

shares in violation of Article 280.5.2(1) is generally thought to be invalid. In the case of a corporation whose articles of incorporation contains the provision that the approval of the board of directors, the issuance of new shares without public notice or notice to each shareholder provided in 280.3.2 is in violation of Article 280.5.2(1) at the same time. So, such issuance would be invalid at all, whether the issuance of new shares in violation of Article 280.3.2 should be invalid or not.

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## **7. International Law**

### **1. Illegality of the Expropriation of Ainu Land in View of Their Rights as An Indigenous People: The Nibutani Dam Case.**

Decision by the Third Division of the Sapporo District Court on March 27, 1997. Case No. (*gyō-u*) 9 of 1993. A case demanding the cancellation of an administrative disposition. 1598 *Hanrei Jihō* 33; 938 *Hanrei Taimuzu* 75. 38 *International Legal Materials* 394.

[Reference: International Covenant on Civil and Political Rights, Article 27; Land Expropriation Act, Article 20; Administrative Litigation Act, Article 31]

#### **[Facts]**

The Ainu people, now estimated at 50,000 in Japan according to the Ainu Association of Hokkaido, are the original inhabitants of Hokkaido and its adjacent areas. Their life-style consists of hunting, fishing and gathering. Although the Ainu people are suffering from the Japanese government's "assimilation" policies – such as promoting a large number of people from the mainland to settle in the Ainu's place of residence and forcing the Ainu to use the Japanese language – since the end of the 19th century, they have managed to maintain their distinct culture and identity under such difficult conditions.

The Hokkaido Development Bureau of the governmental Hokkaido Development Agency launched a dam project in 1983 as part of a development project along the Saru River in Biratori, southern central Hokkaido. The 32-meter-high multipurpose dam, designed to prevent floods and provide water for local agriculture, was completed in August 1994. Much of the Nibutani area including the river bank where the Ainu had held ceremonial rituals was submerged due to the dam construction.

Under these circumstances, the two Ainu landowners – Shigeru Kayano, 70, then a Member of the House of Councillors and 51-year-old farmer Koichi Kaizawa, who replaced his father Tadashi after the latter's death – jointly brought an action against the Hokkaido Expropriation Committee in 1993. The plaintiffs requested the Sapporo District Court to declare that the Committee had to withdraw its 1989 approval of the forcible seizure of 1.8 hectares of their farmland – “land sacred to the Ainu people” – for the Nibutani Dam in Biratori, Hokkaido. Their position was *inter alia* that the construction of a dam in the “heart of Ainu culture” denies not only their constitutionally guaranteed property rights but also the dignity and livelihood of the Ainu people, thereby being contrary to the International Covenant on Civil and Political Rights to which Japan is a contracting party.

The Japanese government intervened in the proceedings of the present case.

### ***[Opinion of the Court]***

The first issue which the Sapporo District Court dealt with is the interpretation of Article 27 of the International Covenant on Civil and Political Rights of 1966 which provides “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”. The Court derived a very positive obligation upon each State Party from these terms, referring also to such other relevant provisions as Article 2, paragraph 1 and Article 26 of the same Covenant. It is reasonable, in the Court's view, to assume that the Covenant “not only guarantees

the right of persons belonging to minorities to enjoy their own culture but also imposes upon each State Party the obligation to take adequate consideration in deciding and implementing governmental policies which might be likely to affect the minorities' culture".

It is quite natural to suppose that such a consideration be required all the more where a minority group can be treated as an indigenous people. The Corrt thus proceeded to the next issue of whether or not the recognition of the Ainu people as an indigenous minority is possible. This issue includes two aspects: what is the definition of an indigenous people and whether the Ainu fall within such a people. "[T]o the extent necessary in the present case", the Court defined an indigenous people as a "social group who has inhabited in a territory before the rule of a State reached there, with a distinct culture and identity from the majority people of that State, and who, in spite of being governed by the majority people, has successively maintained such an unique culture and identity". The Court then found the Ainu to fall within that definition of an indigenous people, referring to the following facts: "[t]he Ainu people have resided mainly in Hokkaido and have established and maintained their own culture and identity before the Japanese government exercised its control over the area; and they can be said to remain a social group who has not lost its unique culture and identity, though they have suffered from huge economic and social damages caused by the majority group since they have been under the Japanese government's control".

