ACTIVITIES

I. ACTIVITIES OF THE INTERNATIONAL LAW ASSOCIATION OF JAPAN

THE TWELVES ACADEMIC CONFERENCE
(2004)

Date: April 10, 2004
Place: Sanjo Kaikan, Tokyo
The Common Theme: **The Changing Functions of Diplomatic Protection and the Protection of Rights of Individuals in International Law**
Morning Session:
Chair: Professor Kimio Yakushiji, Ritsumeikan Asia Pacific University
Speaker: Professor Vaughan Lowe, University of Oxford
Speaker: Professor Makoto Kimura, Senshu University
Afternoon Session (Part 1):
Chair: Professor Kaoru Obata, Nagoya University
Speaker: Associate Professor Yumi Nishimura, Sophia University
Speaker: Professor Nobuyuki Kato, Hokkai Gakuen University
Afternoon Session (Part 2):
Chair: Professor Masato Dogauchi, Waseda University
Speaker: Professor Koresuke Yamauchi, Chuo University
Speaker: Professor Takao Suami, Waseda University
Summary of the Presentations: See the following

The International Court of Justice and Diplomatic Protection

Vaughan Lowe, University of Oxford

If a State mistreats a national of another State and violates international law, for example by arbitrarily imprisoning him or by confiscating his property without compensation, the State of which the injured person is a national may bring a claim against the wrong-doing State. It may exercise diplomatic protection in respect of the injured national.

The doctrine of diplomatic protection has several roots. Historically, it is a survival of the practice of monarchs in writing to each other to complain of mistreatments of their subjects. Logically, it served at a later stage in the development of international law to explain how it is that the mistreatment of an individual can violate the international law that determines the rights and duties of States, and give rise to an international claim. With the rise of the modern State and of international human rights law, those two roots have withered; and they no longer anchor the doctrine of diplomatic protection in the way that they once did. There is, however, a

more general need, which persists today and arguably must always persist within a legal system. That is, the need for those who bring international claims to answer the question, what business is it of yours? What, as lawyers say, is your *locus standi*. It is that need which is the central point of my paper; and my argument is that the despite the attention given to diplomatic protection and State responsibility by the International Law Commission, the question of *locus standi* is being neglected.

Diplomatic Protection and the Development of International Protection of Human Rights

Makoto Kimura, Senshu University

Introduction
I Work of International Law Commission on Diplomatic Protection
II Overview of First Report by Dugard
III Influence of Development of Human Rights Protection on Diplomatic Protection
IV Diplomatic Protection as a Means for Securing Implementation of Human Rights Treaties
V Fundamental Contradictions Inherent in the Established Notion that State Exercises Diplomatic Protection as its own Right
VI New Problems of Diplomatic Protection Arising with Development of International Protection of Human Rights
VII Distinction and Interaction between Diplomatic Protection and Human Rights Protection
VIII Other Proper Functions and *raison d'etre* of Diplomatic Protection
IX Need for Securing Procedural Control of Diplomatic Protection
X Some other Problems
Conclusion

The Relevance of Diplomatic Protection in Today's International Law

Yumi Nishimura, Sophia University

In light of the rapid growth of various treaty regimes (universal or regional human rights treaties, mixed arbitrations under the ICSID etc.) where individuals can claim their rights under international law directly against foreign States, as well as recognition in some States of certain exceptions for the sovereign immunity from domestic litigation, the relevance of the classical institution of diplomatic protection is being questioned recently. If, as the PCIJ stated in the Mavrommatis case, by taking up the case of one of its subjects and by resorting to the diplomatic protection, a State is asserting its own rights, we must consider what kind of effects those recent recognition of individual rights should bear on this classical institution. For example, whether the State espous-

ing its national's claim and resorting to diplomatic protection can dispose of national's rights as stipulated in certain lump-sum agreements can be a problem.

This report, exploring relationship between individuals' interests and national States' rights under the law of diplomatic protection, questions the recent tendency to understand this institution as a tool for promoting individual human rights and points out we should recognize different bases and rationales of each fields of international law.

