

THE JAPAN-ZAMBIA BILATERAL INVESTMENT TREATY

Introduction

On 6 February 2025, Japan and the Republic of Zambia signed a bilateral investment treaty titled, 'Agreement between Japan and the Republic of Zambia for the Promotion and Protection of Investment' (**Japan-Zambia BIT** or **BIT**). The BIT is expected to enter into force later this year after completing the necessary ratification procedures in both countries. This is the latest in Japan's mission to secure investor protection in Africa and is its seventh BIT signed with an African Nation. The others comprise: Angola (2023), Cote d'Ivoire (2020), Egypt (1978), Kenya (2016), Morocco (2020) and Mozambique (2013).

According to the Japanese Ministry of Foreign Affairs: "*Zambia focuses on anti-corruption measures, the rule of law and good governance, and is actively working to attract foreign investment while promoting debt restructuring with economic reform as one of its top priorities. Also, Zambia has great economic potential due to its rich mineral resources, including copper and cobalt, and is attracting strong interest of Japanese companies, which will bring growing investment in the country. This Agreement is expected to further promote the development of the investment environment and strengthen economic relations between the two countries.*"¹

As highlighted in this statement, Japanese companies have shown strong interest in Zambia's mining and mineral resources sectors. However, investment is also expanding into renewable energy, construction, chemicals, and tobacco industries. The Japan-Zambia BIT aligns with Japan's broader investment strategy in Africa and reinforces its long-term commitment to African economic development, a focus that has been reflected through initiatives like the Tokyo International Conference on African Development (TICAD).

The BIT reflects Japan's emerging 'standard' approach to investment treaties and provides a robust legal framework that grants Japanese and Zambian investors rights and protections, enforceable through an international arbitration clause. Importantly, the treaty includes an investor-State dispute settlement (**ISDS**) mechanism, which provides investors with an avenue for resolving disputes outside domestic courts, not only for breaches of the obligations on Japan and Zambia created by the treaty, but also for obligations that are contained in any separately concluded investment agreements (as defined further in the BIT).

This briefing explains who and what is covered by the treaty, the nature of the protections and how they may be enforced.

Key Takeaways

- Wide-ranging investment protections granted under the Japan-Zambia Investment Treaty.
- Signed on 6 February 2025, this is Japan's seventh investment treaty signed with an African country.
- The treaty contains robust protections for Japanese investors in Zambia and Zambian investors in Japan.
- The protections are subject to various limitations and exclusions.
- Investment protection is backed-up by an ISDS mechanism.
- The ISDS mechanism under the treaty can be invoked for breaches of obligations under the treaty or obligations arising under a separate "investment agreement".
- This is the 17th bilateral treaty signed by Zambia – the last treaty was signed 5 years ago.
- Signing of this treaty continues the Japanese Government's push to expand its investment treaty protection for Japanese investors in Africa.

¹ [MOFA Press Release: Signing of the Japan-Zambia Investment Agreement | Ministry of Foreign Affairs of Japan dated 6 February 2025.](#)

New protections for Japanese and Zambian investors

Who and what is covered?

The Japan-Zambia BIT protects "*investors*" from Japan and Zambia, which includes nationals of the two countries, and "*enterprises*". An "*enterprise*" is broadly defined to include most forms of company trust, partnership or other legal form of association that is "*duly constituted or organised under the applicable laws and regulations*". However, this is subject to a denial of benefits clause (Article 22) which excludes Japanese or Zambian 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 Zambia (as applicable). Ownership and control are defined as having over 50 percent equity in the enterprise or the ability to name a majority of directors, but '*substantial business activities*' can be more difficult to define and often the subject of arbitration disputes.

"*Investment*" is also defined very broadly, including any enterprise, equity, debt, rights under contracts, and tangible and intellectual property. Particularly significant in light of Zambia's potential for natural resource investment, is the specific inclusion of rights for exploration and exploitation of natural resources and the protection of indications of source or geographical indications, ensuring protection for valuable rights specific to the mining industry.

What protections are available?

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

National treatment (Article 3): Japanese and Zambian investors and their investments should be treated no less favourably than the local investors in the host State.

