

ACTIVITIES

I. Activities of the International Law Association of Japan

THE SEVENTEENTH ACADEMIC CONFERENCE (2009)

Date: April 18, 2009

Place: Sanjo Kaikan, University of Tokyo

The Common Theme: International Law and Culture

Morning Session:

Chair: Emeritus Professor Jun'ichi Akiba, Hitotsubashi University

Speaker: Emeritus Professor Shigeru Kozai, Kyoto University

Afternoon Session:

Chair: Emeritus Professor Nisuke Ando, Kyoto University

Speaker: Professor Tsuyoshi Kawase, Sophia University

Speaker: Professor Masaki Orita, Chuo University

Speaker: Professor Toshiyuki Kono, Kyushu University

Activities of the Committee on Cultural Heritage Law of the International Law Association (ILA)

Shigeru Kozai, Professor Emeritus, Kyoto University

Reflecting on the past activities of the Committee on Cultural Heritage Law of the International Law Association (ILA), Professor Shigeru Kozai, who has been a member of the Committee for 20 years, discussed the following three aspects of the Committee's work as its main achievements.

The first was the drafting of the Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (1994), which was instrumental in adopting the *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, which came into force in 2009.

The second, in response to the Committee's concern regarding finding a way to secure protection and recovery of cultural property, was the drafting of "Principles for Cooperation in the Mutual Protection of and Transfer of Cultural Material" and "Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material" which were intended to supplement the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, and *1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict*, respectively.

The Third was the Committee's recent Working Paper which focused on the relationship between international trade law and cultural heritage law. The core problem was a conflict between those who insist on trade liberalization and those who favor

national cultural identity or cultural diversity. Given the difficulty in reconciling the two opposing approaches, Prof. Kozai observed that the future work for the Committee should be exploring the scope of the exception for export restriction in Article XX(f) of GATT 1994.

**Cultural Diversity in the Context of the WTO Agreement:
Product Characteristics of Cultural Media Products and Their Treatment**

Tsuyoshi Kawase, Professor, Sophia University

The 2005 UNESCO Convention on Cultural Diversity (CCD) protects and promotes cultural diversity and reaffirms the sovereign rights of States to take measures for that purpose. Yet, one can ask whether a State may legitimately do so even when taking such measures has a negative impact on trade (*e.g.*, tax treatment, broadcasting/screen quota systems, and subsidies, all discriminatory and in favor of domestic cultural products). The WTO Agreement in force is not flexible enough to accommodate the dual nature of cultural products, *i.e.*, a vehicle of identity, values and meaning, and an object of trade at the same time, resulting in some restrictions on WTO Members' cultural policies.

Firstly, the non-discrimination principles of the GATT do not allow Members to treat differently domestic and foreign cultural media products despite some differences between them in cultural traits. One cannot soundly allege, for instance, that foreign films in competition with domestic films are nevertheless not "like products." The precedents in the GATT/WTO suggest the fear that allowing such a distinction would result in indefinite protectionism.

Secondly, the "positive list" approach under the GATS does not exempt e-commerce of cultural media products from the discipline of the GATT; the traded objects are still goods. The broad concept of "goods" comprises any tradable and transferable objects of economic value, whether tangible or intangible. This understanding also coincides with an economic observation of the nature of goods.

Thirdly, the relevant clauses in the WTO Agreement do not appropriately provide for cultural exceptions. The existence of the CCD, in combination with treaty application and interpretation in accordance with the Vienna Convention on the Law of Treaties, could also provide only a limited ground for flexible interpretation of the WTO Agreement.

The observation thus far illustrates a strained relationship between trade and culture. These difficulties in reconciliation of the two values point to the urgent need to establish an institutional and substantive interface between the WTO Agreement and the CCD.

