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ECONOMIC PARTNERSHIP AGREEMENT BETWEEN JAPAN AND THE EUROPEAN UNION AND LEGAL ISSUES —A FOCUS ON INVESTMENT—

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I. *Introduction*

Negotiations regarding the free trade agreement between Japan and the European Union (EU) date back to 28 May 2011, just after the Fukushima accident. Both sides agreed to start a scoping process to conclude a free trade agreement (FTA). At that time, the EU and South Korea concluded a free trade agreement that entered into force in July 2011. Facing such a change, Japanese economic circles began demanding a similar agreement with the EU because Korean and Japanese products compete to some extent. Following the successful conclusion of the Scoping Exercise, the European Commission decided to ask the Council of the EU for a negotiating mandate for the Japan-EU negotiations in July 2012. The first round of negotiations was conducted in Brussels from 15 to 19 April 2013 with the second round taking place in Tokyo from 24 June to 3 July 2013. The deadline for the negotiations was set for one year hence from the EU side. One year later, the EU reviewed the negotiations process and decided to continue to negotiate with Japan. Most recently, the thirteenth round of negotiations on the Japan-EU Economic Partnership Agreement (EPA) took place from 26 October to 6 November 2015.

According to the Ministry of Economy, Trade and Industry (METI), the EU is an important trade partner that accounts for 10% of the Japanese total import and export value (the third largest value behind China and the USA).[1] Japan's investment in the EU is the second-largest investment destination behind the USA, and investment from the EU is the largest in Japan.[2] Japan's main areas of interest are 1) tariff elimination of EU industrial goods (e.g. auto 10%, electronic devices 14%), 2) movement of persons and other barriers and 3) transparency and improvement of the operation of regulations.[3] The first area holds the most interest for Japan and Japanese companies. On the other hand, the EU's interests are 1) Japan's Non-Tariff

[1] http://www.meti.go.jp/policy/trade_policy/epa/epa_en/eu.
[2] Ibid.
[3] Ibid.

Measures (NTMs) on autos, drugs, medical devices, food safety, and processed food etc., 2) public procurement (especially market access to railways, electricity and gas) and 3) geographical indication (GI).[4] As for GI, the Act of Protection of Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs (Geographical Indication Act) was enforced in Japan in June 2015, in the face of demands from the EU and in recognition of the importance.[5] In addition, the EU requested a conclusion to a binding political agreement, now a Strategic Partnership Agreement (SPA) according to the Treaty of Lisbon, especially, Article 21 of the EU Treaty.[6]

The EU finished negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada in September 2014 and is currently negotiating a Transatlantic Trade and Investment Partnership Agreement (TTIP) with the USA. On the other hand, Japan largely agreed to the Trans-Pacific Partnership Agreement (TPP Agreement) with 11 countries including the USA, Australia and Canada. Those are mega FTAs. The negotiations of those FTAs are conducted in parallel and influenced each other. One of the most important issues among those FTAs is investment.

This article examines the legal problems of the EU Common Commercial Policy (CCP) from the viewpoint of a third country and clarifies the legal issues of the Japan-EU EPA under negotiation, focusing on investment. Firstly, the competence problems of the CCP are considered, especially investment after the Treaty of Lisbon. Secondly, the Japanese situation regarding FTAs and investment agreements is discussed. Finally, conclusions and future issues are presented.

II. *The EU and Investment Related Agreements*

Japan is negotiating the EPA with the Union. One of the most complicated issues for Japan is to understand who is responsible for the negotiations. It is difficult for third countries to know how competence is divided between the EU and its Member States. The EPA will cover not only tariffs, but also other important trade related matters. In addition, the EU experienced a great change in the CCP after the Treaty of Lisbon.

