TEXT BY TOBY WATERS

Dealing with disputes under the EPA

A panel of solicitors discusses two competing systems

Since the EU–Japan Economic Partnership Agreement (EPA) entered into force earlier this year, trade and investment between the EU and Japan have become easier and more active than ever before. But, as with any transaction, there is the potential for problems to arise — which could become the basis for a dispute.

On 12 July at Thomson Reuters' Tokyo office, a collective of professional associations — including the European Business Council in Japan, the Roppongi Bar Association, the Italian and Greek chambers of commerce, and the Japan Commercial Arbitration Association hosted a panel discussion titled Dispute Resolution in the Age of the Japan–EU EPA. The panel devoted a substantial amount of time to the potential ways in which investment disputes between states and businesses could be resolved.

Michael Mroczek, a partner at Okuno & Partners and chairman of the European Business Council in Japan, noted that the EPA does not give clear guidance on this issue.

"The investment chapter does not have investment protection provisions," he explained. "It only touches on the liberalisation of investment."

Investment protection was set aside during the EPA negotiations to expedite the process.

There are two competing frameworks for resolving investment disputes. The EU's preferred method is the Investment Court System (ICS), while Japan favours the current system of Investment Treaty Arbitration (ITA), which is dependent on arbitral tribunals.

Tony Andriotis, partner at Quinn Emanuel Urquhart & Sullivan and president of the Greek Chamber of Commerce, explained that the EU's preference for the ICS is partly due to a growing sense among EU citizens that the ITA system currently in place prioritises corporations over people.

"At the grassroots level, Europeans feel as if their rights as citizens are being taken away," he said. "They're told that big industries — Big Tobacco, Big Mining, Big Pharma — are able to successfully sue sovereigns and thus take funds away from taxpayers."

Andriotis then noted an ITA claim filed by Philip Morris International against the government of Australia over its plain packaging laws for tobacco products as a prime example of a case that has generated international political uproar.

According to Andriotis, proponents of the ICS — which has been included in recently signed EU trade agreements — claim that the new system increases transparency while also setting up a more predictable precedential system. Japan — along with most practitioners — prefers a system of arbitration where parties are free to choose their own arbitrators, something that would be absent under the ICS.

However, as Lars Markert, a partner at Nishimura & Asahi, pointed out, the ICS could threaten investment.

"The European Commission proceeds from a view where all European courts are great. At the same time, in the spring of this year, the EU commenced proceedings against one of its member states because it says this member state is unduly influencing its judiciary," he stated. "It might not even be true that there is undue influence, but as an investor, I would not be confident."

Markert proposed that — at least for the time being — both the ITA and the ICS should be made available in parallel to investors under the Japan-EU EPA, and they should be able to decide which system they would prefer to use.

Reaching a decision on the best means of resolving investment disputes continues to be a challenge. But as Andriotis observed, the peace between EU member states that has emerged as a result of the European project is proof that even complex differences can successfully be set aside.

"Europe is a miracle," he said. "One we should reflect on."

TONY ANDRIOTIS, FRANCESCA BENATTI, MICHAEL MROCZEK, LARS MARKERT AND YOSHIFUMI FUKUNAGA