights limiting a host state’s capacity to illegally interfere with foreign investments (like through expropriation). They add to the (more politicised) inter-state arbitration procedure invariably included in investment treaties, as well as any rights under domestic law available through the host state’s court system — particularly [problematic in developing countries](#) ^[2].

ISDS provisions had been added to the South Korea–Australia FTA concluded in December 2013 by the Abbott government, which also declared that it was reverting to a [case-by-case approach to ISDS](#) ^[3]. This contrasted with the position taken by the 2011 Gillard Government Trade Policy Statement, which had reversed Australia’s longstanding treaty practice by declaring that it would not agree to any forms of ISDS in future treaties — even with developing countries. The 2012 Malaysia–Australia FTA omitted ISDS, although that was meaningless in practice as ISDS remains available to enforce similar substantive rights under the 2009 ASEAN–Australia–NZ FTA. Curiously, however, the new Australia–Japan FTA ultimately omitted ISDS provisions as well. Why is this, and what are the broader implications?

We will never really know the reason, as treaty negotiations are kept confidential, but presumably Japan (the net capital exporter, especially for FDI) did not push very hard for ISDS

— even though such protections [are included in almost all its other investment treaties](#) ^[4], including recently with Switzerland. The government would have consulted with key Japanese business groups, including the Nippon Keidanren which since 2000 has been pushing for ISDS, but large-scale Japanese investment into Australia (dating back to the 1960s) has not encountered major adverse treatment by Australian government authorities.

More generally, Japanese investors are still risk averse and prefer to take a long-term view if disputes arise, so they have not yet directly availed themselves of ISDS provisions provided in any Japanese treaty — even with developing countries. Japanese investors tend still to negotiate amicable settlements directly with the host state or through the informal good offices of their own government — although perhaps now more often ‘in the shadow of the law’, including international investment law, as evidenced by a Japanese aluminium joint venture’s [recent claim settled with Indonesia](#) ^[5] (albeit based on an arbitration clause in their contract, not a treaty).

In the FTA negotiations with Australia, the Japanese government may also have not wanted to press too hard to secure ISDS protections because this would probably have involved conceding even more access to Japan’s politically sensitive sectors, such as agricultural markets. Prime Minister Abe will already face fire domestically from rural voters, especially as the commitments made in this bilateral FTA will form a new benchmark for negotiating the expanded Trans-Pacific Partnership Agreement (TPP), involving other major agricultural products exporters including New Zealand and the USA. *[Prime Minister Abe would also have been conscious of some popular concern about ISDS generally, epitomised by a TV Asahi program [last year](#) ^[6] - although mainly from Opposition party members and supporters, and not as strong as in South Korea (in the context of its FTA with the US and a pending ICSID claim indirectly from a US investor).]*

Australian government negotiators were presumably happy enough with existing concessions, deciding that any extras offered from Japan in exchange for ISDS protections were not worth it.

By not agreeing to ISDS, the Abbott government also could signal that it expected better trade-offs to be offered in Australia’s other ongoing negotiations for bilateral FTAs negotiations (especially with China) and regional FTAs (the TPP, and Regional Comprehensive Economic Partnership [RCEP] or ‘ASEAN+6’ FTA). In addition, it could deflect some domestic political pressure from those cautious about foreign investment generally (linked to the government’s [rejection recently of a major US agri-business](#) ^[7] investment proposal) as well as ISDS (evident from the [Trade and Foreign Investment \(Protecting the Public Interest\) Bill 2014](#) ^[8], brought before the Australian upper house by a minority Greens Party senator from Tasmania — and therefore unlikely to be enacted).

Conversely, omitting ISDS holds little downside for Australia’s investors into Japan, as they have limited existing and likely flows of FDI into Japan (which anyway has a [high-quality court system and domestic law protections](#) ^[9] for all investors).

Nonetheless, omitting ISDS from the Australia–Japan FTA may have significant long-term consequences. What happens if Australia also ends up omitting ISDS with developed country negotiating partners in regional agreements such as the TPP, having done so already in its

bilateral FTAs — as with the USA (2004), New Zealand (2011), Malaysia (2012) and now Japan? If this occurs also with Singapore, Chile and Canada, which also have robust domestic law systems, then the other five TPP negotiating partners may also seek exclusion of ISDS — arguing that what is ‘[good for the goose is good for the gander](#)’^[10].

An ‘anti-ISDS’ mood might spread throughout other parts of Asia too, affecting also the RCEP negotiations, despite the gradual acceptance of treaty-based arbitration within the region — epitomised by the 2009 [ASEAN Comprehensive Investment Agreement](#)^[11]. After all, last year India [announced a ‘review’](#)^[12] of ISDS in their treaties, and last month [Indonesia declared that it wished to terminate its bilateral investment treaties](#)^[13] — although without mentioning its regional treaties or FTAs. Such postures are related to domestic politics, including general elections soon in both countries. But it should also not be forgotten that India, Vietnam, Thailand and Laos are still [not among the 150 states](#)^[14] that have ratified the 1965 International Centre for Settlement of Investment Disputes Convention, which provides further support for ISDS procedures.

Including or not including ISDS may not have held much significance for the Australia–Japan FTA itself, but its omission could have wider repercussions for the broader treaty-based arbitration system.

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A version of this article was also published [here](#)^[15] on the ‘Japanese Law and the Asia-Pacific’ blog.

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URL to article:

<http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>

[1] bilateral free trade agreement:

<http://media.smh.com.au/news/federal-politics/japan-free-trade-deal-clinched-5331474.html>

[2] problematic in developing countries:

<http://www.eastasiaforum.org/2012/05/14/indonesian-investments-and-international-treaty-law/>

[3] case-by-case approach to ISDS:

<http://www.eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/>

[4] are included in almost all its other investment treaties:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999

[5] recent claim settled with Indonesia:

http://www.ashurst.com/publication-item.aspx?id_Content=10053

[6] last year:

http://blogs.usyd.edu.au/japaneselaw/2013/06/what_do_australia_and_others_e.html

[7] rejection recently of a major US agri-business:

<http://www.smh.com.au/federal-politics/political-opinion/any-way-the-wind-blows-tony-abotts-conflicting-messages-to-business-20131206-2ywpb.html>

[8] Trade and Foreign Investment (Protecting the Public Interest) Bill 2014:

http://blogs.usyd.edu.au/japaneselaw/2014/04/bill_vs_isds.html

[9] high-quality court system and domestic law protections:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999

[10] good for the goose is good for the gander:

<http://blogs.usyd.edu.au/japaneselaw/2010/08/pc.html>

[11] ASEAN Comprehensive Investment Agreement:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331714

[12] announced a
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http://articles.economictimes.indiatimes.com/2013-04-17/news/38616367_1_canada-india-business-council-indian-high-commissioner-protection-agreement

[13] Indonesia declared that it wished to terminate its bilateral investment treaties:

<http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz2yGcfJXCQ>

[14] not among the 150 states:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>

[15] here: http://blogs.usyd.edu.au/japaneselaw/2014/04/why_no_isarb_with_japan.html