

## ACTIVITIES

### I. Activities of the International Law Association of Japan

#### THE EIGHTEENTH ACADEMIC CONFERENCE (2010)

Date: April 17, 2010

Place: Sanjo Kaikan, University of Tokyo

The Common Theme: New Developments of Sovereign Immunity

Morning Session:

Chair: Professor Yayoi Sato, Kansai University

Speaker: Ambassador Chusei Yamada, Former Member of the International Law Commission

Afternoon Session:

Chair: Professor Kimio Yakushiji, Ritsumeikan University

Speaker: Mr. Koji Tsuruoka, Ministry of Foreign Affairs

Speaker: Professor Yasushi Nakanishi, Kyoto University

Speaker: Associate Professor Shusuke Kakiuchi, University of Tokyo

Speaker: Mr. Takehiro Nobumori, Bank of Japan

Speaker: Mr. Eiichi Fukushima, Attorney-at-Law, Nishimura & Asahi

#### UN Convention on Jurisdictional Immunities of States and Their Property

Chusei Yamada, Special Assistant to the Minister for Foreign Affairs  
Former member of the UN International Law Commission

Preparation for the UN Convention on Jurisdictional Immunities of States and Their Property began in 1978 in the International Law Commission (ILC), and it was finally adopted 27 years later by the UN General Assembly in 2004. Transition from the absolute rules to the restrictive rules of jurisdictional immunity was led by Western European and North American States as exemplified by the adoption of the European Convention of State Immunity of 1972 and enactments of Foreign Sovereign Immunities Act of 1976 (US) and the State Immunity Act of 1978 (UK). The socialist States of the former Soviet Union and East European States, and newly independent States that had adhered to the absolute rules of jurisdictional immunity began to move toward the market economy system and by virtue of that move became amenable to the restrictive rules of jurisdictional immunity. The determination of the border between the absolute and restrictive rules during that transition period was a difficult task.

The UN General Assembly examined the draft articles of the ILC from 1992 to 1994. It identified five outstanding issues: (1) concept of a State for purposes of immunity, (2) criteria for determining the commercial character of a contract or transaction, (3) concept of a State enterprise or other entity in relation to commercial

transaction, (4) contracts of employment, and (5) measures of constraint against State property. Japan decided to play an active role in further negotiations and was instrumental in making the ILC to reconsider these five issues in 1999 and provide suggestions for their solution. Active negotiation was resumed in the General Assembly from 1999 to 2004 and Japan played a coordinating role among the key players to achieve consensus while taking into account the suggestions of the ILC.

The General Assembly successfully concluded negotiations in 2004 by adopting a convention consisting of 33 Articles and an Annex to the convention containing understandings of some of the articles. The Government of Japan has already ratified the convention. However, it will still be several more years before the convention comes into force. Until the 1960s, many codification conventions were produced in a shorter timeframe, even within a few years. Now it often takes thirty to forty years before a convention comes into force. However, the progressive development of international law and its codification remains one of the most important functions of the General Assembly. The process of establishing rule of law must be regularly reviewed and restructured in order to meet the urgent needs of the international society.

#### **Significance of Japan's Conclusion of the United Nations Convention on Jurisdictional Immunities of States and Their Property**

Koji Tsuruoka, Director-General, International Legal Affairs Bureau,  
Ministry of Foreign Affairs

On May 11, 2010, Japan concluded the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the domestic legislation necessary to implement the Convention was put into force in April 2010.

On the orders of the Daishin-in (the Supreme Court of Japan) in 1928 and since then, Japanese courts had consistently adopted "absolute immunity" theory. Then, in 1997, the Sixth Committee of the UN General Assembly resumed discussions of the draft articles of the Convention, and Japan actively tried to bring the various opinions among member states to agreement. In December 2004, the Convention was adopted in the UN General Assembly. Around the same time, Japanese district courts were gradually changing their position, and the Supreme Court adopted the "restrictive immunity" theory in July 2006. In its decision, the Supreme Court ruled that a foreign state was not to be granted immunity from the civil jurisdiction of Japan for "commercial transactions." Thereafter, following careful consideration, Japan decided to conclude the Convention. Though the Convention has not entered into force yet, the Japanese domestic legislation is applied to all concerned states regardless of their participation in the Convention. By enacting such domestic legislation and concluding the Convention, Japan has shown a positive attitude toward the establishment of the clear and singular rule of international law.

