## [Material]

# Rethinking of The cross-links between Tax treaties and Investment-related agreements

Keisaku KOGA (古賀 敬作)

#### 1. Introduction

Both tax treaties (DTCs: Double Tax Conventions) and Investment-related agreements (IRAs)—WTO Agreements, FTA (Free Trade Agreement)/EPA (Economic Partnership Agreement) and BIT (Bilateral Investment Treaty) can be closely linked by the activities of multinational enterprises (MNEs), especially foreign direct investment (FDI). DTCs, like trade IRAs, contain expressly established international legal norms. Such a close linking may often give rise to the simultaneous application of their legal norms. Removing obstacles to trade between states, as the case may be, restrict a State's taxing power. In the same cases, national taxing systems, in turn, may distort such trade. Thus, it seems that there is relationship between trade liberalization through IRAs and the restriction on the exercise of State's taxing power or the coordination of taxing powers between trading counties. If so, we need to once again consider the meaning or the role of DTCs which serve to coordinate each contracting State's taxing power and to facilitate FDI flows between their states.

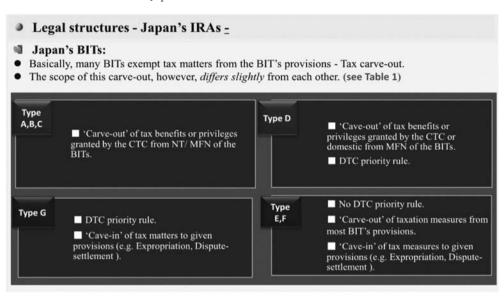
Looking at IRAs concluded by Japan, most of them (especially EPAs or BITs) in general cave out DTCs and grant superiority to DTCs over them to the extent of the inconsistency or conflict. For instance, Article 170 (2) of the Mexico-Japans EPA read as follows:

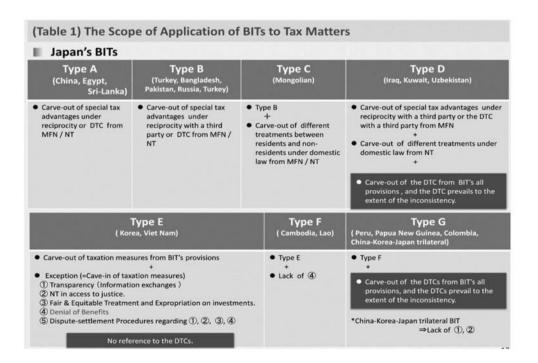
Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency<sup>1</sup>. [emphasis added]

This appears to indicate that IRAs and DTCs affect each of them, at the least from a Japan's perspective. However, it is not clear when or how such a conflict arises under IRAs. On the other hand, some of their Japanese IRAs do not provide for a DTC cave-out, and others do not

<sup>1)</sup> The English text is available at http://www.mofa.go.jp/region/latin/mexico/agreement/index.html. As to BITs, for example, Art. 21 of the Uzbekistan-Japan BIT reads as follows: "Nothing in this Agreement shall affect the rights and obligations of either Contracting Party under any convention for the avoidance of double taxation. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency." However, Japan does not conclude DTC with Uzbekistan.

provide for a definition of taxation measures, while they cave these measures out of the application of their IRAs. In this case, whether or not the interaction or cross-link between IRAs and DTCs exists depends presumably on the interpretation of the relevant provisions of IRAs. These facts or situations involving the relationship between IRAs and DTCs also may hold true of some counties other than Japan.





## (Table 2) Scope of Application of EPAs to Tax Matters

## ■ Japan's EPAs

Contracting party	Trade in Services Chapter		Investment Chapter		
	Carve-out	Carve-in	Cave-out	Cave-in	
Singapore	General: Carve-out of taxation measures / Exception (Cave-in): Transparency, Confidential information				
	Art. XXII(3) of GATS	Art. XIV(d) of GATS		Expropriation/Dispute-settlemen	
Mexico	General: • Carve-out of taxation measures, • Cave-out of the DTC (priority for the DTC to the extent of the inconsistency)				
				Expropriation/Dispute-settlement	
Malaysia, Thailand	General: Carve-out of taxation measures → Cave-out of the DTC (priority for the DTC to the extent of the inconsistency) / Exception (Cave-in): Transparency, Confidential information				
	Art. XXII(3) of GATS			Expropriation/Dispute-settlement	
Chile	General: • Carve-out of taxation measures / • Cave-out of the DTC				
		To the same extent as covered by the GATS		Expropriation	
Indonesia	General: Carve-out of taxation measures Cave-out of the DTC (priority for the DTC to the extent of the inconsistency) / Exception (Cave-in): Transparency, Confidential information				
				Expropriation/Dispute-settlement	
Brunei  No reference to DTCs.	General: • Carve-out of taxation measures / Exception (Cave-in): Transparency, Confidential information				
				Expropriation/Dispute- settlement/Access to the Courts of Justice	

