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ISDS and TPP  
From the Viewpoint of Japan

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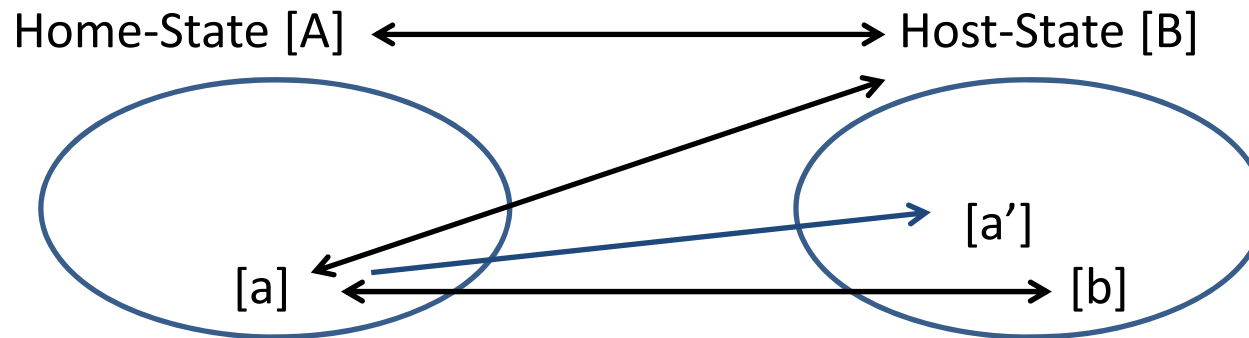
# 1. Basic terms used in the lecture

- **TPP**: Trans-Pacific Partnership Agreement
- **ISDS**: Investor-State Dispute Settlement
- **SSDS**: State-to-State Dispute Settlement
- **ICSID**: International Centre for the settlement of investment disputes
  
- **FTA**: Free Trade Agreement
- **EPA**: Economic Partnership Agreement (= FTA)
- **BIT**: Bilateral Investment Treaty
- **IIA**: International Investment Agreement

## 【usage】

- NAFTA is one of FTAs. NAFTA contains the investment chapter (Chapter 11), thus it is one of IIAs (but not BIT).
- TPP, one of FTA, will contain an investment chapter. So it will become IIA.
- TPP will contain an ISDS clause (probably the ICSID clause) and an SSDS clause.

## 2. Mechanism of dispute settlement



- 1) International (commercial) arbitration  
→ Company [a] vs. Company [b]
- 2) **ISDS**: Investor-State Dispute Settlement  
→ Company [a] vs. **State [B]** → ex. ICSID, ICC, SCC
- 3) **SSDS**: State-to-State Dispute Settlement  
→ State [A] vs. **State [B]** → ex. ICJ, PCA

### 3. How does an investment dispute arise?

【Ex】 Japanese electricity company vs. State [B]

- 1) [a] obtained a **license** from [B] to create a nuclear power plant in [B]
- 2) [a] and [B] concluded an **agreement (= investment contract)** which regulates the supply price of electricity in [B] and so on.
- 3) [a] established **a power plant** (= [a'] = investment) in [B].
- 4) [B] changed its electricity policy and decided to prohibit the establishment and operation of all nuclear power plants in [B] and enacted **a new law** to that end.
- 5) [a] cannot operate the power plant any more  
→ investment disputes!!

【point】

- dispute between **private companies (=investors)** and **public authority (=State, normally Government)**

【what advice can you give to [a] as a lawyer?】

- negotiate with State [B]?
- sue [B] before the court in State [B]?
  - Notwithstanding the new law?
- abandon the power plant?
  - Withdraw from State [B]?
  - huge damage !!

## 4. Why is ISDS needed?

1) It can avoid the [B]'s domestic judicial system, which is **not impartial, not independent** (from political authority) and **not effective** (because of the enacted domestic law).

