

Kobe Seminar on International Investment Law 2014:  
'Impacts of ISDS in the Forthcoming Mega FTA Generation'  
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**Impacts of ISDS  
in the Coming Mega FTA Generation:  
From a Japanese Viewpoint**

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# I. Economic situation of Japan: why is FDI important?

## 1. Basic economic situation of Japan

- after WWII, Japan had long been an **exporting** country:  
car makers, electricity companies, heavy industry, etc.



↓ but

- big change after the *Fukushima* incident in 2011



before 3.11



after 3.11



anti-nuclear protesters before METI

→ Government's new policy (not yet fixed) of no nuclear power plant  
(actually, there is no nuclear plant operating in Japan)

→ Electricity companies (ex. TEPCO) have to  
import much more **LNG** than before



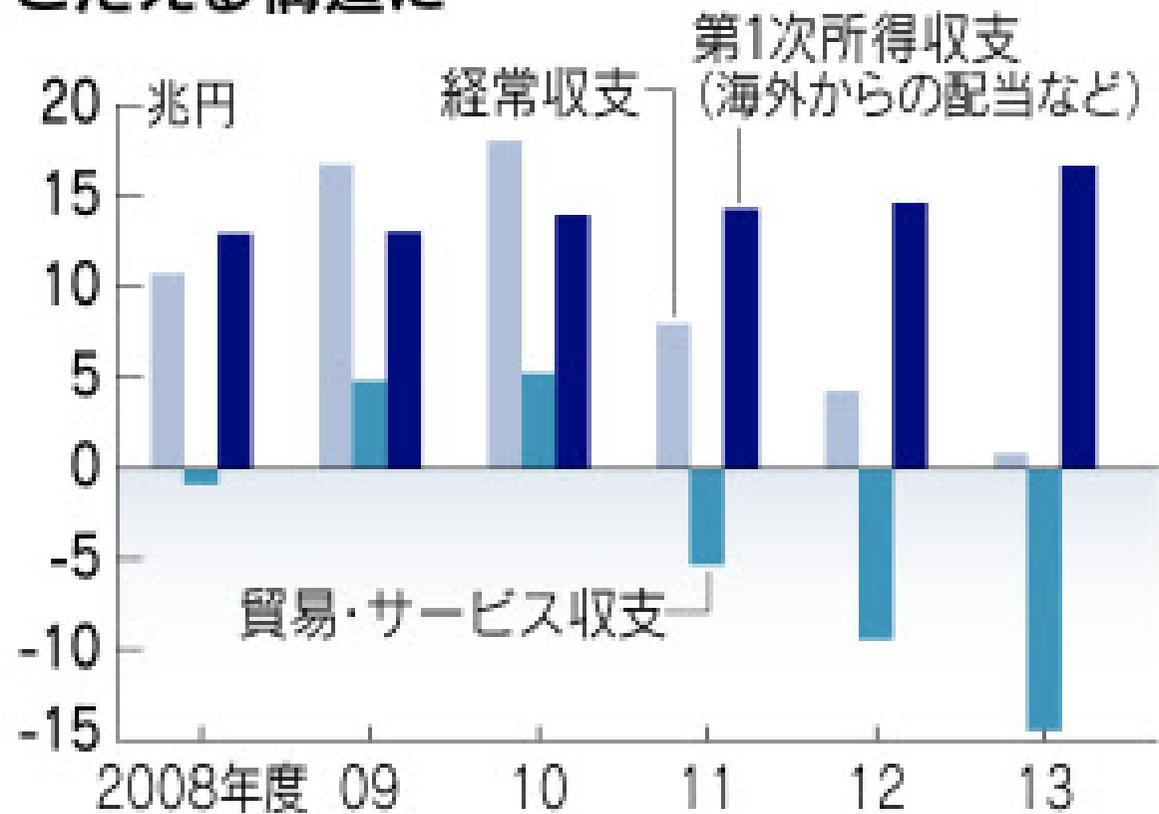
▪ Year 2014 (Apr-Sep): **trade deficit 5,427 billion**

