

ACTIVITIES

I. Activities of the International Law Association of Japan

THE TWENTY-FIRST ACADEMIC CONFERENCE (2014)

Date: April 19, 2014

Place: Sanjo Kaikan, University of Tokyo

The Common Theme: Energy and International Law

Morning Session:

Chair: Professor Kazuhiro Nakatani, University of Tokyo

Speaker: Professor Nobuo Tanaka, University of Tokyo

Afternoon Session:

Chair: Professor Shigeki Sakamoto, Doshisha University

Speaker: Associate Professor Koji Nishimoto, Senshu University

Speaker: Professor Yoshiaki Nomura, Osaka University

Discussant: Professor Yoshimasa Furuta, University of Tokyo

Speaker: Professor Akiko Okamatsu, Hosei University

Speaker: Professor Masato Dogauchi, Waseda University

Energy Security and International Governance

Nobuo Tanaka, Professor, University of Tokyo

The Shale revolution has made significant impacts on global energy markets. Cheap gas strengthens US industrial competitiveness in energy intensive sectors. As a result, trade balance will be significantly improved, and the US will clearly be the winner of the Shale revolution. The US may achieve energy independence from the oil supplies of the Middle East, and it will start exporting natural gas as liquefied natural gas (LNG) in 2016. The International Energy Agency (IEA) says 90% of oil from the Middle East will flow to Asia, in particular, China and India, by 2035. Energy security will be the single most critical issue for these countries and emerging countries as well, more so than ever before. How will they defend searoutes for oil and gas cargo? What should Japan do if the US no longer commits to keep free navigation only through the Strait of Hormuz? Will China and India join the IEA to prepare for a possible disruption of oil supplies? Russia will play an important role as an alternative source of oil and gas without passage through the Hormuz. China considers pipeline network with Central Asia as well as Russia as an important strategy for diversification. Japan faces serious risks of power shortages if a Middle East disruption happens while all nuclear power plants shut down after the Fukushima accident. Japan increases its dependency on fossil fuels while suffering from very high prices of oil and gas from an unstable Middle East.

Europe provides a model for collective energy security by means of connecting members with pipelines and power grids. Can East Asian countries move toward this model by overcoming territorial issues? Japan should join the Asian network first by building a pipeline with Russia. Can the Energy Charter help to discipline the Asian Network?

Protection of Energy Investments under International Investment Agreements (IIAs) and Investment Treaty Arbitration

Koji Nishimoto, Associate Professor, Senshu University

A stable supply of energy has been, and continues to be, a primary driver of economic growth in developed and developing economies. For this reason, it is critical that state governments play a major role in regulating and modernizing the energy market, often operating energy infrastructures for a stable supply as well. In this role, to attract foreign investments; to support the modernization of the energy sector; and to access international capital markets, states often enter into IIAs. These agreements have been used by investors and host states to enhance prospects for long-term relationships between foreign investors seeking legitimate returns from investments, and host states seeking to secure economic development and any related benefits. The explosive growth of Bilateral Investment Treaties (BITs) and Free Trade Agreements containing investment provisions in the 1990s was an expression of the search for stability and legal certainty in the area of foreign investments.

Though state involvement in energy markets can be instrumental to development and modernization, it can also cause both domestic and foreign investments in energy industries to be vulnerable to the effects of a change of policy by the host government or broader political circumstances in the host state. IIAs make use of Investor-State Dispute Settlement (ISDS) to resolve disputes arising as a result of alleged violations of the IIAs. Since the 1990s, the use of ISDS has rapidly increased, and a variety of cases has been filed by investors on the grounds that host states have violated their obligations under IIAs. The typical manifestation of such a violation is the outright seizure through expropriation or nationalization by way of unilateral legislative measures by the host state. Recent violations have also been alleged related to changes of economic policy that have been imposed on the investor.

Examining two recent arbitral awards concerning dramatic changes in energy policy in the states of Argentina and Hungary, respectively, this lecture illustrates how arbitrators have developed the notion of the legitimate expectation to balance protection of investments in energy infrastructures, on one hand, and the legitimate exercise of government authority, on the other. It also attempts to clarify lessons for post-Fukushima energy policy in Japan.

