A Survey of Japan-Related ISDS

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International arbitration is a principal means of settling international commercial disputes and disputes between investors and the states hosting their investments.[1] While international commercial arbitration (ICA) has a tradition lasting centuries, investor-state dispute settlement (ISDS) is a relatively new phenomenon. The rise of ISDS can be explained by a concurrent increase in foreign direct investment and the proliferation of bilateral investment treaties (BITs) in recent times.[2]

This paper considers ISDS and its relevance to Japan and Japanese investors. The specific topics that it will address include the following:

Section 1 will consider the nature of investor-state arbitration and how it differs from traditional commercial arbitration;

Section 2 will survey public cases in which Japanese parties have been implicated in investor-state proceedings;

Section 3 will consider how Japanese investors can structure their investment to take advantage of substantive protections in international investment instruments; and

Section 4 will consider what Japan can do to prepare for possible cases brought against it by foreign investors.

As the title suggests, this paper is meant to be a survey of the aforementioned topics. A much more detailed paper could be written about any one of them.

I Section 1: ICA and ISDS Compared

It might be tempting to think of ICA and ISDS merely as two types of arbitration, like two branches of the same tree. There are many obvious similarities. Consent by the disputing parties is required to extend jurisdiction over their dispute to an arbitral tribunal under either system. The parties select the procedural rules, and they choose arbitrators to decide their dispute in both systems. There are also overlaps in the laws, rules, and guidelines that support the processes as well as the arbitrators and counsel that appear on behalf of the parties.

[1] See, e.g., Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th edition, Oxford University Press 1 (2015); Gary B. Born, *International Arbitration: Cases and Materials*, 2nd edition, Kluwer Law International xxix (2015).

[2] Since 1960, foreign direct investment has expanded faster than the growth of global economic output: see, e.g., Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check (CSIS Reports)*, Rowman & Littlefield Publishers 6 (2015); According to United Nations Conference on Trade and Development (UNCTAD), the number of BITs increased from 385 at the end of the 1980's to a total of 2,926 by the end of 2014: see *UNCTAD, World Investment Report (2015)* available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last verified 26 December 2015).

ICA and ISDS cases may also intersect at the level of individual disputes. An investor may have the option to bring a single dispute to either ICA or ISDS. Even after the choice has been made, relations between the two systems may remain clouded. An investor may seek elevate commitments made in a contract that contains an ICA clause to the level of treaty claims in ISDS proceedings by operation of a so-called "umbrella clause" in the treaty.[3] An investor may otherwise need to establish breaches of a commercial contract as a precursor to finding liability under a treaty in ISDS proceedings.

Despite the similarities and overlap, there are notable differences between ICA and ISDS. The greatest of these may concern the stakes. Whereas ICA normally impacts only the disputing parties, ISDS can have wide-reaching effects across society. ISDS tribunals can re-examine and sanction regulatory action by a state or judgments made by national courts. These might include measures taken to protect the environment, protect consumers, stabilize the economy, or promote public health.[4] If the investor prevails, damages will be paid by the state from public funds that may come from taxpayers with no knowledge of or involvement in the dispute.

There are other differences that stem from the unique nature of ISDS. ICA normally opposes parties that have a horizontal, private contractual relationship. By contrast, ISDS opposes a private entity and a sovereign state.[5] Moreover, ICA disputes concern rights and obligations under private contracts normally governed by a national law, whereas ISDS disputes normally concern the responsibility of a host state for its actions or inactions under international law.

In sum, although both ISDS and ICA are forms of international arbitration, the two systems raise different issues and implicate different stakeholders. A proper understanding of these differences is important to avoid misunderstandings or mistaken assumptions. This may be of particular interest in a jurisdiction like Japan where legal practitioners are familiar with ICA but have limited ISDS experience.

Ⅱ Section 2: Japan-Related Cases

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3 For an overview of the operation of umbrella clauses, see, e.g., Doak Bishop, James Crawford, et al. (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary*, Second Edition, Kluwer Law International 753 (2014); and Andrés Rigo Sureda, "The Umbrella Clause," *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International 374-387 (2015).

4 Some notorious examples include the following: *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2; *Ethyl Corporation v. The Government of Canada*, UNCITRAL; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6; and *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04.

5 See, *e.g.,* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 American Journal of International Law 1 (2013); and Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006).