Finally, the Court found that the government unwarrantably undervalued or disregarded "factors and values to be respected most" and failed to take a necessary step to minimize the effect the dam project might have on Ainu culture. Such being the case, the Court concluded that the government's approval of the Nibutani Dam project was beyond its discretionary power entrusted under Article 20 (3) of the Land Expropriation Act and that the Hokkaido Expropriation Committee's measure to seize the Ainu land on the basis of the former's approval was therefore unlawful.

The Court, however, rejected the two plaintiffs' demand for the return of their expropriated land and held that to nullify the Committee's decision would run counter to the public interest, taking into ac-

count the fact that the dam construction has already been completed and that the land in question is now submerged. The Court applied the so-called "Jijō Hanketsu" system under which the courts may dismiss the plaintiff's claim by considering to what extent the revocation of a given administrative measure would be adverse to the public interest (Article 31 section 1 of the Administrative Litigation Act).

Neither plaintiffs nor defendant lodged an appeal to a higher court, and the Sapporo District Court's decision became final and definitive.

*[Comment]*

As has been seen, the Sapporo District Court for the first time as a public authority in Japan recognized the Ainu people as an indigenous minority and ruled that the expropriation of their land by the government without having a high regard for the Ainu's unique culture and traditions was illegal.

It is not too much to say that this is really a landmark decision: the Japanese government have persistently refused until now to acknowledge the existence of an indigenous people in Japan, though the government recently characterized the Ainu as an "minorit[y]" within the meaning of Article 27 of the International Covenant on Civil and Political Rights in the 1993 Third Periodic Report of Japan under Article 40, paragraph 1 (b) of that Covenant (CCPR/C/70/Add. 1, para. 233). It is the very recognition of the Ainu people as an indigenous minority that they have been seeking for a long time. One of the two plaintiffs, Kayano, in spite of the fact that his claim itself ended in dismissal, welcomed the Court's decision as a great victory for the Ainu people because it expressly referred to their indigenous nature. What he thought of the decision reflects well in his comment after hearing the Court's pronouncement: "Japan's democracy is still alive".

At the same time, from a strictly legal point of view, there may be some dubious points in the Court's reasoning.

In the first place, the Court appears to take it for granted that Article 27 of the International Covenant on Civil and Political Rights is a so-called "self-executing" provision and as such directly applicable in the Japanese legal system, while the Court does not indicate any concrete and substantial grounds for such a presupposition. It is certain

that a State Party to a given international treaty is obliged to implement it domestically, but it's quite a different question whether or not the treaty can be directly invoked before the courts of that State.

The second problem to be mentioned relates to the interpretation adopted by the Court of Article 27 of the said Covenant. Article 27 prescribes that persons belonging to minorities "shall not be denied" such a right as to enjoy their own culture. If interpreted in accordance with the ordinary meaning given the terms, this provision appears to be merely a *passive* one (see Article 31, paragraph 1 of the 1969 Vienna Convention on the Law of Treaties). On the contrary, the Court construed the provision to be a *positive* obligation upon each State Party to the Covenant to take minority culture into utmost consideration. It is on the basis of such a construction that the Court concluded that the Japanese government's approval of a dam project was illegal. It may be doubtful whether the Court gave any persuasive reasoning in this regard.

Finally, it can be pointed out that there remains some ambiguity in the definition of an indigenous people. How could the Court legally define those people? What is the legal nature of sources to which the Court referred in its definition? In other words, did the Court refer to the authorities as customary international law? The Court, as a court of law, ought to base its decision not upon *lex ferenda* (law which is desirable to be exist) but *lex lata* (existing law), and it cannot rely upon a mere "tendency" or "opinion".

