

THE JAPAN-ANGOLA BILATERAL INVESTMENT TREATY

INTRODUCTION

On 9 August 2023, Japan and Angola signed a bilateral investment treaty named 'The Agreement between Japan and the Republic of Angola for the Liberalisation, Promotion and Protection of Investment' (Japan-Angola BIT or BIT). It is expected that the treaty will be ratified and enter into force in 2024. This treaty expands Japan's treaty programme in Africa more generally becoming Japan's sixth BIT signed with an African country. The others comprise: Cote d'Ivoire (2020), Egypt (1978), Kenya (2016), Morocco (2020) and Mozambique (2013).

The signing of the Japan-Angola BIT is significant because it reflects the Japanese government's desire to protect Japanese corporations with current or future investments in Angola. It also demonstrates an interest from the Angolan government in attracting more investment from Japan. A statement from the Japanese Ministry of Foreign Affairs explains further:

*"In an effort to diversify and stabilise its economy, Angola is actively working to attract foreign investment by promoting improvements in the investment environment and legislation, including anti-corruption measures, fiscal and financial reforms as well as reforms of the foreign exchange system. Angola is one of the largest economies in Sub-Saharan Africa, while being one of the largest oil producers in Africa and has a high potential for economic growth with abundant mineral resources. Japanese companies are strongly attracted to Angola and their investment in the country is expected to continue to grow."*¹

As indicated in this statement, there are significant investments from Japanese companies in the oil, gas and mineral resources sectors in Angola but there are also growing investments from Japanese companies in the fields of construction, technology and professional services.

Backed up with an international arbitration clause, the Japan-Angola BIT creates wide-ranging and enforceable rights for Japanese investors in Angola. The treaty can therefore be used as a means to mitigate political risks although there are various limitations of which Japanese investors should be aware.

This briefing explains who and what are covered by the treaty, the nature of the protections and how they may be enforced. It also notes some unique features of the treaty. In particular, this treaty provides access to investor-state arbitration not only for breaches of the obligations on Japan and Angola created by the treaty but also for obligations that are contained in any separately concluded investment agreements (as defined further in the BIT).

Key issues

- Wide-ranging investment protections granted under the Japan-Angola Investment Treaty:
- Signed on 9 August 2023 this is Japan's sixth investment treaty signed with an African country.
- The treaty contains robust protections for Japanese investors in Angola and Angolan investors in Japan.
- The protections are subject to various limitations and exclusions.
- Investment protection is given "teeth" by providing for investor-state dispute settlement ("ISDS") in the form of a detailed arbitration clause.
- The ISDS mechanism under the treaty can be invoked if Angola breach the treaty or for disputes arising under a Japanese enterprise's "investment agreement" with Angola.
- Signing of this treaty continues the Japanese Government's push to expand its investment treaty protection for Japanese investors in Africa.

¹ https://www.mofa.go.jp/press/release/press7e_000027.html

A WIDE RANGE OF BUSINESS INTERESTS ARE PROTECTED

Who and what is covered?

The Japan-Angola BIT protects "*investors*" from Japan and Angola. The definition of "*investor*" includes Japanese and Angolan nationals as well as "*enterprises*". An "*enterprise*" is defined broadly to cover most forms of company, organisation, trust, partnership or other legal form of association that is "*duly constituted or organised under the applicable laws and regulations*". However, as is commonly the case in investment treaties of this kind, there is a 'Denial of Benefits' clause (Article 22) which excludes Japanese or Angolan enterprises from taking advantage of rights conferred by the treaty if such enterprises are subject to the majority ownership or control of a foreign third party that does not have "*substantial business activities*" in Japan or Angola (as applicable). Whether or not the person or enterprise from the third-party state has "*substantial business activities*" is a matter that has been the subject of dispute before international tribunals. Factors that may be taken into consideration in determining whether the requirement has been satisfied include whether the relevant entity has a physical office or pays tax in their home state.

An "*investment*" protected under the Japan-Angola BIT is also defined widely and includes property rights, shares, stocks, bonds, debentures, intellectual property rights, licences, rights under contracts and other assets. Reflecting the industries the subject of existing Japanese investment in Angola rights "*turnkey, construction management, production or revenue sharing contracts*" are expressly included in the definition as well as "*industrial designs*" and "*concessions, licences, authorisations and permits, including those for the exploration and exploitation of natural resources*".

The investment protections created by the Japan-Angola BIT have additional depth as they will apply to investments made prior to or after the entry into force of the BIT.

WHAT PROTECTIONS ARE AVAILABLE?

Amongst *other* rights, the Japan-Angola BIT includes the following key protections for covered foreign investors and investments:

National treatment (Article 2): this prohibits discrimination based on an investor's nationality. In other words, Japanese investors in Angola are entitled to the same treatment that Angola grants to Angolan investors.

Protection from expropriation and nationalisation (Article 12): Japan and Angola may not unlawfully expropriate or nationalise investments covered by the Japan-Angola BIT except for a public purpose, in accordance with due process on a non-discriminatory basis and accompanied by payment to the investor by the state of "*prompt, adequate and effective*" compensation.

Fair and equitable treatment (FET) (Article 4): Japanese investments must be treated in a fair and equitable manner by Angola. This protects against discriminatory or arbitrary treatment and governmental measures that violate the investor's legitimate expectations. However, the FET standard in this treaty is limited to the "*customary international law*" standard, which arguably offers a lower standard of protection than other types of FET clauses found in

investment protection treaties (although Japan typically qualifies its FET clauses in this manner).