Diplomatic Protection and Informal Good Offices

Nobuyuki Kato, Hokkaigakuen University

While diplomatic protection (formal espousal) to which the local remedies rule applies should be distinguished from informal diplomatic assistance (good offices) from the legal and theoretical point of view, "a surprising number of actions taken by the State Department and by diplomatic agents abroad have", as J. G. Wetter points out, "in reality been no different from ... formal protests or representations." Article 1 of the Draft Articles provisionally adopted by the ILC in 2002 defines diplomatic protection confining this concept to State's action in respect of an injury to its national "arising from an internationally wrongful act" of another State. While such a definition and scope of diplomatic protection is often supported by academic writers, there seems to have been cases of diplomatic protection where any internationally wrongful act was not invoked, as *the Serbian Loans Case* in the P. C. I. J. (1929). Moreover, while consular protection is and should be distinct from diplomatic protection, the I. C. J. discerned "interdependence of the rights of the State and of individual rights" in *the Avena and other Mexican Nationals Case* (2004). Taking these into account, the reporter examined the definition and scope of diplomatic protection and its relationship with other means of protection of nationals. He considers the definition and scope of diplomatic protection in the ILC Draft Articles to be rather narrow in light of State practice, though the boundary with the other means of protection is ambiguous.

Nationality of a Corporation and Diplomatic Protection for Corporations in International Law

Koresuke Yamauchi, Chuo University

First of all, national laws are often referred to on the occasion of decision of "nationality" of a corporation. In the Civil Code, there is no statutory rule relating to definition of a foreign corporation, but our theory and praxis consider a foreign corporation as a legal entity established by foreign laws. In Conflict of Laws, there is no statutory rule about personal law of corporations. The Supreme Court mentioned,

however, two factors (establishment and seat). A foreign company in the Commercial Code is defined as company established by foreign laws. In the Banking Act, a foreign bank is based on foreign laws and besides it has been licensed to practice banking business in that country. A national corporation in the Income Tax Act is an entity having the head office in this country and a foreign corporation is an entity except national corporations. The Shipping Act has adopted a control-theory. These differences are caused by different purposes of various laws. The universal interpretation is indispensable to the International Law. Secondly, we can find the word "nationality" of a corporation in many books concerning International Law. But we have no statutory rule concerned "nationality" of a corporation. The reason why the authors use this expression should be made clear. Barcelona-Traction-case is frequently quoted in many articles about diplomatic protection. This case is introduced by many scholars with different understanding. Thirdly, it is said that a Calvo-clause is void under International Law. However, there is no further explanation for an implication of this phase. When the contracting parties didn't adopt a Calvo-clause in their contract, few courts in South-American countries may decide that a Calvo-rule in their own codes is able to apply as a mandatory provision. A Calvo-clause means the territorialism in International Law. It is in fact equivalent to the lex fori-principle in Conflict of Laws.

European Integration and Diplomatic Protection

Takao Suami, Waseda Law School

This presentation deals with two distinct issues on diplomatic protection under the progress of integration through the European Union. The first issue concerns diplomatic protection in the context of relationship between Member States of the EU. It is considered here whether or not any Member State can execute the right to diplomatic protection under international law against another Member State, which infringed the EC law. It is expected within the EU that such disputes on the EC law are resolved through court proceedings before the European Court of Justice. Therefore, it is generally understood that there is no actual possibility of utilizing diplomatic protection within the EU. It seems difficult to totally exclude theoretical possibility of doing such protection, however. The second issue relates to diplomatic protection in the context of relation between EU Member States and the third countries outside the EU. After the coming into force of Maastricht Treaty in 1993, every national of a Member State is granted citizenship of the Union by the EC Treaty, and it is in particular provided that every national shall be entitled to protection by the diplomatic or consular authorities of any Member State (Article 20 of the EC Treaty). There is a conflict over how to interpret this provision. Although a few broadly interpret this provision so that it can cover ordinary diplomatic protection, most including the European Commission support narrow interpretation which confines it

to the right to receive assistance from diplomatic authorities in the third countries. The EU has highly developed itself as a self-contained regime. However, the EU is still made up of various elements having different natures. Such hybrid nature of the EU largely reflects upon discussion about diplomatic protection in the EU.

