

## ACTIVITIES

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

#### THE TWENTIETH ACADEMIC CONFERENCE (2013)

Date: April 20, 2013

Place: Sanjo Kaikan, University of Tokyo

Morning Session: Reparation for Victims of Armed Conflict

Chair: Professor Kazuhiro Nakatani, University of Tokyo

Speaker: Professor Shuichi Furuya, Waseda University

Afternoon Session: Climate Change

Chair: Professor Yoshiro Matsui, Emeritus Professor, Nagoya University

Speaker: Professor Osamu Yoshida, the University of Tsukuba

Speaker: Mr. Masami Tamura, Director, Ministry of Foreign Affairs

Speaker: Professor Tadashi Otsuka, Waseda Law School

Speaker: Professor Satoru Taira, Osaka City University

#### Reparation Mechanisms for Victims of Armed Conflict: Significance and Challenges of the Mass Claims Process

Shuichi Furuya, Professor, Waseda University

The Declaration of International Law Principles on Reparation for Victims of Armed Conflict adopted at the Hague ILA Conference of 2010 proclaims that victims of armed conflict have a substantive right to reparation from the responsible parties. However, the right to reparation is not necessarily accompanied by procedural support for its enforcement. Victims may face numerous practical and legal problems when they initiate proceedings before a domestic court. On the other hand, traditional international law does not grant individual victims the capacity to claim reparations at the international level.

In order to make the right to reparation more substantial, therefore, a special mechanism, whether domestic or international, is needed so that the claims of individual victims can be accepted and processed. Actually, in the last two decades, we have witnessed several *ad hoc* mechanisms created to resolve land and property rights disputes or to provide compensation to victims who have suffered gross violations of human rights and serious violations of international humanitarian law.

The ILA Committee on Reparation for Victims of Armed Conflict has dealt with the issue of how we can promote the establishment of such a mechanism and then drafted a document titled "Procedural Standards for Reparation Mechanisms" in 2012. The Committee authored the document in order to provide future policymakers with the necessary information on the core points that they would be required to examine, and

thereby, to assist them in establishing an effective mechanism as promptly as possible after an armed conflict ends. At the same time, the “Procedural Standards” document also sends a strong signal to the international community that victims should enjoy a procedural right to resort to a fair and effective mechanism for reparation.

The structure and procedure of past mechanisms varied to a considerable extent, depending on the political and social circumstances of conflict and the needs of victims. Nevertheless, these mechanisms have some similar features that the policy-makers were forced to consider when they were involved in establishing a new mechanism for reparation. Based on the comparative analysis of these mechanisms, the “Procedural Standards” document consolidates them into five basic principles with some choices that policymakers may flexibly make.

#### **The Activities and Research Tasks of the ILA Committee on the Legal Principles Relating to Climate Change (2008-2012)**

Osamu Yoshida, Professor, University of Tsukuba

In response to a proposal by the ILA, Japan Branch, the International Committee on the Legal Principles Relating to Climate Change was established by the ILA Executive Council in November 2008. Since then, the distinguished members of the Climate Change Committee—led by the Chair of the Committee, Professor Shinya Murase — have been actively involved in preparing for the First and Second Reports and Draft Articles with attached commentaries. This conference presentation entitled “The Activities and Research Tasks of the ILA Committee on the Legal Principles Relating to Climate Change (2008-2012)” dealt with the following issues: (i) the background underlying and reasons for the establishment of the Climate Change Committee; (ii) global action towards climate change, including the conclusion of the 1992 UNFCCC and the 1997 Kyoto Protocol; (iii) the 2010 First Report on the Legal Principles relating to Climate Change (outstanding contribution by the Japan National Committee on the Legal Principles Relating to Climate Change established in December 2012); (iv) the 2012 Second Report; and (v) efforts towards adopting the Draft Articles with commentaries. It was emphasized that the International Committee has tried to observe the relevant legal principles within the framework of general international law, rather than relying excessively upon the analysis of the existing international environmental régime, itself consisting of the climate change framework agreement and its technical protocol. The Draft Articles will be submitted to and considered at the next 76th ILA Conference to be convened in Washington D.C. in 2014.