On 8 May 1997, the Japanese Diet enacted, possibly as a response to the Sapporo District Court's decision, a new law which is often called the Act on the Promotion of Ainu Culture in its short form. The infamous Hokkaido Former Aborigine Protection Act of 1889, the real purpose of which was said to be to legitimize the government's "assimilation" policies, that is, to deprive the Ainu people of their land and destroy their own culture and traditions, was thereby replaced. It must be noted, however, that even the new Act does not recognize the Ainu's status as an indigenous minority. It is therefore appropriate to take the Nibutani Dam Case decision not as a destination but as an important milestone for the Ainu people. They are still on a long road to redeem their dignity and pride. It is particularly interesting in this re-

spect to follow how the United Nations Working Group on Indigenous Populations, which proposed the Draft Declaration on the Rights of Indigenous Peoples in 1993 (E/CN. 4/Sub. 2/1993/29/Annex1), will deal with the subject from now on.

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## **2. A case concerning a defendant who violated the Law on Regulation of Fishing Activities by Foreigners.**

Decision by Hamada Branch of Matsue District Court on 15 August, 1997. Case No. (wa) 35 of 1997. A case confirming whether Japan has control and jurisdiction over the defendant. 1135 *jurisuto* 276.

[Reference: Law on Regulation of Fishing Activities by Foreigners, Article 3 [1] and 9 (1)–[1]; Law on the Territorial Sea and Contiguous Zone, Article 2; Agreement on Fisheries between Japan and the Republic of Korea, Article 1 (1) and 4 (1).]

### **[Facts]**

The defendant is a South Korean national, Kim Sun-Ki, the captain of the South Korean fishing boat *Daedong-ho No. 909*. On 9 June 1997, the vessel was seized for alleged illegal fishing at the point 131°47' east longitude, 35°08' north latitude, approximately 18.9 miles off Hamada. In the present case, the issue is the legal status of the sea area where the seizure took place.

The Agreement on Fisheries between Japan and the Republic of Korea of 1965 (hereinafter cited as “the Agreement”), establishes fishery zone up to a limit of 12 miles measured from each party’s “coastal baselines”. It also provides for joint regulation zones outside the 12 – mile limit of fishery zones. In the joint regulation zones, Japan and South Korea exercise exclusive control and jurisdiction over their own fishing vessels. The sea area in question was located within the joint regulation zone.

After ratifying the 1982 United Nations Convention on the Law of the Sea in 1996, however, Japan changed the normal baseline sys-

tem to a straight baseline system under the revised Law on the Territorial Sea and Contiguous Zone and its revised Enforcement Order. This change had the effect of extending the outer limit of the Japanese territorial sea, and in consequence, the area in question has come to be included within its newly extended territorial sea.

In this case the issues are as following: ① Has Japan come to have the right of control and jurisdiction over South Korean fishing boats in the new territorial seas through the said revised law and order? ② Can a Japanese court punish the defendant in accordance with Article 3 [1] and 9 (1)–[1] of the Law on Regulation of Fishing Activities by Foreigners?

### *[Opinion of Court]*

The prosecution in the present case should be dismissed.

The area in question is the territorial sea of Japan. But there might be the case where Japan has no control and jurisdiction even within its territorial seas, according to treaties concluded by Japan and established international law. In principle, the treaties and established international law always have priority over domestic laws regardless of when they were established [Constitution, Article 98 (2)]. Therefore, on the basis of the fact that the sea area in question is a Japanese territorial sea, it can not always be accepted that Japan has control and jurisdiction. If the 1965 Agreement on Fisheries were provided other way, Japanese control and jurisdiction should be denied.