→ Useless to use the unreliable court of [B]

→ ISDS is alternative method of [B]'s Court

2) It can avoid the **escalation** of dispute from that between [a] and [B] to that between [A] and [B]

→ State [B] wants not to enlarge the dispute

→ ISDS is alternative method of diplomatic protection

3) It can **enforce** the award more effectively (esp. the ICSID arbitration) than domestic court's judgments

→ ICSID Convention Art 54 (enforcement)

# 5. When can we use ISDS?

【basic requirements】

- a) [A] and [B] must conclude **IIA or BIT**, which contains **the ISDS clause**
- b) [A] and [B] must be the contracting parties to the **ICSID Convention**, if [a] wants to use the ICSID arbitration
- c) Jurisdiction of ISDS is **consensual** (based on the consent of both parties) → [B] agrees to jurisdiction at the conclusion of IIA. [a] agrees when it submits application to the ISDS

## 6. What can [a] claim before ISDS?

【basic obligations contained in IIA】

- a) **Expropriation clause**: [B] can expropriate (=nationalise) the investment (= [a']) under the condition of (i) public purpose, (ii) non-discrimination, (iii) due process and (iv) compensation
  
- b) **NT** (national treatment clause): [B] must treat [a] and [b] equally, without discrimination
  
- c) **MFN** (most-favored-nation clause): [B] must treat [a] and [c] equally, without discrimination



d) **FET** (faire and equitable treatment clause): [B] must be consistent and transparent in its policy

e) **Umbrella clause**: [B] must abide by the agreement (= investment contract) between [a] and [B]

f) **ISDS clause**: [a] can sue [B] before ISDS arbitration

g) others: PR (performance requirement), denial of benefit, definition of investors and investment

## 【Question】

In the above mentioned case, what can the Japanese electricity company claim before ISDS? → let's think about the answer !!

- expropriation? → indirect expropriation
- NT? → target of the law
- MFN? → any company from third State?
- FET? → inconsistent or not transparent?
- Umbrella? → any agreement?

# 7. Advantages and disadvantages of ISDS

## 【Advantages】

- able to **protect** foreign investments and to **promote** foreign investments (the safe investment environment in [B])

## 【Disadvantages】

- limitation of **regulatory power** (ex. health, environment, tax, education)
- discrimination between [a] and [b] (only merits to [a])
- too advantageous to foreign investors (as many ISDS cases show)

## 【Example case】

### *Philip Morris vs. Uruguay*

Company [a] claims that (i) trade mark on tobacco case is an intellectual property right protected under the IIA as ‘investment’, (ii) the plain-packaging policy (health policy) of [B] prohibits the use of trademark by [a], (iii) thus, this policy is equivalent to an illegal expropriation of investment.

## 8. Evaluation of ISDS in TPP

### 【Negotiation process】

- confidential negotiation → the draft text is not opened.
- TPP will contain the ISDS clause (Nikkei newspaper).
- the content of ISDS clause is under negotiation.
  - **negative** stance: AUS, Vietnam ...
  - **positive** stance: USA, Japan
    - important topic is the '**safe-guard**' of ISDS
- without the ISDS clause, the protection of investment under the TPP (investment chapter) will not be effective...

## 【Some relevant cases】

a) American investors will sue the Japanese Government? → ex. *LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37)

b) Japanese companies will sue other States' governments? → ex. *Saluka (subsidiary of Nomura) vs. Czech Republic*, PCA

## 9. Exercise

▪ [a] has a dispute with [B]. You are working as a in-house lawyer of [a]. What advice can you give to [a]?

### 【Case 1】

Company [a] is an oil company. It concluded an agreement with State [B], which allows [a] to drill the oil field and fixes the share of profit on 50-50 between [a] and [B]. After a great success of [a] and more profitable results than expected, State [B] decided to impose a new oil tax mechanism on every oil company in [B], by enacting a new law. [B] justified its actions by the public opinion and its history of exploitation.

## 【Case 2】

Company [a] is a food company and concluded an agreement with State [B] with regard to providing a fixed amount of food to the military section of [B]. After that, State [B] found Company [c], of State [C], which can provide the same food at cheaper price. State [B] decided to terminate the agreement with company [a] and justified this by its public purpose and contribution to the public interest of State [B].



## Information

- If you have any question, please send e-mail: [tamada@port.kobe-u.ac.jp](mailto:tamada@port.kobe-u.ac.jp)
- If you are interested in **public international law** at Kobe University, see 'Kobe University Centre for International Law': [http://www.edu.kobe-u.ac.jp/ilaw/index\\_e.html](http://www.edu.kobe-u.ac.jp/ilaw/index_e.html)
- FDI Moot 2014: <http://www.fdimoot.org/>  
→ from 21 to 23 August, in Seoul. This year, Kobe University team will participate in it for the first time.