**Legal Issues Concerning “Convention on the Protection and Promotion
of the Diversity of Cultural Expressions”**

Masaki Orita, Professor, Chuo University

The Convention was adopted in Paris on 20 October 2005 and entered into force on 18 March 2007. As of the end of March 2009, 97 states and the European Community are Parties to the Convention. Looking back at the history of discussions and documents of UNESCO and other fora about diversity of cultures and the arguments at GATT/WTO negotiations about exceptions of culture within the framework of free trade, the reports points out three points in analyzing and evaluating the Convention. The first point is the basic aim of the Convention which puts high value on diversity of cultures and the importance of understanding different cultures and facilitating their interaction. The second point is the relationship of the rights and obligations under the Convention with those of other international agreements such as WTO/GATT. The third point is the protection and promotion of cultures of developing countries threatened by the possibility of serious impairment. Many scholars have focused substantial discussions on the second point. The report considers that under Article 20 of the Convention, the rights under the Convention do not legally modify the obligations of other agreements, although the Convention may give some influence in interpretation of other agreements and in future negotiations. The report considers that despite some vagueness on the second point, the Convention gives a very good legal framework to deepen on-going international discussions on the first and the third points, which are important for the basic stability of international order. The report recommends that non-party countries, including Japan and USA, should join the Convention and participate in the on-going international discussions.

**The Convention for the Safeguarding
of the Intangible Cultural Heritage and its Impacts**

Toshiyuki Kono, Professor, Kyushu University

This lecture began by providing an overview of the development of international law in the field of cultural heritage before the establishment of UNESCO. UNESCO, which was established in 1945 with the aim of formulating international instruments to protect the world's inheritance of books, works of art and monuments of history and science (the UNESCO Charter Article 1 paragraph 2 (c)), adopted five Conventions and two Protocols in the field of cultural heritage: the Convention for the Protection of Cultural Property in the Event of Armed Conflicts (1954) and two Protocols (1954 and 1999); the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (1970); the Convention for the Protection of World Cultural and Natural Heritage (1972); the Convention for the Protection of Underwater Cultural Heritage (2001); and the Convention for the Safeguarding of the

Intangible Cultural Heritage (2003). This lecture offered some theoretical analysis on the notions of “cultural property” and “cultural heritage.” This lecture then focused, in particular, on the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). After explaining its drafting history and the structural scheme of the Convention, the lecture identified various specificities of this Convention, pointing out the differences between this Convention and the Convention for the Protection of World Cultural and Natural Heritage. Furthermore, the lecture identified several issues that are related to other fields of law, i.e. human rights and intellectual property rights, as well as possible future directions of research.

ACTIVITIES OF OFFICE IN 2009

1. The General Meeting of the Japan Branch was held on April 18, 2009 at Sanjo Kaikan, Tokyo.

- a. Election of Council Members and Officers

Thirty Council Members and two Auditors, who are to serve from October 23, 2009 to October 22, 2012, were elected as follows.

Council Members

Jun'ichi Akiba, Professor Emeritus, Hitotsubashi University
 Nisuke Ando, Professor Emeritus, Kyoto University
 Masato Dogauchi, Professor, Waseda University,
 Hisakazu Fujita, Professor, Kansai University
 Kazuya Hirobe, Professor, Seikei University
 Ryuichi Ida, Professor, Kyoto University
 Yuji Iwasawa, Professor, University of Tokyo
 Atsuko Kanehara, Professor, Rikkyo University
 Naoya Kasai-Okuwaki, Professor, University of Tokyo
 Yoshiya Kawamata, Professor Emeritus, Kyoto University
 Akira Kotera, Professor, University of Tokyo
 Shigeru Kozai, Professor Emeritus, Kyoto University
 Yoshio Kumakura, Attorney-at-Law, Nakamura & Partners Patent & Law
 Office
 Yoshiro Matsui, Professor, Ritsumeikan University
 Hiroshi Matsuoka, Professor, Tezukayama University
 Shigeki Miyazaki, Professor Emeritus, Meiji University
 Koichi Morikawa, Professor, Senshu University
 Shinya Murase, Professor, Sophia University
 Toshiji Nakajima, Legal Advisor, Asahi Law Office
 Kazuhiro Nakatani, Professor, University of Tokyo
 Seiichi Ochiai, Professor, Chuo University
 Shigeru Oda, Professor Emeritus, Tohoku University