When the territorial sea is expanded outside of the fishery zone in the Agreement, it depends on the interpretation of the Agreement whether the right of control and jurisdiction of the coastal state extends to its newly expanded territorial sea. It cannot be interpreted that the Agreement is an arrangement that its scope of application is only limited to high seas, which do not belong to territorial seas and internal waters. Rather, it is proper to interpret that, even if the territorial seas of either party were expanded, the character of the sea areas in which both states have a common interest, as provided for in the preamble of Agreement, should not be changed, and such expansion cannot give rise to any alteration of the scope and legal status of fishery zones prescribed by the Agreement.

The Agreement approves the establishment as fishery zones of the sea areas to a limit of 12 miles measured from baselines. And it requires each party to renounce the right of control and jurisdiction over the fishing vessels of the other party outside the 12 – mile limit of fishery zones, and to consult with the other party in employing straight baselines. If one party were permitted to expand its territorial seas beyond the established limits of its fishery zones by unilaterally employing straight baselines for its territorial seas, and thereby substantially make the effect of treaty meaningless, it might lead to the loss of significance of the Agreement. Therefore, it is not proper to interpret that, due to the subsequent expansion of the territorial seas, the Agreement would become non-applicable to areas which had not been territorial seas at the time of concluding the Agreement.

The sea area in question is a territorial sea of Japan under its revised law and order in 1996. But the area is located outside the fishery zone stipulated in Article 1 (1) of the Agreement. Article 4 (1) provides that, in such an area, the contracting party to which the fishing vessels belong can only exercise control and jurisdiction. Accordingly, in this case, Japan has no control and jurisdiction over the South Korean fishing boat.

On the grounds stated above, the instant prosecution should be dismissed.

### *[Comment]*

After ratifying the 1982 United Nations Convention on the Law of the Sea, Japan changed the normal baseline system to a straight baseline system. Japanese territorial sea under this new system has become more extensive than the 12 – mile fishery zone in the Agreement on Fisheries between Japan and the Republic of Korea of 1965. Up to 25 June 1998, seven South Korean fishing vessels were seized on charges of illegal fishing activities within the newly extended territorial seas. This case is the first one in which the court issues a judgement on the legal status of the new territorial seas.

The court concluded that, notwithstanding the fact that the seized vessel in the present case was within the newly expanded territorial sea of Japan as measured from the straight baseline, the seizure was



not in accordance with the Agreement. In other words, it was held in this case that, according to the interpretation of the Agreement, Japan could not assert to South Korea exclusive fishery jurisdiction in the sea area in question. Therefore, the focus of this case was whether the area where the fishing boat of the defendant engaged in fishing activity could be validly asserted to South Korea as the territorial sea of Japan, in spite of the existence of a bilateral treaty between Japan and South Korea that provides that Japan has no exclusive fishery jurisdiction outside the fishery zone.

The primary problem of this case is whether under international law and the Agreement, it is permissible not to take into account South Korean fishing interests guaranteed under the Agreement through a unilateral act of the delimitation of territorial sea and the establishment of straight baseline based on the revised Law on the Territorial Sea and Contiguous Zone and its revised Enforcement Order.

Japan and South Korea ratified UNCLOS, and started negotiations to conclude a new Agreement in 1996. In the negotiations both countries agreed to suspend negotiations about the problem of ownership of Takeshima-Island and thereby establish provisional fishery zones. But as regards the scope of the zones, the negotiations got into a difficult situation. The Japanese government notified the South Korean government of its repudiation of the Agreement on January 1998 (the Agreement would continue to be in force for one year after that denunciation).

In the midst of such actions, the Nagasaki District Court dealt with the same kind of case in Matsue on 24 June 1998 (Case No. (wa) 15 of 1998), and it reversed the judgment of the Matsue District Court. Such divided views of the courts must come from the complexity of the problems about fishing arising between Japan and South Korea. Therefore, it should be noted how these court decision will influence the future of negotiations to conclude a new Agreement aimed at stabilization of the maritime order between Japan and South Korea.

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