Energy Law from a Contractual Perspective

Yoshiaki Nomura, Professor, Osaka University

Few energy contracts are free from governmental regulations. In the upstream, the state has the power to grant the right to mine and acquire mineral resources. In the downstream, market mechanisms are subordinated to securing a stable supply. Even contract terms related to energy sales and negotiations thereof are influenced by governmental regulations.

Beginning in 2000, the EU Commission investigated long-term supply contracts and successfully negotiated with various upstream suppliers to eliminate destination clauses in long-term gas supply contracts that prohibited the purchaser from re-selling the gas to countries other than the countries of destination.

Long-term LNG supply contracts with Japanese purchasers have long had destination clauses (together with oil price indexation clauses). Though recent flexibility of the LNG supply markets is expected to have an impact on destination requirements in the contracts, compared with the European purchasers, Japanese counterparts are not in a better position to negotiate better terms because they lack the backing of competition law and an enforcement agency. Japanese competition law does not apply to contract terms that prohibit re-selling to areas outside of Japan.

While admitting that contractual terms are basically determined between private companies, the Japanese Government takes on a mission to improve the environment that enables negotiation on the diversification of terms and conditions of transactions, such as the pricing mechanisms and destination clauses.

Freedom of contract and of negotiation in energy law is limited more than in any other field of law by regulatory law and policy of the supplier and purchaser countries.

International Law on the Peaceful Use of Nuclear Energy

Akiko Okamatsu, Professor, Hosei University

Nuclear energy is used for both peaceful purposes and military purposes. Although the peaceful use of nuclear energy is facilitated and encouraged by the International Atomic Energy Agency (IAEA), there is a potential risk of nuclear proliferation behind it. As nuclear materials may be diverted to a military use in the process of concentrating and reprocessing, states which have nuclear power plants are required to accept the inspection by the IAEA under the obligations of the Non-Proliferation of Nuclear Weapons Treaty (NPT). However, India, Israel, and Pakistan have not signed this treaty. In response to the Indian nuclear test in May 1974, the Nuclear Suppliers Group (NSG) was created, and it controls the export and re-transfer of nuclear materials, equipment, and technology, which may be ap-

plicable to nuclear weapons development.

However, the United States insisted on granting a waiver to India in the NSG to commence civilian nuclear trade and passed the bill to approve the deal with India. The India-United States Civil Nuclear Agreement was established as an event that shakes the NPT system and is criticized by many states such as Pakistan and Iran.

Japan also had meetings to conclude the cooperation agreement with India subject to terms that would state the agreement would be suspended when India restarts a nuclear test. The damage that the agreement inflicts on should be considered.

International Framework of Nuclear Liability and Japan

Masato Dogauchi, Professor, Waseda University

While Japan has not been a party to any international convention on nuclear liability, the rules of Japanese law thereon are, in general, in conformity with those of other countries. However, it has been pointed out that the unlimited liability system adopted by Japan, along with Germany, Switzerland and some others, is exceptional in comparison.

On and after March 11, 2011, a huge tsunami caused an accident in the Fukushima Daiichi (No. 1) Nuclear Power Plant of the Tokyo Electric Power Company (TEPCO), and people living nearby were forced to evacuate from their towns and villages. Almost immediately after the accident, the Japanese government made a statement that Article 3, Paragraph 2 of the Act on Compensation for Nuclear Damages should not be applied, which meant that this accident was not caused by "a grave natural disaster of an exceptional character" and TEPCO should not be immune from the liability. Without additional legal measures, TEPCO would have been bankrupted, and the victims would not have been fully compensated. Accordingly, Japan enacted several acts that included, among others, the Nuclear Damage Compensation Facilitation Act, which provided for financing TEPCO in several ways. It is significant to note that this scheme works in this special case because TEPCO would be able to earn enough money to repay its debt in the long run, because it has many thermal and hydro power plants and will provide consumers with electricity. Under such conditions, currently, the unlimited liability system of Japan works.