# (Table 2 ) Scope of Application of EPAs to Tax Matters (Cont.)

## ■ Japan's EPAs

Contracting party	Trade in Services Chapter		Invest	Investment Chapter	
	Carve-out	Carve-in	Cave-out	Cave-in	
ASEAN	General: • Carve-out of taxation measures • Cave-out of the DTC (priority for the DTC to the extent of the inconsistency) / Exception (Cave-in): Transparency, Confidential information				
				No expropriation provision	
Philippines	General: • Carve-out of taxation measures • Cave-out of the DTC (priority for the DTC to the extent of the inconsistency )				
				Expropriation/Dispute- settlement/Access to the Courts of Justice	
Swiss	General: •Cave-out of the DTC (priority for the DTC to the extent of the inconsistency )				
			NT for the scope of the DTC     NT/MFN for dispute settlement	XIV (d) and (e) of GATS, mutatis mutandis	
Viet Nam	General: Carve-out of taxation measures Cave-out of the DTC (priority for the DTC to the extent of the inconsistency) / Exception (Cave-in): Transparency, Confidential information				
	Art. XXII(3) of GATS		No chapter		
India			ut of the DTC (priority for t , Confidential information, F		
Peru	General: •Carve-out of tax inconsistency ) / Exception		ut of the DTC (priority for t , Confidential information No cha		

## 2. Study object and background

The object of this study is mainly to explore the possible of the cross-links or conflicts between DTCs and IRAs. This is because I believe that the substance of arguments from the standpoint of trade or investment is not always contrary to the elimination of a difference (or discrimination) between domestic and foreign investments in the context of the object and purposes of the DTCs, and that seeking to such a possible of the cross-links or conflicts may contribute to make more developments of the DTCs. Recently, there has been an increase in the number of literature viewing the relationship the area of trade law that of tax law<sup>2</sup>). However, few would argue specifically the above inconsistency or conflict under EPAs or BITs, or how to interpret and apply the relevant provisions of IRAs in the case of the lack of a DTC cave-out clause or a definition of taxation measures.

## 3. Approach and questions

In the light of the legal structures of the IRAs or the object and purposes of the IRAs, this study explores the meaning or role of the DTCs, especially focusing on non-discrimination rules under the DTCs. The main study questions for example are summarized as follows:

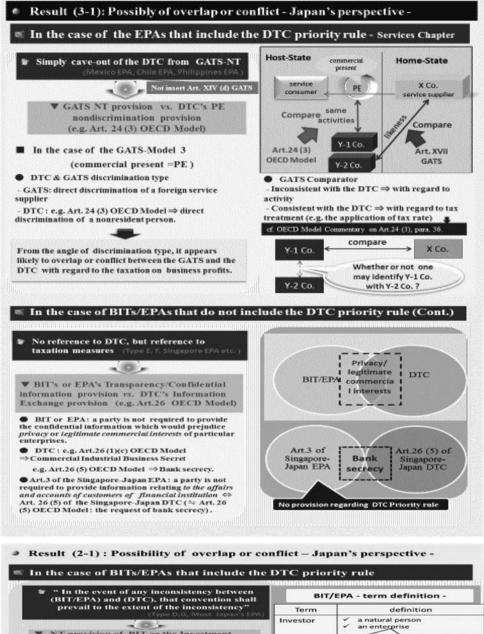
## (1) When or how a conflict between DTCs and IRAs arises?

As already mentioned above, under most of EPAs or BITs the DTC has priority over the EPA or BIT to the extent of the conflict between them. Here we considers the cases where such a conflict arises. One such case could be where non-discrimination principles which are commonly laid down in both DTCs and EPAs or BITs may conflict with each other. For example, it is the case where the National Treatment provision of EPAs or BITs and the Non-discrimination provision of the DTCs simultaneously apply to a taxation measure. There are also cases where with regard to a taxation measure the conflict between such a National Treatment provision and the distributive provisions of the DTCs, especially Business Profits provision of the DTCs may arise because it is said that the Business Profits provision of the OECD Model Tax Convention originates in the principle of "equitable treatment of commerce" under Article 23 (e) of the Covenant of the League of Nations, like agreements related trade and investment, as a historical fact. Taking these my views into account, I compare the legal structures of the EPAs or BITs with the Non-discrimination provisions of DTCs, and I examine or show hypothetical cases of conflicts between DTCs and IRAs (the EPAs or BITs), referring to tax case laws regarding the Non-discrimination provisions of the DTCs in some counties.

(2) Whether or not IRAs apply directly to a taxation measure in the case of the lack of a DTC cave-out clause or a definition of taxation measures?

Theoretically, there is no conflict between DTCs and IRAs in the case of the lack of a DTC cave-out clause or a definition of taxation measures. I consider that there exists this conflict if

<sup>2)</sup> For example, Lang/Herdin/Hofbauer (eds.), *WTO and Direct Taxation* (Alphen aan den Rijn: Kluwer Law International, 2005). See also Arthur J. Cockfild and Brian J. Arnold, "What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model", Vol. 2, No. 2 (2010).



\*\* In the event of any inconsistency between
(BIT/EPA) and (DTC), that convention shall
prevail to the extent of the inconsistency.