The COMMEMORATIVE SEMINAR FOR DR. THOMAS BATY

Under the co-sponsorship of the ILA Japan Branch, the Commemorative Seminar for Dr. Thomas Baty (1869-1954) was held in the afternoon of April 9, 2004, at Sanjo Kaikan of the University of Tokyo, on the occasion of the fiftieth anniversary of his death. Dr. Baty served as legal advisor to the Foreign Ministry of Japan between 1916 and 1941, and also between 1952 and 1954. He was instrumental in establishing the ILA Japan Branch in 1920.(1)

The Seminar's common theme was "Contributions of Dr. Thomas Baty and their Reappraisal", and it was presided over by Professors Shinya Murase and Jun'ichi Eto, both of Sophia University. The first speaker was Professor Vaughan Lowe of Oxford University who spoke on "The Place of Dr. Baty in International Law Studies in the 20th Century". Mr. Toshijiro Nakajima, former Justice of the Supreme Court of Japan, former Director General of the Treaties Bureau of the Japanese Foreign Ministry and also Vice-President of the ILA Japan Branch, gave a detailed account and appraisal of the "Work of Dr. Baty as Legal Adviser to the Japanese Foreign Ministry." Then, Mr. Martin Gornall of Oxfordshire, a relative of Dr. Baty and successor of the Baty Archive, spoke on "The Life of Dr. Thomas Baty."(2)

During the coffee break, participants were invited to an exhibition of photos of Dr. Baty which had been brought by Mr. and Mrs. Gornall.

The fourth speaker was Professor Hatsue Shinohara of Waseda University who spoke on "Thomas Baty: A Traditionalist in the Study of International Law in the Interwar Period." A paper was also given by Professor (Emeritus) Jun'ichi Akiba of Hitotsubashi University on "Dr. Thomas Baty (1869-1954) and Private International Law: In Search for Clues of Reappraisal of Baty's Theory." Professor (Emeritus) Toshio Sawada, President of the ICC International Court of Arbitration, gave his "Thoughts on Dr. Baty," which was followed by Mr. Kyoichi Usui, former editor of *Bungei Shunju* and an old friend of Dr. Baty since the 1930s, who shared his memories with the participants on Dr. Baty's favorite dish, "Curried Rice with Eggs."

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(1) See Shinya Murase, "Thomas Baty in Japan: Seeing through the Twilight," *The British Year Book of International Law*, vol.73, 2003, pp.315-342)

(2) See Martin Gornall, "Dr. Thomas Baty (1869-1954): Legal Adviser to the Japanese Foreign Ministry 1916-1941," in *Biographical Portraits*, vol.v, ed. Sir Hugh Cortazzi, to be published by The Japan Society 2004.

The Seminar was attended by some 80 people, and was followed by a reception. Ambassador Chusei Yamada, member of the UN International Law Commission and adviser to the Organizing Committee of the Commemorative Seminar, gave a remark on Dr. Baty's contribution and thanked the participants.

Mr. and Mrs. Gornall, with their daughters, Erica and Elizabeth, visited the grave of Dr. Baty at Aoyama Cemetery on April 8 who were joined by Professor and Mrs. Lowe, Mr. Joseph Altham and a number of Japanese friends. The Gornalls visited Lake Chuzenji, Nikko, on April 12 and 13 and were able to identify the location of Dr. Baty's old summer house though the house itself had had to be demolished in the 1990s.

ACTIVITIES OF THE OFFICE IN 2004

1. The General Meeting of the Japan Branch was held on 10 April, 2004 at Sanjo Kaikan, Tokyo.

a. With regard to the fiscal year 2003:
   (i) The financial account of the Japan Branch for fiscal year 2003, audited by Mr. Masatsugu Mitsuki and Mr. Shunji Yanai, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, were submitted and approved by the meeting.
   (ii) The general affairs of the Branch during this term were reported by Professor Shinya Murase, Secretary-General.
   (iii) The academic activities of the Branch during this term were reported by Professor Naoya Okuwaki, Director of Plannning.
   (iv) Publication of Number 46 of *The Japanese Annual of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.

b. With regard to the fiscal year 2004:
   (i) The budget for fiscal year 2004, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the meeting.
   (ii) The general affairs scheduled for this term were presented by Professor Shinya Murase, Secretary-General.
   (iii) The academic activities of the Branch scheduled for this term were presented by Professor Naoya Okuwaki, Director of Plannning.
   (iv) The Progress of the editorial work for Numbers 47 and 48 of *The Japanese Annual of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.