Japanese investors have used ISDS far less than investors from other countries, which is paradoxical given that Japan has comparatively high levels of outbound investment.[6] This section summarizes the two Japan-related cases that are in the public domain.

Saluka v. The Czech Republic, conducted under the UNCITRAL Arbitration Rules, concerned the privatization and reorganization of the Czech banking system as it had existed during the Communist period.[7] Saluka Investments BV (Saluka), a Dutch company, acquired shares of a Czech state-owned bank (IPB). Saluka claimed that the Czech Republic gave discriminatory state aid to Saluka's competitors and otherwise violated Article 3 (fair and equitable treatment) and Article 5 (deprivation of investment) of the BIT between the Netherlands and the Czech Republic (NE-CZ BIT).

The Czech Republic challenged the jurisdiction of the tribunal. It claimed that the real investor was not Saluka but an English company, Nomura Europe, which was a subsidiary of a Japanese group of companies. According to the Czech Republic, Saluka was merely a shell company with no real economic interest in the IPB shares and therefore failed to meet the definition of "investor" under the NE-CZ BIT.

The tribunal rejected this argument. The NE-CZ BIT defines "investor" as "legal persons constituted under the law of one of the Contracting Parties."[8] The tribunal considered that this definition was broad enough to include Saluka. It went on to find that the Czech Republic had breached the NE-CZ BIT and, after a separate hearing on quantum, awarded US$236 million to the Japanese group of companies.[9]

JGC Corporation v. Kingdom of Spain was first arbitration brought directly by a Japanese investor.[10] The case was registered on 22 June 2015 with the International Centre for Settlement of Investment Disputes (ICSID), the leading specialist ISDS institution. JGC Corporation (JGC) claims to have invested in two solar-thermal power plants in southern Spain in the late 2000s. In 2007, Spain began offering feed-in tariffs and subsidies to encourage investment in solar projects. In the wake of the global recession, Spain reversed its policy and began capping the number of hours of electricity that could benefit from the feed-in tariff in 2010. Since then, Spain has continued to roll back the

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6 The UNCTAD World Investment Report 2014 identifies Japan as second only to the United States in terms of FDI outflows (page 5).

7 See *Saluka v. The Czech Republic*, Partial Award of 17 March 2006, available at http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (last verified 26 December 2015).

8 Article 1(b)(ii) of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/968 (last verified on 26 December 2015). By letter of 8 December 1994, the Minister of Foreign Affairs of the Czech Republic confirmed to the Minister of Foreign Affairs of the Kingdom of The Netherlands that the BIT remained in force after the separation of the Czech and Slovak Federal Republic (*Saluka v. The Czech Republic*, Partial Award of 17 March 2006 at para. 31).

9 See "Saluka resolved following battle of experts," Global Arbitration Review, 27 June 2008.

10 See "Japanese investor joins solar claim bandwagon," Global Arbitration Review, 25 June 2015; see also the case register on the ICSID website at https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?CaseNo=ARB/15/27 (last verified 26 December 2015).

incentives, including by passing a law in 2013 that cut subsidies for alternative-energy projects.

JGC bases its claims on alleged violations of the Energy Charter Treaty, a convention that establishes a multilateral framework for cross-border cooperation in the energy industry. At the time this paper was written, the parties are in the process of constituting the arbitral tribunal.

This is not the first time that Spain has been challenged for its policy reversal on renewable energy. In fact, JGC brought the 16th of 23 such cases (at present) against Spain at ICSID, and other arbitrations have been commenced against Spain on similar grounds under other arbitral rules.[11] Perhaps the spate of existing cases comforted JGC in initiating the first known Japanese ICDS case. In any event, it remains to be seen whether this arbitration, perhaps paired with the extensive news coverage of the Trans Pacific Partnership Agreement and its inclusion of ISDS, will encourage other Japanese companies to consider using ISDS to resolve their disputes.

While a relative lack of experience in ISDS may not itself be a hindrance, it may mean that Japanese investors do not consider ISDS as readily as investors in other jurisdictions where ISDS is more common. Similarly, that Japan has not been a respondent in ISDS proceedings means that the Japanese government has not had to deal with the many issues that arise when defending itself in such as case. The remaining two sections of this paper provide a basic overview of the main issues facing Japanese investors and the Japanese government in these circumstances.