Most-favoured-nation treatment (Article 4): This protects investors by requiring both Japan and Zambia to treat investors from the other nation no less favourably than other foreign investors active in the host State. However, this protection is limited to investors "*in like circumstances*" when compared to third party investors granted rights under other treaties, which is typical in Japan's investment treaties. It also expressly excludes application to procedural rights (i.e. ISDS) and measures related to land acquisition, subsidies, government procurement, reciprocal treatment for third-party investors, certain international agreements, investment in public services, restricted industries, and fisheries within territorial waters and exclusive economic zones.

Fair and equitable treatment (Article 5): Japan and Zambia must treat investors from the other nation in a fair and equitable way, which protects against discriminatory, arbitrary treatment and government behaviour which violates investors' legitimate expectations. The standard is limited to the customary international law minimum standard of treatment of aliens, which is lower than the standard in some FET clauses found in investment protection treaties (although Japan typically qualifies its FET clauses in this manner).

Full protection and security (Article 5): Japan and Zambia must provide protection and security (i.e., police or military protection) to protect investors from the other nation and their investments. This must be the same as is provided to local investors of the state, but subject to the same customary international law standard.

Prohibition of Performance Requirements (Article 7): Japan and Zambia are prohibited from imposing conditions on the management of investments such as import or export quotas or requirements to transfer production, headquarters or a given value of research and development to the country.

Expropriation and compensation (Article 12): Japan and Zambia may not unlawfully expropriate or nationalise investments covered by the Japan-Zambia BIT. This protection is qualified in cases which are non-discriminatory and carried out with due process of law. Most importantly, there is a requirement that investors are promptly and effectively compensated for any nationalised or expropriated investments.

Intellectual Property Rights (Article 19): This requires states to provide effective protection for investors' intellectual property rights and to adopt measures to create a system which effectively protects these rights.

Rights and obligations under investment agreements

The dispute resolution clause in the Japan-Zambia BIT protects investors and investments by granting consent to arbitration not only for disputes concerning rights and obligations under the treaty, but also for those arising from breaches of separately negotiated investment agreements between investors and either government. These 'investment agreements' are written agreements between the central or local government of Japan or Zambia and an investor from the other country. For example, if a Japanese company were to enter into an agreement with the Zambian government, it would be able to rely on the terms of the BIT to enforce its rights, in particular the right to arbitrate its dispute.

Limitations and Exclusions

Although the protections for investors provided by the Japan-Zambia BIT are wide-ranging, there are various limitations and exclusions of which investors or potential investors should be aware. Article 16 creates exceptions to the general protections in cases where measures are needed to protect human, animal and plant life, maintain public morals or sites of archaeological value, among other concerns. Importantly, this is qualified by the fact that such measures must not be used as 'a means of avoiding its obligations' nor discriminatory against protected investors. These exceptions to general protection are particularly important in the wake of the COVID-19 pandemic where governments had to take swift actions which caused harm to commerce and therefore investors.

Enforceable rights and obligations

Article 24 contains a detailed and carefully drafted dispute resolution clause. In the event a dispute between a state and an investor cannot be resolved through negotiation, either party may submit the dispute to arbitration. The treaty designates two primary rule sets from which the investor may choose: the rules of the International Centre for the Settlement of Investment Disputes (**ICSID**) and the Rules of the United Nations Commission on International Trade Law (**UNCITRAL Rules**), under which Japan and Zambia consent to arbitration. However, the parties may mutually agree to apply a different set of rules. Arbitral awards issued via the UNCITRAL Rules process are enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) while ICSID awards are enforceable under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (**ICSID Convention**). This means an arbitral award

made in favour of a covered investor can generally be enforced in any jurisdiction that is a member of the relevant convention.

These ISDS provisions provide investors with important protections by granting access to an independent dispute resolution process outside the jurisdiction of either state. This mitigates the political risk for Japanese investors in Zambia, which may in turn reduce the cost of capital for Japanese investors in Zambia.

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, Article 24 contains 'a fork-in-the-road' clause, requiring investors to choose between arbitration and domestic courts. Legal advice on this point should therefore be taken before taking a step in any legal proceedings.

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-Zambia BIT, or if you would like to know more about using investment treaties to protect your international investments more generally, please contact one of the individuals listed below.

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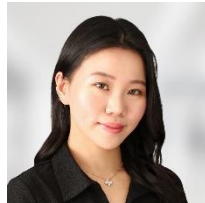
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