Tsuneo Ohtori, Professor Emeritus, University of Tokyo
 Hisashi Owada, President, International Court of Justice
 Yoshiaki Sakurada, Professor, Konan University
 Koji Tsuruoka, Director-General of International Legal Affairs Bureau,
 Ministry of Foreign Affairs
 Hisashi Uchida, Former Professor, University of Tokyo
 Chusei Yamada, Member, International Law Commission
 Soji Yamamoto, Professor Emeritus, Tohoku University
 Shunji Yanai, Judge, International Tribunal for the Law of the Sea

Auditors

Masaki Orita, Professor, Chuo University
 Akira Kawamura, Attorney-at-Law, Anderson Mori & Tomotsune Law
 Office

- b. With regard to fiscal year 2008:
- (i) The financial account of the Japan Branch for fiscal year 2008, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (ii) The general affairs of the Branch during this term were reported by Professor Naoya Okuwaki, Secretary-General.
 - (iii) The academic activities of the Branch during this term were reported by Professor Yuji Iwasawa, Director of Planning.
 - (iv) The publication of Volume 51 of *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
- c. With regard to fiscal year 2009:
- (i) The budget for fiscal year 2009, 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 Naoya Okuwaki, Secretary-General.
 - (iii) The academic activities scheduled for this term were presented by Professor Yuji Iwasawa, Director of Planning.
 - (iv) The progress of the editorial work for Volumes 52 and 53 of *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
2. Council Meetings were held twice for fiscal year 2009 and dealt with the following matters.
- a. At the first regular Council Meeting of 2009 held on April 18, 2009 at Sanjo Kaikan, Tokyo:

- (i) The financial account of the Branch for fiscal year 2008 and its budget for fiscal year 2009 were reported.
 - (ii) The general affairs of the Branch for fiscal year 2008 and the program for fiscal year 2009 were approved.
 - (iii) The academic activities of the Branch during fiscal year 2008 and the program for fiscal year 2009 were approved.
 - (iv) The publication of Volume 51 of *Japanese Yearbook of International Law* and the progress of the editorial work for Volumes 52 and 53 of *Japanese Yearbook of International Law* were reported on.
 - (v) The following persons were admitted as new members of the Branch.
Keiichi Nakabayashi, Associate Professor, Hiroshima Shudo University
Mari Takeuchi, Associate Professor, Okayama University
Yasuko Tsuru, Professor, Tokyo Gakugei University
Iwao Fujisawa, Associate Professor, Chiba University
Kiyohisa Tanaka, Assistant Professor, Aichi University
Rei Kawazoe, Assistant Professor, Nihon University
Tsuyoshi Kawase, Professor, Sophia University
- b. At the second Regular Meeting of 2009 held on November 10, 2009 at Gakushi Kaikan, Tokyo
- (i) Judge Shunji Yanai was elected as the President.
 - (ii) Professor Shinya Murase was elected as the Vice-President.
 - (iii) Mr. Yoshio Kumakura and Professor Naoya Okuwaki were elected as the Standing Councillors.
 - (iv) Professor Kazuhiro Nakatani was elected as the Secretary General.
 - (v) Former President Shigeru Oda was elected as the Honorary President.
 - (vi) Former Vice-President Toshijiro Nakajima was elected as an Honorary Member.
 - (vii) The financial condition of the Branch was reported on.
 - (viii) The general affairs of the Branch was reported on.
 - (ix) The academic activities of the Branch were reported on.
 - (x) The progress of the editorial work for Volumes 52 and 53 of *Japanese Yearbook of International Law* was reported on.
 - (xi) The following person was admitted as a new member of the Branch
Takehiro Nobumori, Director, Bank of Japan

Kazuhiro Nakatani