Ⅲ Section 3: Securing Investment Treaty Protection

States are not bound to harmonize the protections afforded to investors in treaties, laws, and contracts. A state may conclude an investment treaty with one country but not another, and it may offer investment protections for investors from one country that are different or better than those offered to investors from another country.

In practice, investors may have ways of avoiding these differences in treatment. Some rely on most-favored nation clauses in treaties to benefit from superior investment protection.[12] Another way to achieve maximum treaty benefit is to structure investments to take advantage of treaties that offer the broadest protection to investors.

Consider a Japanese investor planning to buy shares in a company that is a national of a state that has no investment treaty with Japan. The investor might purchase shares in the foreign company in its own name and fail to benefit from any investment treaty protection. Conversely, the

[11] See "Spain claims count at ICSID hits 23," Global Arbitration Review, 27 November 2015.

[12] For an overview of the operation of most-favored nation clauses, see, e.g., Doak Bishop, James Crawford, et al. (eds.), *Foreign Investment Disputes: Cases, Materials and Commentary*, Second Edition, Kluwer Law International 754 (2014); and David D. Caron and Esmé Shirlow, "Most-Favored-Nation Treatment: Substantive Protection," *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International 398-414 (2015).

investor could establish a subsidiary as an investment vehicle in a country that has a favorable investment treaty with the state hosting the investment. The investor would thereby go from no treaty protection to wide-ranging protection backed by international law and enforceable in arbitration outside of the reach of the national courts of the host state. Such structuring might also give the host state greater incentive to treat the investment fairly to avoid a public and costly arbitration. Moreover, even if the Japan did have an investment treaty with the host state that would cover the aforementioned investor, the investor might still be able to structure its investment to benefit from an investment agreement that offers better protection for its investment.

Optimal structuring in any case will depend on the investment and the treaties that might apply. As a starting point, an investor can compare the protections available in different treaties between its home state and the host state, on one hand, and the host state and third states (not Japan), on the other hand, in order to find instruments offering the maximum protection. As part of this analysis, the investor must consider what restrictions those treaties place on the protections they offer. For example, a treaty might define "investment" and "investor" restrictively to limit the scope of protection.

The investor should also consider whether the treaty provides direct access to arbitration. Some treaties require, for example, that investors bring their claims to the courts of the host state before they can be brought to arbitration. The investor must also consider how difficult and costly it would be to set up a subsidiary in a state with a favorable treaty.

The process of structuring investments to benefit from treaty protection is a complex subject that is beyond the scope of this paper. What is important to take away is that Japanese investors should consider investment structuring as early as possible in the process of investing, and this assessment should include consideration of all viable investment treaties between the state hosting the investment and other states and not merely any treaty that might exist between the host state and Japan.

Ⅳ Section 4: Preparing for and Avoiding ISDS

As noted, Japan has not been a respondent state in a case brought by a foreign investor. This might not be surprising given the relatively low levels of incoming foreign investment and the modest number of investment treaties to which Japan is a party compared with other countries in the region.[13]

That said, the amount of foreign investment into Japan has been increasing, and the Abe

[13] E.g, the Organisation for Economic Co-operation and Development (OECD) reported in April 2015 that Japan had the lowest share of inward foreign direct investment as a percentage of gross domestic product (GDP) among member countries (OECD Economic Surveys JAPAN, April 2015, pge. 4, available at http://www.oecd.org/eco/surveys/Japan-2015-overview.pdf (last verified 26 December 2015)).

government is working to increase the number of investment treaties. At least nine new BIT's and two free trade agreements have been singed or have come into force since 2014.[14] Japan is also an intended member of the Trans Pacific Partnership Agreement, which contains ISDS provisions and will cover more than one-third of the world's gross domestic product.[15] Japan may yet find itself as a respondent in ISDS proceedings.

There are steps that the Japanese government can take to protect Japan from claims brought by investors. One is to ensure that government agents and officials are aware of Japan's treaty obligations and the risk of arbitration. This might be achieved through education programs and systems of communication across agencies that include a mechanism to alert the appropriate agency of problems when they arise with investors.

Other steps can be taken if arbitration seems eminent. Preparations should begin early since coordination across various governmental ministries may be necessary. A dispute management team should be put in place. Internal counsel should be identified, and external counsel should be used in most cases. It may also be advisable to establish a team to manage press releases and communications with the media.