**Reflections on Sovereign Immunity: From the Perspective of Conflict of Laws**

Yasushi Nakanishi, Professor, Kyoto University

The Japanese Foreign State Immunity Act of 2009, based on the United Nations Convention on Jurisdictional Immunities of States and Their property, makes Japan's praxis about state immunity clear. However, we should reconsider some problems that, with entry into force of the Act, may result in conflict of laws.

First, we should reexamine the relationship between immunity and jurisdiction. Jurisdiction is, in principle, a matter of domestic law, and in order to assert jurisdiction about a case, the forum state must have territorial connection with the case. However, for example, in Articles 9 and 10 of the Act, territorial connection with the forum state, that is to say Japan, is the requirement to exercise jurisdiction against a foreign state as an exception to its immunity. We suspect that jurisdictional issues might have entered unconsciously into the Act and the UN Convention.

Second, we should reconsider the choice of law problems arising in lawsuits with a foreign State acting as defendant and the problems as to recognition of foreign judgments in such a lawsuit. Under the absolute doctrine of sovereign immunity, which had been the praxis of Japan in principle until the Supreme Court overturned its prior decision in 2006, it was not necessary to decide the merit of the case. However, under the Act, we must determine which law may be applicable for litigation in which a foreign state is the defendant, because even if a foreign state is the defendant, Japan's courts would exercise jurisdiction to a certain extent. Is there any special element in such cases not present in cases between private parties? According to our conclusions, no special treatment is necessary, so it is a normal choice of law rules and rules of recognition of foreign judgments that decide on such issues.

**Foreign State Immunity Viewed from the Perspective of Japanese Procedural Law**

Shusuke Kakiuchi, Associate Professor, University of Tokyo

The enactment of the Act on Civil Jurisdiction over Foreign States in 2009 increased the foreseeability of foreign state immunity in Japan. Nevertheless, this does not mean that every possible doubt as to the application of the restrictive theory has been eliminated by the new law. In order to procure a theoretical viewpoint which will serve as a guideline for the interpretation of the new law, it is necessary, first, to consider the rationale of immunity under current Japanese law. Second, the problem of treatment of a foreign state which is not named as a party to the proceeding should be examined as one of several problems that are not expressly addressed by the new law. As for the first question, we may conclude that, among other considerations behind the provisions of the Act, that of the extent to which the exercise of jurisdiction affects the exercise of the foreign state's sovereign power plays an important role. Thus, in cases in which doubt arises with regard to interpretation of the Act, this con-

sideration can affect the decision as to whether immunity should be granted or not. However, it is not obvious in what sense the exercise of jurisdiction could affect the activities of foreign states. In particular, it is difficult to say that *res judicata* of a judgment can directly infringe upon the foreign state's sovereign activities by itself, at least in normal cases where a claim against the foreign State is at issue. Consequently, other effects of a judgment, including its *de facto* effects, should be focused on. As for the second question, extension of *de facto* effects of judgment plays an important role. Although the Act has no explicit provisions regarding this question, it should be admitted that there exist instances in which immunity is to be granted even if the foreign state is not named a party, so as to interpret the Act in conformity with the UN Convention. However, so far as immunity can be granted in a second lawsuit and this provides a sufficient remedy, immunity does not come into question in the first lawsuit.

### **The Significance of Japan's Sovereign Immunity Law from the Perspective of Comparative law**

Takehiro Nobumori, Bank of Japan

The legislation of Japan's Sovereign Immunity Law, which includes a special clause concerning the protection of the central bank's assets, makes some material progress in that regard, and central bankers have paid attention to the immunity privilege afforded to central banks. This is because sovereign immunity enables central banks to function properly to pursue public functions. In particular, the immunity claim for assets held by central banks in other jurisdictions has been sometimes controversial in litigation. It has not been admissible at times for central banks to enjoy immunity privileges because of two peculiar characteristics of central banks: independent legal structure and transactions similar to those conducted by commercial parties.

Following such undesirable consequences of litigation, various jurisdictions have clarified the status of the central banks' assets. For example, the U.S. and U.K., which recognized the importance of protecting a central bank's assets from a policy perspective, promulgated a comprehensive immunity statute providing a special immunity rule for central banks' assets in the 1970s. In the past ten years, other jurisdictions, including China, France, and Switzerland, have passed statutes specifically addressing central bank asset immunities. Under such circumstances, Japan has had to clarify its policy on protection of assets held by foreign central banks in order to compete with other countries' with financial centers.