1. Before the Treaty of Lisbon

The CCP is one of the oldest community (now, Union) policies that came into existence with the establishment of the European Economic Community in 1958. In the past, subjects of negotiations were mainly tariffs, but the scope of the CCP has now been extended to services, intellectual property rights and investment. The European Court of Justice contributed to the extension of its scope. For example, in Opinion 1/78 the Court expressed, “an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments

[4] Ibid.

[5] http://www.maff.go.jp/e/japan_food/gi_act; http://www.maff.go.jp/e/japan_food/gi_act/pdf/gi_pamph.pdf; http: //www.japaneselawtranslation.go.jp/law/detail/? ft = 1&co = 01&ia = 03&x = 70&y = 12&ky = geographical + indication&page=4&re=02.

[6] Yumiko Nakanishi, “Political Principles in Article 21TEU and Constitutionalism”, *Hitotsubashi Journal of Law and Politics*, Vol.42, 2014, pp.11; http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/26442/1/HJlaw0420000110.pdf.

intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time".[7] However, the Court recognised the limits of the extension and in Opinion 1/94 regarding the WTO it did not accept that the Community had exclusive competence for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS).[8]

Before the Treaty of Lisbon, i.e. according to Article 133 TEC, the CCP "shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies". As for agreements in the fields of trade in services and the commercial aspects of intellectual property, Article 133 TEC paragraphs 1 to 4 shall apply to them, although those fields did not fall within the scope of the CCP and the Community did not have exclusive competence in those fields. Trade and investment are connected to each other. However, Article 133 TEC did not refer to investment in any way.

There were about 190 investment related agreements between intra-EU Member States before the Treaty of Lisbon. About 1200 investment related agreements between the EU Member States and third countries existed, many of which have been concluded by Germany. In a few cases the EU became a contracting party with its Member States of agreements including investment with third countries. In those cases the EU competences were derived from Article 56 of the Treaty establishing the European Community (TEC) (now, 63 TFEU)[9] and Article 57 TEC (now, 64 Treaty on Functioning on the European Union (TFEU))[10] based on the reason that Articles 56 and 57 TEC would be affected when the related agreements include limitation to market access or freedom of establishment.

Before the Treaty of Lisbon, in the Community (now, the Union), the competence of direct investment lay principally with the Member States. The Community only had investment competences that fell within Articles 56 and 57 TEC, meaning that the Community could not conclude investment treaties with third countries by itself.

The European commission tried to amend the treaty provision to extend the scope of the CCP. With the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001, the Commission was unsuccessful in acquiring competence in the field of direct investment. However, the phrase "foreign direct investment" was introduced in Article III-314 of the Treaty establishing the European Constitution.[11] The final document of the working group had pointed out the

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7 Opinion 1/78 [1979] ECR 2871, para. 44; ECLI:EU:C:1979:224, para. 44.

8 Opinion 1/94 [1994] ECR I-5267; ECLI:EU:C:1994:384.

9 Article 56 (2) TEC lays down, "within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited".

10 Article 57 (2) TEC lays down, "whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment-including investment in real estate-establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries".

11 Streinz/Ohler/Herrmann, *Die neue Verfassung für Europa*, Beck, 2005, p.100.

importance of direct investment.[12] The Constitutional Treaty did not enter into force, but the treaty of Lisbon that took substantially from the Constitutional Treaty was concluded by the EU Member States in 2007 and entered into force on 1 December 2009. The Treaty of Lisbon changed the situation of the EU regarding the competence of direct investment.

2. After the Treaty of Lisbon

(1) Competences issues

The Treaty of Lisbon amended the TEC and Treaty on the European Union (TEU) substantially. One of the most important amendments relates to external actions of the EU. Title V of the TEU sets out general provisions on the Union's external action and specific provisions on the common foreign and security policy. Article 21 TEU lays down the following political principles: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. On the other hand, TEC was changed to TFEU. Part Five of TFEU sets down the general provisions on the Union's external action. Setting a special part for external action was a new concept. The political principles referred to in Article 21 TEU apply to the external actions including the CCP (Article 205 TFEU).[13]

Article 207 TFEU (former Article 133 TEC) lays down that the CCP shall be based on uniform principles, particularly with regard to changes in the conclusion of not only tariffs, but also trade agreements relating to trade in services, and the commercial aspects of intellectual property, foreign direct investment and so forth. This means that the new competences in the field of foreign direct investment as well as trade in services and intellectual property rights are transferred to the Union. Those competences are exclusive (Article 3 (1) (e) TFEU).