Full protection and security (FPS) (Article 4): Angola must provide physical protection (e.g. police or military protection) to Japanese investments, which must be at least the same as the protections provided to Angolan nationals. Notably, this protection is also linked to the "*customary international law*" standard. However, it is also bolstered by provisions concerning 'Protection from Strife' (Article 13) which seek to ensure equality for covered investors in entitlement to compensation made as a result of losses caused by civil war, revolution or other kind of violent disruption.

Prohibition of performance requirements (Article 6): this Article prohibits the imposition by on covered investors of conditions on the management or operation of covered investments such as import/export quotas or requirements to use locally produced goods or materials.

Free transfers (Article 15): subject to certain limitations, covered investors are entitled to free transfer of capital, profits, interests, royalties, fees, dividends, or other cashflows related to their investments.

Most-favoured nation treatment (MFN) (Article 3): Japanese investors covered by the BIT are entitled to be treated no less favourably than other foreign investors active in Angola. As is typical in Japan's investment treaties, this protection is limited to investors "*in like circumstances*" when compared to third party investors granted rights under other treaties. It also expressly excludes application to procedural rights (i.e. ISDS).

Rights and obligations under investment agreements

A unique and potentially powerful feature of the Japan-Angola BIT is that the dispute resolution clause provides consent to arbitration not only for disputes concerning rights and obligations created by the treaty but also for obligations Angola has agreed to in a separately negotiated investment agreement.

An "*investment agreement*" is defined in the treaty to include a written agreement between a Japanese investor and Angola which creates legally binding obligations under the applicable laws. These kinds of agreements are relatively common for major corporations making significant investments overseas. Such agreements usually contain similar protections for investors as those offered by the treaty including promises not to change certain laws or regulations for a fixed period of time (sometimes called "*stabilisation clauses*"). Investment agreements may also include more specific promises to investors, for example, they may include tax incentives or commitments to maintain certain tariffs or regulations for a defined period of time.

The Japan-Angola BIT creates a mechanism by which the investor-state arbitration clause in the treaty is incorporated into investment agreements even if those investment agreements have a different jurisdiction clause (e.g local courts). This is a significant advantage for investors that conclude an investment agreement with the state that does not already contain a robust arbitration clause (e.g. the right to arbitration that takes place outside the host state and is governed by international standards). The treaty therefore provides similar

protection to what is usually called an "umbrella clause" but is limited to rights and obligations contained in an "investment agreement".²

Limitations and Exclusions

Although the protections for investors provided by the Japan-Angola BIT are wide-ranging, there are various limitations and exclusions of which investors and potential investors should be aware. In particular, Article 16 contains an agreement that neither Japan or Angola is prevented from taking necessary measures aimed at protecting human health, animal or plant life, national treasures, public order and essential security interests. However, to fall under the exception, such measure cannot be a "*disguised restriction*", arbitrary or constitute "*unjustifiable discrimination*".

Another limitation on the protections in the BIT concerns existing measures which may be considered breaches of a party's obligation. Described as "Non-Conforming Measures" under Article 7, both Japan and Angola have included in Annex II a Schedule of Measures which exempt the listed measures from becoming actionable breaches in respect of either government's obligations to investors under Article 2 (national treatment), 3 (most-favoured nation) and 6 (prohibition of performance requirements). For example, the provisions of Angola's Mining Code, which limit the grant of mining rights to locally owned entities, are agreed not to be a breach of Article 2 (national treatment).

It is important for investors expecting to rely on the protections in the Japan-Angola BIT to be aware of potential exclusions and to consider carefully whether their investments might be better protected through alternate structures.

Enforceable rights and obligations

The Japan-Angola BIT contains an ISDS mechanism (Article 24) which allows investors to enforce rights granted under the treaty through international arbitration. Specifically, Japan and Angola consent to the submission of an investment dispute for arbitration either under the rules of the International Center for the Settlement of Investment Disputes (**ICSID**) or the Rules of the United Nations Commission on International Trade Law (**UNCITRAL Rules**). Both Japan and Angola are members of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (**ICSID Convention**).³ This means an arbitral award made in favour of a covered investor can be enforced in the territory of any member of the relevant convention.

This ISDS clause therefore provides covered investors with access to a dispute settlement process conducted outside the jurisdiction of either party. This mitigates the political risk associated with investments into Angola from Japan, which may in turn reduce the cost of capital for Japanese investors in Angola.

Investors should be aware that the dispute resolution clause requires the parties to a dispute to try and resolve any such dispute commercially prior to commencing arbitration. Additionally, the treaty seeks to impose certain time

² Umbrella clauses usually have the potential to elevate a breach of *any* promise or obligation by the state to an investor to an actionable breach under the treaty – such obligations do not typically have to be contained within an investment agreement.

³ Angola ratified the ICSID Convention in September 2022.

limits and notice requirements on investors who may commence arbitration proceedings under the treaty.

Further Information

Extensive guidance on investment treaty structuring and resolving disputes with foreign governments is available from Clifford Chance. This note is an overview only and is not legal advice. For further explanation on the protections available under the Japan-Angola BIT, please contact one of the individuals listed below.

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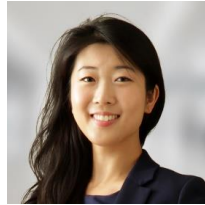
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