The clause of Japan's Sovereign Immunity Law eliminates legal uncertainties regarding foreign central banks assets in Japan. However, it can be argued that some issues remain, for example, coverage of central bank concepts and treatment of the Bank for International Settlement.

**Case Study concerning the US FSIA where the Defendants were  
Japanese Government Agencies**

Eiichi Fukushima, Nishimura & Asahi

The following is a brief overview of a case in which our firm acted for a Japanese Government Agency (“B Agency”) and Japanese Government Association (“C Association”) in a claim brought against them in the U.S. District Court for Y District of Texas for an injunction and damages for patent infringement.

We made the following arguments under US FSIA: (i) Foreign agency and instrumentality are subject to sovereign immunity if exceptions are not applicable under 28 U.S.C. §1604; (ii) B Agency and C Association fall under “agency” or “instrumentality” under 28 U.S.C. §1603 (a) and (b); and (iii) the exception for “commercial activity” under US FSIA is not applicable under 28 U.S.C. §1603 (d) and §1605 (a) (2).

In support of our argument as to whether B Agency and C Association fall under “agency” or “instrumentality” under US FSIA, we cited the cases of *Patrickson v. Dole Food Company* (9th Circuit, 2001) and *Dole Food Co. v. Patrickson* (Supreme Court, 2003).

With regard to commercial activities, 28 U.S.C. §1605(a)(2) states that “...an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

This part of the act was discussed in *Republic of Argentina v. Weltover, Inc.* (Supreme Court, 1992).

Finally, we introduced other US FSIA cases in which Japanese Government agencies were defendants.

**ACTIVITIES OF OFFICE IN 2010**

1. The General Meeting of the Japan Branch was held on April 17, 2010 at Sanjo Kaikan, Tokyo.
  - a. With regard to fiscal year 2009:
    - (i) The financial account of the Japan Branch for fiscal year 2009, 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 Kazuhiro Nakatani, 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 52 of *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.

- b. With regard to fiscal year 2010:
  - (i) The budget for fiscal year 2010, 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 Kazuhiro Nakatani, 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 53 and 54 of *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.

2. Council Meetings were held twice for fiscal year 2010 and dealt with the following matters.

- a. At the first regular Council Meeting of 2010 held on April 17, 2010 at Sanjo Kaikan, Tokyo:
  - (i) The financial account of the Branch for fiscal year 2009 and its budget for fiscal year 2010 were reported.
  - (ii) The general affairs of the Branch for fiscal year 2009 and the program for fiscal year 2010 were approved.
  - (iii) The academic activities of the Branch during fiscal year 2009 and the program for fiscal year 2010 were approved.
  - (iv) The publication of Volume 52 of *Japanese Yearbook of International Law* and the progress of the editorial work for Volumes 53 and 54 of *Japanese Yearbook of International Law* were reported on.
  - (v) The following persons were admitted as new members of the Branch.
    - Yutaka Arai, Senior Lecturer, Kent Law School
    - Tamitomo Saito, Associate Professor, Kinjo Gakuin University
    - Inha Yoon, Lecturer, Keio University
    - Tatsuya Abe, Associate Professor, Aoyama Gakuin University
    - Taira Nishi, Associate Professor, Kansai University
    - Shun Kaku, Associate Professor, Hokkaido University
    - Takuhei Yamada, Professor, Kobe Gakuin University
    - Shizuka Sakamaki, Assistant Professor, University of Shizuoka
    - Takahide Nagata, Associate Professor, Rissho University
    - Nami Kwon, Assistant Professor, Kansai University
- b. At the second Regular Meeting of 2010 held on November 11, 2010 at Gakushi Kaikan, Tokyo
  - (i) The financial condition of the Branch was reported on.
  - (ii) The general affairs of the Branch were reported on.
  - (iii) The academic activities of the Branch were reported on.

- (iv) The progress of the editorial work for Volumes 53 and 54 of *Japanese Yearbook of International Law* was reported on.
- (v) The following persons were admitted as new Members of the Branch.
  - Eiichi Fukushima, Attorney-at-Law, Nishimura & Asahi
  - Yasue Mochizuki, Professor, Kwansei Gakuin University
  - Hiroo Sono, Professor, Hokkaido University

Kazuhiro Nakatani