Article 207 TFEU does not define foreign direct investment (FDI) and the scope of FDI is unclear.[14] However, the definition is important because it directly relates to the scope of the Union's exclusive competences. If the Union has exclusive competences, it can negotiate and conclude agreements including investment issues alone. In the case of shared competences between the EU and its Member States, those agreements will be mixed agreements where the EU and its Member States conclude them together. It is uncertain whether the "foreign direct investment" in Article 207 TFEU covers all investment including portfolio investment. This point is important because the ordinary investment chapter of those agreements covers not only direct investment, but also indirect investment (portfolio investment). In addition it is unclear how to define the relationship between direct investment in Article 207 TFEU and property protection in Article 345 TFEU.[15] According to Article 345 TFEU the protection of property

[12] CONV 685/03, p.52.

[13] Marc Bungenberg, "Going Global? The EU Common Commercial Policy After Lisbon", in C. Herrmann and J.P. Terhecte (ed.), *European Yearbook of International Economic Law*, Springer, 2010, p.123, p.150.

[14] Ex. Freya Baetens, Gerard Kreijen and Andrea Varga, "Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know", *Vanderbilt Journal of Transnational Law*, Vol.47, No.5, (2014), p.1203, p.1223.

[15] Cf. Frank S Benyon, *Direct Investment, National Champions and EU Treaty Freedoms*, Hart Publishing, 2010, p.101; another opinion, Filippo Fontanelli and Giuseppe Bianco, "Conserving Towards NAFTA: An Analysis of FTA

belongs to the competence of the Member States.

In the case of C-157/05 Holböck, the European Court of Justice considered that the concept of direct investments concerned any type of investment undertaken by natural or legal persons and which served to establish or maintain lasting and direct links between the persons providing the capital and the undertaking to which that capital was made available in order to carry out an economic activity.[16] The European Commission published a communication document in 2010 after the Treaty of Lisbon.[17] In the document, the Commission clarified FDI as follows: "Foreign direct investment is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which it is made available in order to carry out an economic activity. When investments take the form of a shareholding, this objective presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as 'portfolio investments'".[18] The Commission recognised that the Treaty's Chapter on capital and payments (Articles 63-66 TFEU) covered direct as well as portfolio investments, but remarked further, "to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capital and payments, the exclusive Union competence to conclude agreements in this area would be implied".[19] This means that the Union would have implied treaty-making powers regarding portfolio investments according to Article 3 (2) TFEU, which was derived from AETR doctrine.[20] However, definitions of FDI differ among the scholars.[21] The German constitutional court expressed its view that direct investment would not cover portfolio investment in the decision regarding the Treaty of Lisbon.[22] It is for the European Court of Justice to clarify the scope of the phrase "direct investment".

(2) Existing Investment Agreements

The EU Member States have concluded many investments or agreements including investment with third countries. In Case C-205/06[23] the Court considered investment agreements. Austria had concluded investment agreements with China, Malaysia, Russia, South Korea, Turkey and Cape Verde prior to its accession to the EU. The Commission insisted that Austria had failed to fulfil its obligations under Article 307 (2) TEC (now, Article 351 (2)

Investment Chapters in the European Union and the United States", 50 *Stan. J. Int'l L.* 211, (2014), p.211, p.216.