If nuclear power will be utilized for the generation of electricity, at least for a certain time, it is necessary to build a new legal system to cope with potential future accidents that might be caused by a smaller nuclear operator. One of the steps to be adopted by Japan is to ratify the Convention on Supplementary Compensation for Nuclear Damage (CSC). The CSC would make the Japanese system more reliable. One of the merits is the introduction of a rule of exclusive

jurisdiction in the Contracting Party within which the nuclear incident occurs (Article XIII). This rule would prevent claimants outside the country of a nuclear incident from suing nuclear operators in their domestic courts. If such lawsuits are brought, the courts would apply ordinary tort law in accordance with which nuclear power manufactures would be liable. This result would be against the established principle of channeling the liability to the operator only. In order to secure a fair result, however, the ratification of the CSC would not be enough. A special choice-of-law rule should be incorporated in the conflict of laws of Japan (Act of General Rules for the Application of Laws). This rule should provide for the application of the law of the place of the incident, not the law of the place of the damage as set forth in Article 17 of the Act.

ACTIVITIES OF THE OFFICE IN 2013

1. The General Meeting of the Japan Branch was held on April 20, 2013 in Sanjo Kaikan, Tokyo.
 - a. With regard to fiscal year 2012:
 - (i) The financial account of the Japan Branch for fiscal year 2012, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved at the Meeting;
 - (ii) The general affairs of the Branch during this term were reported by Professor Kazuhiro Nakatani, Secretary-General;
 - (iii) The academic activities of the Branch during this term were reported by Professor Yuji Iwasawa, Director of Planning; and
 - (iv) The publication of Volume 55 of the *Japanese Yearbook of International Law* was reported by Professor Koichi Morikawa, Co-Editor-in-Chief.
 - b. With regard to fiscal year 2013:
 - (i) The budget for fiscal year 2013, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved at the Meeting;
 - (ii) The general affairs scheduled for this term were presented by Professor Kazuhiro Nakatani, Secretary-General;
 - (iii) The academic activities scheduled for this term were presented by Professor Yuji Iwasawa, Director of Planning; and
 - (iv) The progress of the editorial work for Volumes 56 and 57 of the *Japanese Yearbook of International Law* was reported by Professor Koichi Morikawa, Co-Editor-in-Chief.
 - (v) The following 6 persons were admitted as new members of the Branch: Tadashi Imai, Professor, Utsunomiya University; Kentaro Furuya, Associate Professor, Japan Coast Guard Academy;

Yoko Matsuura, Assistant Professor, Tohoku Gakuin University;
 Jun Matsukuma, Professor, Tokyo University of Foreign Studies;
 Seigo Iwamoto, Professor, Kyoto Sangyo University; and
 Kazuko Kawamata, Professor, Rishso University.

2. Council Meetings were held twice for fiscal year 2013 and dealt with the following matters:
 - a. At the first Council Meeting of 2013 held on April 20, 2013 in Sanjo Kaikan, Tokyo:
 - (i) The financial account of the Branch for fiscal year 2012 and its budget for fiscal year 2013 were reported;
 - (ii) The general affairs of the Branch for fiscal year 2012 and the program for fiscal year 2013 were approved;
 - (iii) The academic activities of the Branch during fiscal year 2012 and the program for fiscal year 2013 were approved; and
 - (iv) The publication of Volume 55 of the *Japanese Yearbook of International Law* and the progress of the editorial work for Volumes 56 and 57 of the *Japanese Yearbook of International Law* were reported.
 - b. At the second Council Meeting held on November 11, 2013 in Shigaku Kaikan, Tokyo:
 - (i) The financial condition of the Branch was reported;
 - (ii) The general affairs of the Branch were reported;
 - (iii) The academic activities of the Branch were reported; and
 - (iv) The progress of the editorial work for Volumes 56 and 57 of the *Japanese Yearbook of International Law* was reported.

*Correction to JYIL Vol. 56, pp. 484-485: The General Meeting and the First and Second Council Meetings in 2012 were held on April 21, 2012.

Kazuhiro Nakatani