The case management team should perform an early case assessment to determine cost exposure, political concerns, and non-legal objectives. Meanwhile, steps should be taken to preserve the state's position should the arbitration go forward. Dispute managers should identify staff who may be implicated in the dispute; internal and external communications by these individuals can be restricted, and the staff can be directed to retain documents that might be relevant to the dispute. Dispute managers should also identify the documents and witnesses that may be relevant to the case early in the process.

On a broader scale, Japan could limit its exposure to claims by changing or harmonizing the scope of protections that it offers investors in treaties. This is a large topic with many political and strategic implications. As an overview, Japan could consider supplementing the vague standards of protections in its investment treaties with definitions that explain them; exempt certain investors, investments, or activities from protection; systematically include denial of benefits clauses in investment treaties; reserve the rights to regulate in certain domains, such as for the benefit of the environment or public health; and reserve the right to take safeguard measures, such as after a financial crisis. Such provisions could be included in new treaties or incorporated into treaties with existing partners through renegotiation.

Japan might also consider using and publishing

[14] United Nations and UNCTAD Investment Policy Hub available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/105?type=c#iiaInnerMenu (last verified 26 December 2015).

[15] See, e.g., The Office of the United States Trade Representative, "Trans-Pacific Partnership: Summary of U.S. Objectives," available at https://ustr.gov/tpp/Summary-of-US-objectives (last verified 26 December 2015).

a model BIT, which could offer a number of advantages.[16] Generally speaking, the preparation of a model BIT may itself enable a state to carefully review its investment treaty policy in consultation with interested private and governmental stakeholders. This may be less relevant to Japan given its recent investment treaty activity, but there might still be scope for refinement or harmonization.

Once complete, the resulting model BIT can be publicized to communicate a state's position to potential partners. This may place the state on firm footing at the outset of future treaty negotiations by setting a framework for the negotiations and by forcing its negotiating partners to respond to the model rather than frame the negotiations themselves.

V Conclusion

Backed by more than 2800 BIT's and significant multilateral investment treaties providing for arbitration, ISDS has established itself as an important means of resolving disputes between investors and host states. The system continues to evolve with more cases, cases in new sectors, cases in new parts of the world, and more lawyers specializing in the area. At the same time, there has been a backlash against the present system that has caused some commentators to question its long-term viability, some to propose reforms, and some to propose alternative systems.[17]

Despite this activity, there has only been one public case in which a Japanese investor used ISDS. Meanwhile, Japan has not been a respondent in proceedings and so it has not been directly impacted by the sort of concerns expressed by states that have been obligated defend themselves or pay large damage awards to investors. This relative lack of experience should neither prevent investors from using ISDS as a dispute resolution tool nor prevent the Japanese government from preparing to avert or properly manage a case brought against it.

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[16] See, e.g., Jeswald W. Salacuse, *The Law of Investment Treaties*, Oxford University Press 132-133 (2015).

[17] For a recent survey of concerns about the ISDS system and proposals for reform, see Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*, Hotei Publishing (2015). The introduction to the book provides a helpful overview of the main issues and can be found at http://www.transnational-dispute-management.com/article.asp?key (last verified 26 December 2015).

Claxton報告コメント

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本報告は日本企業を当事者とするISDS（Investor State Dispute Settlement-投資家/投資受入国間の紛争解決）に関するものである。発表者は本件を以下４段階に分けて述べている：

1）ISDSによる仲裁の内容と従来の国際商事仲裁（ICA）との比較。
2）日本当事者が関与しているISDS仲裁について。
3）日本当事者が対外投資を行う際の有効なリスク回避手段。
4）海外の対内投資家からの訴えにホスト国の日本としての有効な対処方法。

1）について発表者は、ISDS仲裁とICA仲裁との基本的な違いとして、①ICAは紛争当事者間だけの利害関係だが、ISDSは社会全体にまたがる問題である事、②もし原告が勝利したら損害賠償金はその紛争に無関係な国民の負担で支払われる事、③ICAは当事者の水平的な関係を律する私法の関係だが、ISDSは私的組織と国家という垂直的な関係を律する公法が関係する事、④ICAは契約両当事者相互の責任を対象とするが、ISDSは投資受け入れ国の責任のみを追及する事等の相違点を挙げている。