▪ **current balance (經常収支): deficit -507 billion**  
= **trade balance (貿易収支): deficit - 5,427 billion**  
+ service balance (サービス収支)  
+ **investment income balance (所得収支): surplus**  
+ unilateral transfer balance (經常移転収支)

▪ direct investment profit (money transfer from foreign investment)

▪ to maintain the **current balance**, Japan has to keep investment income balance → importance of investment protection regime (ex. IIAs, ISDS)

## 貿易収支が赤字になり、所得収支で持ちこたえる構造に



Nikkei Newspaper, 12 May 2014

## II. Japan's policy of ISDS

### 1. Achievement of Japan's ISDS

- Japan concluded, so far,
  - **24** BIT + **11** EPA (FTA) including investment chapter
    - **33** ISDS clauses in total
    - except Japan-Philippines EPA and Japan-AUS EPA
  
- Government of Japan is now
  - promoting ISDS against developing countries  
(as investors' home States)
  - promoting **balanced ISDS** against developed countries  
(as investors' host States)

## 2. Ambivalence of Japan's stance towards ISDS

### (1) offensive stance

- need to **protect** foreign investments of Japanese companies in foreign countries and offering a negotiation leverage

### (2) Defensive stance

- need to **defend** itself against foreign investors (esp. U.S. companies)
- Need to promote foreign investment in Japan

### Some problems

- negotiators are **government officials** → defensive discourse
- current balance is not large in Japanese economy (GDP):  
internal market is large enough
- political environment (with US, China, Korea)

### 3. General problems of ISDS in discussion

- limit the state's power (**regulatory power**) to pursue public welfare  
(ex. health, safety, environment)
- lack of **legitimacy** and **democracy**
  - in a closed room, unknown arbitrators (only three people)
  - quality of awards: no appeal, contradictions, unpredictability
- huge amount of damages: payment from national budget (tax)
  - ex. **50 billion US dollars** in Yukos case
- fear about foreign (US) law firms, English litigation, legal skill
  - fear about international procedure (the *Whaling* case, ICJ)
- lack of (specialised) information about ISDS
  - not so many academics in Japan

## 4. Japan's experience of ISDS

- no case as **Respondent**, so far
- one exceptional case as **Claimant**: the *Saluka* case → **winner**

### *Saluka Investments B.V. v. Czech Republic* [2008]

- the Netherlands-Czech BIT



- Saluka, a Netherlands company (subsidiary of Japanese securities company, Nomura), possessed 46% of shares of ex-national Czech bank (C).

- In Czech, 4 national banks, including C, were holding a lot of bad debt (non-performing loans). The Czech Government offered financial supports, including public funds, **except C**. As a result, C's business became worse and it was transferred to another national bank.



- Tribunal stated that the Czech discriminatory measure, excluding C from the objects of public funds without any reasonable reasons, constitutes a breach of 'legitimate expectation', and of the **FET** obligation.

- Saluka finally obtained damages (1.8 million yen)

## **IV. China-Japan-Korea Investment Agreement**

- signed in 2012, entered into force in 2014
- replacement of old treaties

### **1) Japan-China BIT [1988]**

- ISDS was applicable only to the expropriation compensation issue
- no provision on IPR, FET, PPR

### **2) Japan-Korea BIT [2002]**

- modern BIT

### **3) New tripartite Agreement**

- modern IIA
- ISDS clause including **ICSID** (Article 15)
  - three countries are contracting parties to the ICSID Convention
- **transparency** in domestic laws and regulations (Article 10)

## How can we use the 2012 Agreement? Anticipated cases

### 1) Anti-Japan riots in China [2012]

Arson, robbery, destruction, etc. against Japanese companies

→ breach of **Article 5 (full protection and security)**

i.e. breach of **due diligence** under CIL

→ ICSID arbitration by Article 15 (b)