2. Council Meetings were held twice for fiscal year 2004 and dealt with the following matters.

a. At the first Regular Council Meeting of 2004 held on April 10, 2004 at Sanjo Kaikan, Tokyo:

(i) The financial account of the Branch for fiscal year 2003 and its budget for fiscal year 2004 were approved.
(ii) The general affairs of the Branch during fiscal year 2003 and the program for fiscal year 2004 were approved.
(iii) The academic activities of the Branch during fiscal year 2003 and the program for fiscal year 2004 were approved.
(iv) The publication of Number 46 of *The Japanese Annual of International Law* and the progress of the editorial work for Numbers 47 and 48 were reported on.
(v) The following persons were admitted as new regular members of the Branch.

- Kyo Arai, Associate Professor, Kyoto Gakuen University
- Hiroko Akizuki, Professor, Asia University
- Kanami Ishibashi, Associate Professor, Tokyo University of Foreign Languages
- Hidenori Inoue, Professor, Meisei University
- Aki Kitazawa, Associate Professor, Keio University
- Naozumi Kurokami, Associate Professor, Okayama University
- Keiko Ko, Associate Professor, Mie University
- Mari Koyano, Associate Professor, University of Shizuoka
- Taro Saishu, Lecturer, Fisheries College
- Kazuya Sakamoto, Associate Professor, Kyushu Kokusai University
- Hiromi Sato, Lecturer, National Defense Academy
- Yasuhiro Shigeta, Associate Professor, Osaka Gakuin University
- Akiho Shibata, Associate Professor, Okayama University
- Megumi Suzuki, Associate Professor, Fukushima University
- Yukari Takamura, Associate Professor, Ryukoku University
- Miyako Tatematsu, Associate Professor, Yamagata University
- Koji Teraya, Associate Professor, University of Tokyo
- Shinji Tokugawa, Professor, Ritsumeikan University
- Itsuko Nakai, Professor, Konan University
- Tomoaki Nishimura, Associate Professor, Mie University
- Keiko Morita, Reserch Associate, National Institute for Defense Studies
- Tetsuya Yamada, Associate Professor, Sugiyama Women's College
- Tomoyuki Yuyama, Associate Professor, Kagawa University
- Dai Yokomizo, Lecturer, Kanazawa University
- Takuya Yoshida, Associate Professor, Akita Keizaihoka University
- Sachiko Yoshimura, Associate Professor, Hiroshima Shudo University
- Thomas J Schoenbaum, Professor, International Christian University
- Tadashi Ishikawa, Attoney-at-Law, Oh-Ebashi Law Office
- Takeo Kosugi, Attoney-at-Law, Matsuo Sogo Law Office
- Yasufumi Shiroyama, Attoney-at-Law, Anderson Mori Law Office
- Wataru Sueyoshi, Attoney-at-Law, Mori, Hamada &Matsumotro

- Shinichiro Tanaka, Attoney-at-Law, Nakamura&Partnes Patent &Law Office
- Aijiro Tsunoda, Attoney-at-Law, Nagashima,Ohno&Tsunematsu Law Office
- Kazuhiko Yoshida, Attoney-at-Law, Nakamura&Partnes Patent &Law Office
- Tetsuo Ito, Professor, Tokai University

b. At the second Regular Council Meeting of 2004 was held on October 12, 2003 at Shigaku Kaikan, Tokyo:

(i) the financial condition of the Branch was reported on.

(ii) The general affairs of the Branch was reported on.

(iii) The academic activities of the Branch were reported on.

(iv) The progress of the editorial work for Number 47 and 48 were reported on..

(v) The following persons were admitted as new members of the Branch.

- Naoko Saiki, Professor, Keio University
- Takao Suami, Professor, Waseda University
- Mustafa Kamal Gueye, Polucy Researcher, Institute for Global Environmental Strategies
- Osamu Yoshida, Assistant Professor, Tsukuba University

(vi) The Council approved the Study Group's report on the holding of the ILA Conference in 2014 in Japan on the condition that the proposal be ratified by the General Meeting in April 2005

(Shinya Murase, Kazuhiro Nakatani)