**Evaluation of COP18 and its Implications for Negotiations under UNFCCC**

Masami Tamura, Director, Climate Change Division,  
International Cooperation Bureau, Ministry of Foreign Affairs

The Eighteenth Session of the Conference of Parties for United Nations Framework Convention on Climate Change and the Eighth Session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (hereafter COP18) were held from November 26 to December 8, 2012. The COP18 was concluded with the adoption of the “Doha Climate Gateway,” which includes the following decisions: (a) COP decisions on the ADP work plan; (b) COP decisions on amendments to the Kyoto Protocol; (c) COP decisions on agreed outcome of the AWG-LCA; and (d) COP decision on climate finance.

As is clear from the appointments of ministerial facilitators and their assigned issues, “Access to the mechanisms of Kyoto Protocol,” “Key finance issues,” “Reporting guidelines,” and others are the main focus of the negotiations in the high-level segment. The exact figures of the emissions targets in the second commitment period were not included in those issues. This is contrary to the negotiations for adoption of the Kyoto Protocol when “the numbers” were the main focus of negotiations.

Another salient characteristic of COP18 was that the COP decisions were adopted despite clear objections from Russia, Belarus, and Ukraine at the final plenary meeting. Consensus making has become increasingly difficult in the recent COP. Rules of Procedure have not been settled at COP and consensus is required to adopt any decision. The COP President declared that consensus existed at COP18 despite the clear objections of a few parties.

It is expected that “a protocol, another legal instrument or an agreed outcome with legal force,” which will come into effect by 2020, will be adopted at COP21 in 2015. The above-mentioned characteristics of COP18 may influence the outcome of the COP21, and therefore, the framework for global efforts to tackle the climate change after 2020.

**Emission Trading Scheme — Focusing on the Task of Domestic Law**

Tadashi Otsuka, Professor, Waseda Law School

The emission trading scheme is an economic instrument of environmental policy. It is characterized as highly cost-efficient, able to set a cap on the amount of emissions, and able to ascertain the realization of reduction countermeasures. However, it may cause some concerns that we need to cope with: firstly, 1) the fairness of the allocation of emission allowances; secondly, 2) the issue of “Carbon Leakage,” which happens when enterprises relocate their factories to developing countries to avoid costly countermeasures against climate change and the factories release GHG at their new locations; and thirdly, 3) the issue of how to cope with the steep rise in the price of

emission allowances.

I address two issues concerning the domestic emission trading scheme.

1) What is the tidemark for a domestic emission trading scheme with reference to various schemes in different regions, countries, and states? We have to cope with the three concerns above. Regarding the first concern, we can manage fairness by using benchmarks for free allocation or by using an auction system. Regarding the second concern, we can avoid "Carbon Leakage" by continuing "Business As Usual" free allocation for special types of industry or by introducing the "border adjustment." Regarding the third concern, we can avoid the continuation of the steep price rise of allowances by admitting banking or borrowing of allowances, by introducing the "Strategic Reserve Auction," or by introducing market management organizations.

2) How is the ownership of emission allowances treated in various emission trading schemes in different regions, countries, and states, and how should we treat this issue in Japan? In the U.S., the states do not admit the ownership of emission allowances at the Public Law level. In the EU, it is up to member states whether they admit the ownership of emission allowances or not. In my opinion, Japan should admit the ownership of the allowances, but it is necessary to restrict the extent of the transferability in the exceptional case where the business is in economic hardship and once the business transfers its allowances, it will be difficult to purchase adequate allowances in order surrender its allowances to the government at the end of the term.

### **Climate Change and International Economic Law**

#### **Analysis of the Consistency of the EU Aviation Directive with WTO Law**

Satoru Taira, Professor, Osaka City University

With the entry into force of the EU Aviation Directive (EU AVD) in January 2012, CO<sub>2</sub> emissions from all airlines arriving and departing the EU are now included under the EU Emission Trading System (EU ETS). Like industrial installations covered by the EU ETS, airlines must receive tradable allowances covering CO<sub>2</sub> emissions emitted from their flights not only over the EU but also over third countries and the high seas. The EU AVD was frozen temporarily in November 2012 to provide negotiation time for the ICAO in autumn 2013. However, the legislation will continue to apply to all EU and non-EU airlines.