16 Case C-157/05 Holböck v Finanzamt Salzburg-Land [2007] ECR I-4501, para. 34; ECLI:EU:C:2007:297, para. 34.

17 COM (2010) 343 final, Towards a comprehensive European international investment policy.

18 Ibid., pp.2-3.

19 Ibid., p.8.

20 Case 22/70 Commission v Council [1971] ECR 263; ECLI:EU:C:1971:32

21 Ex. Bungenberg, note (13), pp.143-145; Colin M. Brown, "Changes in the Common Commercial Policy of the European Union after the Entry into Force of the Treaty of Lisbon", p.163, pp.174-176, in Marc Bungenberg and Christoph Herrmann (ed.), *Common Commercial Policy after Lisbon*, Springer, 2013; David Leys, "EU Competence in Foreign Direct Investment: Will the EU Court of Justice End the Controversy", *Global Trade and Customs Journal*, Vol. 10, Issue 7&8, (2015), p.267, p.269.

22 BVerfGE, 2 BvE 2/08, Rn. 379 (30 Juni 2009),
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/06/es20090630_2bve000208.html.

23 Case C-205/06 Commission v Austria [2009] ECR I-1302; ECLI:EU:C:2009:119.

TFEU) by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on the transfer of capital contained in those agreements. The Court accepted the Commission's allegation. Article 307 (1) TEC (now, Article 351 (1) TFEU) lays down that the rights and obligations arising from agreements concluded before the establishment of the EEC or, for acceding States, before the date of their accession, between Member States and third countries shall not be affected by the Treaties. On the other hand, Article 307 (2) TEC (now, Article 351 (2) TFEU) obliged the Member States to take all appropriate steps to eliminate incompatibilities with Community (now, Union) law. Austria should have negotiated to amend the existing investment agreements with the above-mentioned countries. At that time, the measures under Article 57 (2) TEC (now, Article 64 (2) TFEU), Article 59 TEC (now, Article 66 TFEU) and Article 60 (1) TEC (now, Article 75 (1) TFEU) were not adopted and there was only risk. The Court placed a high value on avoiding future incompatibilities with Union law.

This case occurred in May 2006 and the Court gave its judgment in March 2009. It is presumed the Court was considering the effect of the new investment competence and future conclusion of investment agreements by the Union, although the Court's decision was made before the Treaty of Lisbon. Similar cases exist.[24]

(3) Transitional Measure

Facing the above-mentioned Case C-205/06 and similar cases on the one hand and new competence in the field of direct investment after the Treaty of Lisbon on the other, the Commission published a proposal for a regulation of the European Parliament (EP) and of the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries.[25] The proposal was adopted on 12 December as Regulation 1219/2012 ("grandfathering regulation") and entered into force on 8 January 2013.[26] The regulation is composed of a preamble and 17 articles. The legal basis is Article 207 (2) TFEU. Paragraph 4 of the preamble recognises that the Member States maintained a significant number of bilateral investment treaties with third countries and the TFEU does not contain any explicit transitional provisions for such treaties that have now come under the Union's exclusive competence. According to its paragraph 11, Member States are required to take the necessary measures to eliminate incompatibilities with Union law, contained in bilateral investment agreements concluded between them and third countries. The aim of regulation 1219/2012 is to set up transitional provisions.[27]

There are two periods: the first period is between 1 December 2009 (effective date of the Treaty of Lisbon) and 9 January 2013 (effective date of the regulation). The second period is after 9 January 2013. Member States shall notify all existing bilateral investment treaties (BITs) before 1 December 2009 or before the date of their accession (Article 2). The Commission may assess those BITs, by evaluating whether their provisions constitute a serious obstacle to the negotiations or conclusion by the Union of BITs with third countries (Article 5). After 9 January 2013, Member States were empowered to amend or conclude BITs with third countries

24 Cf. Case C-249/06 Commission v Sweden [2009] ECR I-1335; ECLI:EU:C:2009:119.

25 COM (2010) 344.

26 Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ 2012 L351/40.