→ the 2012 Agreement is effectively applicable

### 2) Judgment of the Supreme Court of Korea [2014?]

Order for Japanese big conglomerate (zaibatsu) companies to pay salaries to wartime workers (forced labors)

→ Court will attach the property (account receivable)

→ breach of **Article 11 (indirect expropriation)**

→ ICSID Arbitration by Article 15 (b)

→ the 2012 Agreement will be effectively applicable

## **Japan-China-Korea Investment Agreement**

Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (entry into force in 2014)

### **Article 5 General Treatment of Investments**

1. Each Contracting Party shall accord to investments of investors of another Contracting **Party fair and equitable treatment** and **full protection and security**. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not *ipso facto* establish that there has been a breach of this paragraph.
2. Each Contracting Party shall observe **any written commitments in the form of an agreement or contract** it may have entered into with regard to investments of investors of another Contracting Party.

# Japan-China-Korea Investment Agreement

## Article 11 Expropriation and Compensation

1. No Contracting Party shall **expropriate** or **nationalize** investments in its territory of investors of another Contracting Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Agreement as “expropriation”) **except**:  
(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with its laws and international standard of due process of law; and (d) upon **compensation** pursuant to paragraphs 2, 3 and 4.
2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.
3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time from the time of expropriation to the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Contracting Party of the investors concerned, and into freely usable currencies.

# Japan-China-Korea Investment Agreement

## Article 15 Settlement of Investment Disputes between a Contracting Party and an Investor of Another Contracting Party

3. The investment dispute shall at the request of the disputing investor be submitted to either:

- (a) a competent **court** of the disputing Contracting Party;
- (b) arbitration in accordance with the **ICSID** Convention, if the ICSID Convention is available;
- (c) arbitration under the ICSID **Additional Facility** Rules, if the ICSID Additional Facility Rules are available;
- (d) arbitration under **the UNCITRAL Arbitration Rules**; or
- (e) if agreed with the disputing Contracting Party, any arbitration in accordance with **other arbitration rules**,

## V. TPP

- substantially the **Japan-US FTA** (90 % GDP of TPP countries)
- main issues remain unsolved
  - SOE (Vietnam, Malaysia)
  - tariff on beef (US), car (Japan)
- depends on Japan-US bilateral negotiation (parallel)

### **Some issues on ISDS of TPP**

- Promoters (US, Japan) vs. Negative (developing countries, Australia)
  - secret negotiation (confidentiality)
  - ISDS is used as a negotiation tool.
- ex. Australia agreed with ISDS clause in TPP to obtain concession from other countries.

## **‘Appropriate safeguards’ in ISDS**

- basic idea: **US Model BIT 2012**
  - **‘prompt, fair, and transparent’ ISDS**

### **1. Promptness**

- temporal conditions: Art. 26(1), 28(5)

### **2. Fairness**

- submission by non-disputing parties (*amicus curiae*): 28 (3)
- preliminary ruling to prevent an abusive usage of ISDS: 28(6)
  - 2 out of 34 BITs/EPAs of Japan: ex. Japan-Chile EPA, Art 97
- appeal mechanism: 28(10)

### **3. Transparency**

- open the documents and proceedings: 29

### **4. Safeguards**

- expands the exception clause
- limits the arbitrators' power
  - ex. restitution can be replaced by compensation: 34(1),
  - no punitive damages: 34(3)

### **Present negotiation process**

- approaching to the opposite position
- no serious opposition any more

## **VI. Key points of Japan's future ISDS policy**

- important to keep the fixed policy of ISDS (promoting)
  - realise the high level protection by ISDS  
(same level as that of US Model BIT)
  
- the first case of ISDS is important
  - influences on people's opinion and Government's position
  - but, we should accept eventual lost cases
  
- important to expand the basic understanding of ISDS
  - seminar, symposium, university education etc.

**Thank you for your attention**

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