\*\* NT provision of BIT or the Investment
Chapter of EPA vs. DTC's non-discrimination
provision

BIT/EPA - term definition 
Term definition 
Term definition

Term definition

Investor an anterprise

any legal person or any other entity duly constituted or organized under the laws and regulations of the home-State

No less favorable treatment of a foreign investor and its investment that stands 'in like circumstances' with a domestic investor and its investment regarding investment activities

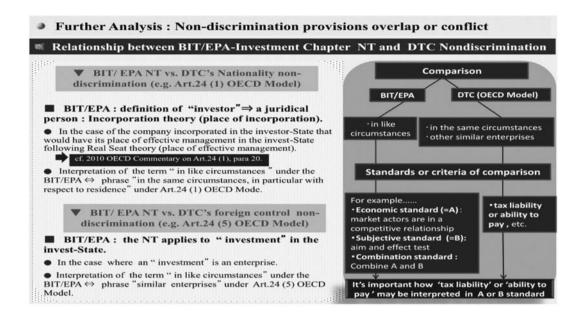
Broad and open-ended definition of 'investment activities'

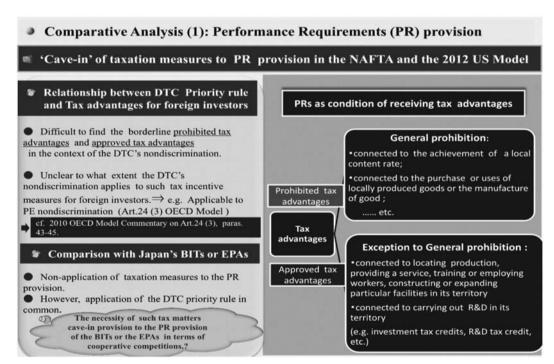
Broad and open-ended definition of 'investment activities'

Slikely to raise a overlap with the DTC ys non-discrimination (e.g. Art.24 (1), 3), (3) of the OECD Model)

The inconsistency depends on the interpretation of the term 'in like circumstances' (= Comparator standard)

Trigger the application of Art.24 (1) or (5)





domestic law prevails over international treaty in a county, such like Japan. In other words, this is that the conflict between DTCs and IRAs may arise if the IRAs apply directly to a taxation measure under such a domestic tax law because of the lack of a DTC cave-out clause or a definition of taxation measures. The possibility of such a conflict will be discussed further on in this study, taking account of Art. 30 of the Vienna Convention on the Law of Treaties or the

recent Japanese tax case law dealing with the relationship Hong King-Japan BIT and former Japanese CFC legislation.

## 4. Conclusions

- (1) Causes of overlaps or conflicts between IRAs and DTCs and Tentative ways to avoid them.
  - The lack of the DTC priority rule in the IRAs raises such overlaps (or conflicts) because of similar rules. But, this priority rule is not versatile.
  - The DTC priority rule consists of two sentences: First sentence provides for the 'caveout' of the DTC from all provisions. Second sentence provides for the DTC priority rule in the event of any inconsistency between BIT/EPA and DTC. Why is this second sentence inserted?
  - The necessity of the second sentence results from the unstable interpretations of terms employed by the DTCs which are similar to those of the IRAs 'likeness' and 'same circumstances', or 'other similar enterprises' etc. The second sentence only shows the requirements to secure a State's taxing powers from the side of tax law's field.
  - · A better way to avoid overlaps (or conflicts); the approach observed in US Model (see table 3) or clarification of the above terms in OECD Commentary.
- (2) Effectual tax matters provisions (Tax carve-out/in) in IRAs.
  - · Reconsider the scope of 'Carve-in' of taxation measures i.e. taxation measures apply to the PR provision or the provision regarding the denial of the BIT's benefits.
  - · In this case, enough communication between relevant authorities.

#### References;

Diebold, NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES 'Likeness' in WTO/GATS (CAMBRIDGE, 2010).

Lang, Herdin & Hofbauer eds., WTO and Direct Taxation (Alphen aan den Rijn: Kluwer Law International, 2005).

Lang, Herdin & Hofbauer eds., The Relevance of WTO Law for Tax Matters (Linde, 2006).

Van Raad, Nondiscrimination in taxation of cross-border income under the OECD Model and EC Treaty rules—a concise comparison and assessment, in Tax Globalist Essays in honour of Maarten J. Ellis (IBFD, 2005).

WÄLDE & KOLO, COVERAGE OF TAXATION UNDER MODERN INVESTMENT TREATIES, in The Oxford Handbook of INTERNATIONAL INVESTMENT LAW (Ortino & Schreuer eds., OXFORD, 2008).

Ault & Sasseville, *Taxation and non-discrimination: a reconsideration*, WORLD TAX JOURNAL, Vol. 2, No. 2 (2010).

Avery Jones, Some Current Tax Treaty Issues, Sozeikenkû, No. 751 (2012).

Bezborodov, Freedom of Establishment in the EC Economic Partnership Agreements: in Search of its Direct Effect on Direct Taxation, INTERTAX Vol. 35 (2007).

Cockfild & Arnold, What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model, WORLD TAX JOURNAL, Vol. 2, No. 2 (2010).

Diebold, NON-DISCRMINATION AND THE PILLARS OF INTERNATIONA (2010).