27 Cf. Fontanelli and Bianco, note (15), p.220.

under certain conditions. Firstly, Member States shall notify the Commission of their intentions in writing, when they intend to enter into negotiations with third countries (Article 8). Secondly, the Commission authorises the Member States to open formal negotiations with a third country (Article 9) and it may request to participate in the negotiations (Article 10). Thirdly, the Member States shall notify the Commission of the outcome and transmit the text of such an agreement to the Commission (Article 11 (1)). Finally, the Commission authorises the Member States to sign and conclude such an agreement (Article 11 (4)).

After the Treaty of Lisbon, 1 December 2009, the Union has exclusive competence to negotiate and conclude investment agreements. However, until that date, the Member States had concluded many BITs with third countries. Therefore, the Union is obliged to respect those agreements. On the other hand, the Union has not yet concluded investment agreements. Therefore, the Member States are authorised to conclude those agreements temporarily. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may negotiate or conclude agreements, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts (Cf. Article 2 (1) TFEU). Regulation 1219/2012 empowers the Member States to negotiate and conclude investment agreements with third countries.

Third countries including Japan have to pay attention to current temporal situations and should be ready to amend or negotiate agreements with the Member States, taking into consideration competence changes in the EU. Third countries should assume that the Commission might participate in negotiations and in the future a bilateral investment agreement between a Member State and a third country might be replaced by an agreement between the EU and the third country or between the EU and the Member State on the one hand and the third country on the other.

(4) Preparation for Investment Agreements by the EU

The Commission published a communication document “toward a comprehensive European international investment policy” on 7 July 2010.[28] Currently, the Member States have Bilateral Investment Treaties (BITs) with third countries. However, the Commission will establish a common international investment policy of the Union where in the long run investors from the EU and from third countries do not need to rely on BITs by the Member States.[29] It recognises that the Union’s trade policy needs to integrate investment liberalisation and investment protection and it is the Union’s responsibility to promote the European model and the single market as a destination for foreign investors.[30] It also indicates that a common investment policy should be guided by political principles and objectives such as the promotion of the rule of law, human rights and sustainable development in Article 21 TEU and Article 205 TFEU.[31] As for the effective enforcement of investment commitments, investor-state dispute settlement (ISDS) is considered important and necessary.[32] However, there are some

[28] COM (2010) 343.

[29] Ibid., p.5.

[30] Ibid., pp.5-6.

[31] Ibid., p.9.

[32] Ibid., pp.9-10; but there are views that ISDS is not necessary between countries that have a legal system based on the rule of law. Cf. Reinhard Quick, “Why TTIP Should Have an Investment Chapter Including ISDS”, *Journal of World Trade* 49, No.2, (2015), p.199, p.204.

problems with this. ISDS might compete with the ECJ and it might affect the autonomy of EU Law.[33] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) offers the most often used method for ISDS. The Convention is open to signature and ratification by state members of the World Bank or the Statute of the International Court of Justice, but the EU is neither of these.[34] The Commission is making efforts to become a member of the ICSID convention, which may take a long time and is not easy.[35]

The Commission published a proposal for a regulation establishing a framework for managing financial responsibility linked to investor-state-dispute settlement tribunals established by international agreements to which the European Union is party on 21 June 2012.[36] It was adopted as regulation 912/2014 on 23 July 2014 and entered into force on 17 September 2014.[37] It is composed of the preamble and 25 articles. Its legal basis is Article 207 (2) TFEU. Since the Treaty of Lisbon, the Union has had exclusive competence in the CCP including FDI and may be a party to investment agreements. Those agreements can be bilateral agreements or mixed agreements with the Member States and may include an ISDS mechanism, which allows an investor from a third country to bring a claim against an entity in which it has made an investment (Preamble (2)). Further, ISDS is related to monetary compensation. Therefore, it is indispensable for not only the EU and the Member States, but also investors to recognise who is responsible financially and the respondent for ISDS cases. Regulation 912/2014 aims to clarify such matters, i.e. division of financial responsibilities between the EU and the Member States and establish related procedures. The Union will be a respondent where the dispute concerns treatment afforded by the EU organs (Article 1). In the regulation, the cooperation between the Commission and the Member States in accordance with the principle of sincere cooperation in Article 4 (3) TEU is emphasised (Article 6 and preamble (14)). The regulation clarifies the method of determining financial responsibilities between the Union and the Member States, but it is still unclear for investors of third countries how they should proceed because the division of competences between the EU and the Member States is not sufficiently clear and the Union cannot be a respondent in such ICSID cases. It is necessary to observe how the regulation will be implemented.