2）については、日本の対外投資額が世界的に非常に高いレベルにあるにもかかわらず（日本は米国に次いで世界第２位[1]）ISDS条項に基づいて仲裁を申し立てた事例はまだ２件に過ぎない（古屋注：全世界では2012年だけで50件[2]）としこれら２件の概要を述べている。一件はチェコ国営銀行の民営化に関して野村欧州がオランダの子会社を通じて、オランダとチェコの投資協定第３条、第５条に基づいてチェコ政府を訴えた件で、もう一件はスペインにおける太陽光発電プロジェクトに投資した日揮が、電力買い取り条件を一方的に変更したスペイン政府をエネルギー憲章条約に違反したとして訴えた事案である。また本論は、スペイン政府が新規エネルギーに関して政策変更をするのは本件が初めてではなく、日揮はスペインがICSIDに提訴された20件中16番目のケースにあたるとし、他のケースは、UNCITRAL仲裁規則によりストックホルム商業会議所仲裁協会に対スペイン案件として登録されていると述べている。

3）では日本企業が対外投資を行い2）のような問題に遭遇した場合、如何にホスト国での投資リスクを回避できるかについて述べている。ある投資家達はこれらの問題を実務処理で回避してきたし、あるものは協定中の最恵国待遇条項をより強固なリスク防衛のよりどころとしてきたとしている。もう一つの

1 The UNCTAD World Investment Report 2014
2 ICSIDに関する基本情報p.5、http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1173431677052/I CSID-FactSheet-ja.pdf 、2015.10.31

最大の協定防御方法は、ISDS条項のような第三者とのより広い防御を有する協定から利益を得る投資方法を構築することであると述べている。

4）では3）項とは逆に、日本は現在のところ外国投資家からの仲裁被申し立て国にはなっていないが、安倍内閣は投資協定を増加させようとしている等の理由から、将来日本が国際投資案件のホスト国として被申立人(respondent)になるかもしれないリスクについて、幾つかの防御策を推奨している。まずは、政府の付属機関や職員達に、日本が締結する協定における責任やリスクを認識させることであり、その後は政府各省にまたがる連携による係争管理チームやメディア対策チームの設置、外部弁護士の起用等が必要であると述べている。

Claxton教授が本発表で主張したかったことは下記二点に要約されよう：

1）日本は対外投資額では米国に次いで世界第二位であるにもかかわらず、投資仲裁の申し立てはたった二件に過ぎない。グローバルにビジネスを進めていくには紛争解決手段としてISDS仲裁をもっと活用すべきである。

2）現在のところ日本はISDS条項による被申し立て国にはなっていないが、対内投資の増加につれこのケースが増えると思われるので､その対策を早めに行っておく必要がある。

1）については日本企業ひいては“日本人の紛争嫌い”の資質が大きく影響していると思われる。一般的に日本企業（日本人）は私的な紛争を裁判や仲裁等、公の場で争うことを忌避する傾向にある。その場合、狭い日本という土俵の中での両者の関係は勝敗、結果の如何を問わず将来的に修復されることがなく、取引や付き合いはそこで終わってしまうことが多い。日本では国民一人当たりの弁護士数が欧米に比べて桁違いに少ないにもかかわらず裁判制度があまり問題なく維持されていることがこれを裏付けている。これは投資協定を対象とする紛争に限ったことではない。このようなDNAで長い間育ってきたため、日本企業を当事者とする紛争では、今回の日揮・スペイン間の事案の結果の如何を問わず、今後ともISDS条項による仲裁が投資額に見合うほど増える可能性は少ないのではないだろうかと思われる。

2）について最近の報道では、安倍内閣も日本がISDS条項による被申し立て国になった場合の対策を関係部署に指示したようである。Claxton教授も本論でそれに対する具体策を述べている。特に対策にあたっては省庁の縦割り構造が大きな弊害になることを懸念し横断的な組織の構築を推奨しているが、まさに正鵠をついた提言といえよう。

尚、蛇足ではあるが、本論第二章に述べられているスペイン王国を被申立人とする太陽光発電の紛争20案件にはEU諸国を申立人とする仲裁がかなり含まれている。日揮関係者に小職がヒアリングしたところ、これらの案件に対してスペイン政府は、EU諸国はISDS条約が対象とする独立国家ではないとして仲裁不適格による門前払いを考えているとのことである。もしこれが事実であれば、本件紛争がEU諸国の法的独立性を問うという、予想もしなかった論争に波及するかもしれず極めて興味あることである。