The application of the EU AVD to all airlines entering EU airspace was a response to the so-called competitiveness and carbon leakage concerns that would have arisen had only EU airlines been included within the EU ETS. The EU AVD could affect trade in service and indirectly affect trade in goods, where airlines pass through the cost of the EU ADV in their cargo rates. This means that it could be governed by both GATS and GATT.

The cost to airlines varies according to their CO<sub>2</sub> emissions and therefore varies directly with the distance flown. The EU AVD imposes a higher cost on goods and ser-

VICES coming from countries that are further away from the EU than on like goods and services from within the EU or countries closer to the EU. Thus, it could violate the EU's obligations of most favored nation treatment and national treatment under GATS and GATT. Driven by the competitiveness and carbon leakage concerns, the EU AVD could be doubtfully justified under the general exception provisions in GATS Article XIV and GATT Article XX.

To consider these and other issues concerning the consistency or inconsistency with WTO law will also be helpful for other WTO member countries seeking to understand the scope of action by which they must address their CO<sub>2</sub> emissions consistently with their WTO commitments.

#### ACTIVITIES OF OFFICE IN 2012

1. The General Meeting of the Japan Branch was held on April 20, 2012, at Sanjo kaikan, Tokyo.
  - a. The following 28 persons were admitted as Council Members of the Branch: Jun'ichi Akiba, Nisuke Ando, Masato Dogauchi, Hisakazu Fujita, Kazuya Hirobe, Ryuichi Ida, Yuji Iwasawa, Atusko Kanehara, Yoshiya Kawamata, Akira Kotera, Shigeru Kozai, Yoshio Kumakura, Yoshiro Matsui, Hiroshi Matusoka, Shigeki Miyazaki, Koichi Morikawa, Shinya Murase, Yasumasa Nagamine, Kazuhiro Nakatani, Seiichi Ochiai, Tsuneo Ohtori, Naoya Okuwaki, Hisashi Owada, Yoshiaki Sakurada, Hisashi Uchida, Chusei Yamada, Soji Yamamoto, Shunji Yanai. The following 2 persons were admitted as auditors of the Branch. Masaki Orita, Akira Kawamata.
  - b. With regard to fiscal year 2011:
    - (i) The financial account of the Japan Branch for fiscal year 2011, 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 54 of the *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
  - c. With regard to fiscal year 2012:
    - (i) The budget for fiscal year 2012, 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 55 and 56 of the *Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
  - (v) The following person was admitted as a new member of the Branch: Taisaku Ikeshima, Professor, Waseda University
2. Council Meetings were held three times for fiscal year 2012 and dealt with the following matters.
- a. At the first Council Meeting of 2012, held on April 20, 2012 (before the General Meeting) at Sanjo Kaikan, Tokyo:
    - (i) The financial account of the Branch for fiscal year 2011 and its budget for fiscal year 2012 were reported.
    - (ii) The general affairs of the Branch for fiscal year 2011 and the program for fiscal year 2012 were approved.
    - (iii) The academic activities of the Branch during fiscal year 2011 and the program for fiscal year 2012 were approved.
    - (iv) The publication of Volume 54 of the *Japanese Yearbook of International Law* and the progress of the editorial work for Volumes 55 and 56 of the *Japanese Yearbook of International Law* were reported on.
  - b. At the second Council Meeting of 2012, held on April 20, 2012 (after the General Meeting) at Sanjo Kaikan, Tokyo, Professor Shinya Murase was elected as Chairman of the Council. Judge Shunji Yanai was elected as President. Mr. Yoshio Kumakura and Professor Naoya Okuwaki were elected as Managing Directors.
  - c. At the third Council Meeting held on November 12, 2012, 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 55 and 56 of the *Japanese Yearbook of International Law* was reported on.

Kazuhiro Nakatani

On November 7, 2012, Professor Hisakazu Fujita, a Council Member, passed away. On

March 21, 2013, Ambassador Chusei Yamada, a Council Member, passed away. On July 25, 2013, Professor Hiroshi Matsuoka, a Council Member, passed away. On September 19, 2013, Professor Soji Yamamoto, a Council Member and the former Editor-in-Chief of the Japanese Annual of International Law, passed away. The Japan Branch expresses its sincere condolences.