(5) Investment Agreements by the EU

The EU and South Korea began to negotiate an FTA in 2007 and concluded this on 15 October 2009 before the Treaty of Lisbon.[38] It is done in the form of a mixed agreement, meaning that the Member States ratified it with the EU. It entered into force in July 2011. The FTA includes the word “investment”, but does not have a chapter for investment and does not rule ISDS.

On the other hand, the EU and Singapore finished the negotiations for a comprehensive

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[33] Angelos Dimpoulos, “The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities”, *Common Market Law Review* 51, (2014), p.1671, pp.1696-1702.

[34] COM (2010) 343, p.10.

[35] Smaranda Miron, “The Last Bite of the BITs-Supremacy of EU Law versus Investment Treaty Arbitration”, *European Law Journal*, Vol.20, No.3, (2014), p.332, p.343.

[36] COM (2012) 335 final.

[37] OJ 2014 L257/121; Dimpoulos, note (33), pp.1675-1682; Leys, note (21), p.272.

[38] OJ 2011 L127/1.

FTA on 17 October 2014.[39] It has not yet been formally adopted and has not yet entered into force. It is uncertain whether the provisional agreement will be concluded by the Union and Singapore in the form of a bilateral agreement with or without the participation of the Member States. The Commission asked the European Court of Justice if the EU had exclusive competence or shared competence for the FTA on 10 July 2015.[40] Currently, the Court has not yet given its opinion 2/15. The agreement contains a special chapter for investment protection in Chapter 9 that is composed of 30 articles and a special annex for the mediation mechanism for investor-State disputes as Annex 9-E.

The EU finished the negotiations of the FTA, Comprehensive Trade and Economic Agreement (CETA) on 26 September 2014. CETA also has a special chapter for investment including ISDS. Currently, the EU and the USA are negotiating a Transatlantic Trade and Investment Partnership agreement (TTIP). One of the most important items is investment. In negotiations it is important for the Union to maintain or even emphasise the State's right to regulate, i.e. right to adopt generally binding laws for the purposes of health, environmental or consumer protection.[41] The Union and the USA have had trade conflicts regarding hormone-added meats, and genetically modified organisms (GMO) based on the precautionary principle. European consumers and environmental non-governmental organisations (NGO) are very conscious about such matters. Recently, the Commission published a proposal for investment protection and the investment court system for TTIP.[42] The compatibility of such a court with the autonomy of EU law is uncertain according to EU case law, especially Opinion 2/13.[43]

Further, it is also uncertain, whether the arbitral tribunal entrusted by the BITs of EU Member States can be a 'court or tribunal of a Member State' in the meaning of Article 267 TFEU.[44] The question is whether such an arbitral tribunal can seek a preliminary ruling before the European Court of Justice. In Case 102/81 Nordsee the Court held that an arbitrator could not be considered as a court within the meaning of Article 177 TEEC (now, Article 267 TFEU).[45] If the Court accepts it, which conditions an arbitral tribunal should be established?

3. Summary from the Viewpoint of a Third Country

Third countries that have concluded investment related agreements should take into account changes in the EU after the Treaty of Lisbon. They should be ready to renegotiate with the Member States or/and the Commission. Third countries, which are negotiating or will negotiate after the Treaty of Lisbon, should be aware of who will be a negotiation partner, the Commission or/ and the Member States and who has/have the competence to conclude related

[39] http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

[40] Opinion 2/15, OJ 2015 C363/18.

