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# MAJOR LEGISLATION & TREATIES

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## 1. Constitutional Law

### **Act to Amend Part of the Self-Defense Forces Act, etc. In Order to Contribute to Ensuring the Peace and Security of Japan and International Society**

Law No.76, September 30, 2015 (unenforced).

#### **Background:**

In September 1, 2014, prime minister Abe Shinzo changed the government interpretation of Article 9 of the Constitution, which permitted the exercise of the individual right to self defense, in order to enable the exercise of the right to collective self-defense.

Changing the government interpretation did not itself enable the exercise of the right to collective self-defense. Existing legal systems are premised on the exercise of only the right to individual self-defense as in, for example, Article 76 of Self-Defense Force Act (prior to revision) which stipulated that the Self-Defense Force can respond with defense operations “when an armed attack on Japan occurs or the clear danger of an armed attack is approaching”. Without changing the existing legal systems, the

government could not exercise the right to collective self-defense.

Thus, this amendment allows the Japanese government to use the force on the basis of the right to collective self-defense.

At the time of the debate about this amendment in the Diet, there was much public opposition because this amendment aims to change Article 9 of the Constitution without the process of the revision of the Constitution. Indeed, in the periphery of the Diet, demonstrations which opposed this amendment were carried out and tens of thousands people gathered.

### **Main Provisions:**

#### **Self-Defense Force Act**

**Article 3:** The self-defense force is assigned the mission to defend Japanese peace and independence and to maintain national security, and to maintain public order if necessary.

**Article 76:** The Prime Minister can order all or a part of the self-defense force to take the field under the following situation when the Prime Minister recognizes the need to defend Japan. .... 2 The situation that an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn the people's right to life, liberty and the pursuit of happiness.

#### **Act to Ensure the Independence and Peace of Japan and Security of Japanese People in the Armed Attacked Situation and the Situation which Threatens Japan's Survival**

**Article 1:** The purpose of this Act is to prepare for the situation in which an armed attack against Japan threatens Japan's survival, and to support Japan's peace and independence and the security of Japan and Japanese people.

**Article 2(4):** "The Situation which threatens Japan's survival" is the situation in which an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn the people's right to life, liberty and the pursuit of happiness.

**Editorial Note:**

The main points of this amendment are the following: ① Deleting the term of Article 3 of the Self-Defense Force Act, “direct and indirect invasion”, and permitting the Japanese government to use force when Japan is not invaded. ② Japan can use the force when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn the people’s right to life, liberty and the pursuit of happiness. ③ Japan can prepare the system which enables it to cope with not only an armed attack against Japan but also “the situation which threatens Japan’ survival”.

The most important point of this amendment is that it enables Japan to exercise the right to collective self-defense. Before the cabinet decision of September 1, 2014, Japanese government and constitutional scholars were consistent that it is unconstitutional to exercise the right to collective self-defense. But this amendment, which is based on the cabinet decision, enables the use of force when a foreign country that is in a close relationship with Japan was suffers an armed attack even if Japan is not attacked.

There are many problems about this amendment. First, exercising the right to collective self-defense violates Article 9 of the Constitution. In Article 9 of the Japanese Constitution, the use of military force (first clause) and the maintenance of military force (second clause) are not recognized. The Japanese government took the position that exercising the right to collective self-defense is unconstitutional. This is clear from the reply of the Japanese government. (For example, materials showing that the right of collective self-defense to prevent military attacks on foreign countries cannot be constitutional was provided to Congress in 1972. ) And almost all constitutional scholars thought that the right to collective self-defense is unconstitutional, although there are various theories about Article 9 of the Constitution. So this amendment and the cabinet decision which permits the right to collective self-defense is an acrobatic interpretation and there is a high possibility this amendment is unconstitutional.

Even excluding this problem, this amendment has many problems.

Second, the definition of “The Situation which threatens Japan’s survival” is too vague. In this amendment, “The Situation which threatens Japan’s survival” is defined as “the situation that an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn the people’s right to life, liberty and the pursuit of happiness.” But it is not clear that what country is “a foreign country that is in a close relationship with Japan”. Only countries in the military alliance? Or are countries that are in a close economic relationship also included? In addition, what kind of situation is “a clear danger to fundamentally overturn the people’s right to life, liberty and the pursuit of happiness”? It is not clear. These uncertainties are very dangerous because they can lead to an arbitrary use of the self-defense force by the Cabinet.

Third, the Japanese Diet probably will not control the use of forces by the Cabinet. In the Japanese political system, a Parliamentary system is adopted. So the leader of the majority Party becomes the Prime Minister. Further, party discipline is very strict in Japan. As a matter of practice, it is impossible that the Diet controls Cabinet and it is assumed that the Diet recognizes the Cabinet to use the self-defense force without meaningful discussion. So the Diet probably cannot meaningfully control the Cabinet. Rather, it increases the validity of the use of force by the Diet and the Cabinet is to warning together, and there is even a risk that domestic brakes are lost altogether.

As such, this amendment has, at least, three problems: ①problem of unconstitutionality; ②Uncertainty of the requirements for the use of force; ③There will not be a meaningful control on the use of force. This amendment is inappropriate.

## **2. Commercial Law**

The legislative and other related activities concerning commercial laws in Japan in 2015 are as follows:

First, the amendment to the Companies Act which was enacted in 2014 took effect on May 1, 2015.