[41] Cf. Commission document, Public consultation on modalities for investment protection and ISDS in TTIP, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf

[42] http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[43] Opinion 2/13, ECLI:EU:C:2014:2454; Cf. Marise Cremona, "Guest Editorial", *Common Market Law Review* 52, (2015), p.351, p.360.

[44] Jürgen Basedow, "EU Law in International Arbitration: Referrals to the European Court of Justice", *Journal of International Arbitration* 32, No.4 (2015), p.367, pp.378-381; Cremona, note (43), p.360; Miron, note (35), p.334.

[45] Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v ReedereiMond Hochseefischerei Nordstern AG & Co. KG [1982] ECR 1095; ECLI:EU:C:1982:107; Basedow, note (44), p.371.

agreements. If the agreements are investment agreements or free trade agreements including investment issues that lay down ISDS, third countries should confirm in advance which arbitration can be used because the Union cannot be a respondent in the case of ICSID arbitration. When the Commission proposes the establishment of an investment court system, third countries should pay attention to legal issues in the EU. This means that it is uncertain whether such an establishment of an investment court complies with Union law. In Opinion 2/13 of the Court regarding the accession of the EU to the European Convention for the Protection of Human Rights (ECHR), the Court was very conscious about the autonomy of EU law and recognised the incompatibilities of the accession draft agreement with EU law.[46] In addition, after the Treaty of Lisbon, the ratification of those agreements requires the consent of the European Parliament (EP). Lastly, the EU requests third countries to accept the political principles in Article 21 TEU at the same time. Some legal points remain and they should be clarified by the EU Court in future. The above-mentioned Case Opinion 2/15 might be a good opportunity to clarify them to some extent.

Third countries can use the Union's actions and strategy as a reference. If third countries negotiate or conclude investment related agreements with developing countries, sharing or emphasising political principles is important. If they negotiate or conclude those agreements with developed countries, the right to regulate becomes increasingly important.

III. *Japan and Investment Related Agreements*

1. Figure of Investment Related Agreements

Japan and Germany are export countries, but there is a large difference regarding the investment policy between them. Germany's investment agreement with Pakistan in 1959 is said to be the first one of its kind and became a model for investment related agreements.[47] In fact, Germany has concluded about 200 (135 BITs and 64 other investment related agreements, including FTA) investment related agreements with third countries.[48] On the other hand, Japan has not concluded as many investment related agreements with third countries; only 36 investment related agreements (26 BITs and 10 other investment related agreements, including FTA) have been concluded.[49]

The oldest one is the investment agreement between Japan and Egypt.[50] It was concluded in January 1977 and entered into force in January 1978. This was the only agreement concluded in the 70s. In the 80s two investment agreements (one between Japan and Sri Lanka and the other between Japan and China) were enforced. In the 90s there were only three agreements (with Turkey (1993), Hong Kong (1997) and Bangladesh (1999)). In the noughties the number of investment related agreements increased suddenly. Nine BITs and eight

[46] Opinion 2/13, ECLI:EU:C:2014:2454.

[47] Ex. Markus Krajewski, *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective*, p.6, Friedrich-Ebert-Stiftung, EU Office Brussels, http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf.

[48] http://investmentpolicyhub.unctad.org/IIA/CountryBits/78.

[49] http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/105#iiaInnerMenu.

[50] http://www.meti.go.jp/policy/trade_policy/epa/english.html.

Economic Partnership Agreements were enforced. To date, the number continues to increase and Japan is negotiating BITs or EPA/FTAs with other third countries including the EU. Japan largely agreed to mega FTA, TPP with 11 other countries. TPP includes a special chapter for investment protection.

2. Character of Investment Related Agreements

All investment related agreements except two cases concluded by Japan include the ISDS procedures. The EPA between Japan and the Philippines that was enforced in December 2008 and the EPA between Japan and Australia enforced in January 2015 do not include the ISDS procedures.

Third countries with which Japan has concluded an FTA/EPA number 14. There are eight with Asian countries, one with ASEAN, three with Central and South American countries, Australia, and Switzerland. Japan and Switzerland decided to start common research in April 2005. Both countries decided to negotiate in January 2007 and signed the EPA in February 2009. The EPA with Switzerland entered into force in September 2009. It was the first EPA between Japan and a European country[51] and it contains the ISDS procedure in Article 94. Japan has concluded investment agreements with two Central and South American Countries (Colombia and Peru), 12 Asian Countries including South Korea and China, six Middle East/Africa Countries, Papua New Guinea and Russia.

In the past, Japan concluded investment related agreements in order to protect Japanese investors. However, Japan has recently concluded agreements with not only developing countries where Japanese investors invest, but also the developed countries Australia and Switzerland. Japan concluded an EPA with ASEAN and succeeded in concluding TPP with other countries. Estimating the increase of entry to foreign markets by Japanese companies after the TPP conclusion, the Japanese government is ready to support the improvement of legal infrastructure including proper enforcement of the ISDS procedures in foreign countries, especially Myanmar, Laos, Cambodia, Vietnam and Indonesia. The negotiations of a tripartite EPA with South Korea and China have currently been shelved because of political problems, but economic circles consider it important to restart of them.

IV. *Conclusions and Outlook*

Today, we have access to the the text of the TPP and that of the CETA, but access to even those drafts was denied during the negotiations. Unlike in the case of the draft of the Treaty establishing the European Constitution and the EU Charter of Fundamental Rights, the documents of working groups are not open to the public. The negotiations were held secretly and lacked transparency. The same thing applies to the negotiations between Japan and the EU. Those negotiations are not open to the public. Principally, we are only privy to when and where negotiations take place.[52] In Japan, the Ministry of Economy, Trade and Industry (METI), the

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[51] http://www.mofa.go.jp/region/europe/switzerland/epa0902/agreement.pdf.

[52] http://www.mofa.go.jp/policy/economy/page6e_000013.html; http://www.meti.go.jp/policy/trade_policy/epa/epa_en/eu/index.html.

Ministry of Foreign Affairs and other related ministries participate in the negotiations. The persons who are responsible for the TPP negotiations are responsible for other FTA/EPAs and consider them simultaneously. The participation of Japan in the TPP negotiations influenced the negotiations of the EPA between Japan and the EU.

Japan has neither concluded any FTA nor investment agreement with the EU and even the Member States before. It is the first time for Japan to negotiate investment related agreements with the EU. The EPA between them might contain ISDS procedures, the right to regulate and GI because both are developed countries. As there are still no draft texts of the EPA, only documents on related legal issues are accessible.

While Japan was negotiating the FTA with the EU, it decided to participate in negotiations of the Transpacific Partnership Agreement with the USA, Australia and other countries and its participation was approved on 20 April 2013. On the other hand, the EU was negotiating FTAs with Canada, the USA and other countries, too. Those parallel mega FTA negotiations influence the contents of each of those agreements. For example, TPP contains not only investment protection, but also ISDS provisions (Section B, Article 9.17-9.27), the right to regulate, and geographical identification (GI), which are insisted on by the Union. For example, Article 9.5 of the TPP lays down, "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives".[53] Article 9.9 paragraph 3 (d) of the TPP also lays down, "... shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: ... (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources". Further, Annex 9-B paragraph 3 (b) of the TPP regulates that non-discriminatory regulation actions by a Party that are designated and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances. Further, the conclusion of the TPP might accelerate the negotiations between Japan and the EU.

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[53] http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP-text/9.%20Investment%20Chapter.pdf.