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The Ainu in Japan

—The Ainu and International Law—

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Introduction

This working paper intends to analyze how the international law, especially international human rights instruments including the UN Declaration of the Rights of Indigenous Peoples (UNDRIP), affects the Ainu, an indigenous people of Japan. For this purpose, chapter 1 examines the so-called Nibutani Dam judgment, chapter 2 shows the current situation of the Ainu and chapter 3 conducts a study about the relationship between forest certification schemes and the Ainu. Kiriyama is in charge of chapter 1 and Osakada is responsible for chapters 2 and 3. In the process of writing this paper, the interviews were held twice at the Ainu Association of Hokkaido (21 January 2017 and 16 March 2017) and once at the FSC Japan (24 January 2017).

I The NIBUTANI DAM DECISION²⁾ and after

The Japanese government was denying the existence of minorities protected by Article 27 of the International Covenant on Civil and Political Rights (ICCPR) for a long time, particularly at the dialogue with the international human rights bodies. At the third report to the Human Rights Committee, the Japanese government admitted the Ainu as a minority group³⁾, but even after that, the government did not recognize the

1) Authors are the members of the Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association (ILA). This paper is a revised version of our paper submitted to the Committee as part of the Committee's research regarding the land rights of indigenous peoples.

2) *Kayano et. al v. Hokkaido Expropriation Committee (The NIBUTANI DAM DECISION)*, 38 *I. L. M.* 394 (1999), translated by Mark A. Levin with the introductory note.

Ainu as the indigenous people.

The first small step towards the protection for an indigenous people of Japan appeared during the Nibutani Dam Decision. The Ainu people is an indigenous people who have lived around the northern part of Japan, especially in Hokkaido, with a unique language as well as religious and cultural distinctiveness. The construction project of the Nibutani Dam was to submerge the symbolic site for the Ainu people's religious and cultural ceremony. The Ainu, therefore, brought an action for invalidation of the expropriation of the land for the construction of the Dam.

In 1997, Sapporo District Court found as follows :

First, the court recognized the Ainu people as an indigenous people for the first time as one of the Japanese state organizations. Although, at the international level, there are controversies over the definition of an indigenous people, the court tried to define them⁴⁾. Consequently, the court recognized the Ainu people as an indigenous people within the meaning of the definition cited below.

Second, the Ainu were recognized as having a right to enjoy their distinct culture that is based both on Article 13 of the Constitution of Japan and Article 27 of the ICCPR. Although Article 27 of the ICCPR does not require the minority's indigenoussness, an ethnic group's indigenous character demands enhanced consideration of their cultural needs. On the other hand, those rights are subject to the limits of the public welfare included in Articles 12 and 13 of the Constitution⁵⁾.

3) CCPR/C/70/Add. 1, para.233(1991).

4) The court regards "indigenous people as a social group who live and have lived in a religion which historically existed outside of a state's rule and was brought under that state's rule as a minority group with a culture and identity which differed from the majority of the parent ruling state, and who have retained a unique culture and identity that originate and continue from the past, such that even while subject to the rule of the above-mentioned majority, that group has not since lost the unique culture and identity which derives and continues from the past." The NIBUTANI DAM DECISION, *op cit.*, pp. 419-420.

5) Article 13 of the Constitution of Japan provides "All of the people shall ✎

Third, after considering the comparative balance between the interest arising from the dam project and the Ainu's rights to enjoy their culture, the court recognized the limitation of the latter should be minimum. The court said, "the Minister of Construction, who was the authorizing agency and the agent for the enterprise authority in the instant matter, neglected the investigative and research procedures that were necessary to judge the priority of the competing interests⁶⁾, and gave a concession without taking measures to minimize the influence over the Ainu culture. Such action exceeded the administrative discretion given to the authorizing agency pursuant to Article 20(3) of the Land Expropriation Law, thus was illegal".

Fourth, as the Nibutani Dam was already complete and filled with water, the court admitted the status quo because of the extraordinary harm to the public interest in case of reversing the Confiscatory Administrative Rulings.

Regarding the rights of indigenous peoples, the court recognized the right to enjoy the Ainu people's culture, but did not recognize the right to self-determination of indigenous peoples. This caused controversies over the scope of the decision. Parallel to the founding of the Nibutani Dam case, the government enacted the Ainu culture promotion act⁷⁾, not recognizing the right to self-determination of the Ainu.

Another important point is that the court limited the right of the Ainu stipulated in the ICCPR based on the public welfare clause of the Japanese Constitution. Apart from the interpretation of the provisions of the Japanese Constitution, however, public welfare principle, which is very vague, should not be applied to limit the articles of the ICCPR.

↘ be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

6) The NIBUTANI DAM DECISION, *op. cit.*, p.427.

7) The Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture.

In 2003, the Biratori Dam project was revived. The Dam is situated on the upper reaches of the river where the Nibutani Dam is located. During the convention between the authority and people concerned, the investigation committee on cultural and environmental assessment evaluation was set and the people concerned took part in it. The investigation committee researched the Ainu people's culture and published the report in 2006⁸⁾. Although the local committee, which was set after the submission of the report, has been discussing the preservation of cultures and environments with the participation of local Ainu representatives, they presuppose the construction of the Dam, not aiming at the modification of the construction plan based on the cultural assessment⁹⁾. According to Kaizawa Koichi, one of the plaintiffs in the Nibutani Dam case, the plan of dam construction was rarely modified based on the cultural assessment¹⁰⁾. As of November 2016, the Dam has been under construction. At least, it could be said that no comparative consideration between the profit of Dam construction and the failed value of the culture of the Ainu had taken place in deciding whether to resume the construction of the Dam. On the other hand, according to the interview at the Center for preservation of the Ainu culture, Biratori City on 21 October 2017, the developer has been transplanting woods and plants which are necessary for the Ainu culture along the nearby river. It also has been repairing landscape to mitigate the impact on the Ainu culture and further enrich it, in cooperation with the Biratori City. This project includes the establishment of an alternative place for the Ainu ceremonies.

II. Current Situation of the Ainu

According to a survey which was conducted by Hokkaido's local government in 2013, the number of the Ainu who live in Hokkaido is 16,786, that is 0.4% of the region's total¹¹⁾. People who are considered to be Ainu descendants, or those living with the

8) Biratori City, *Ainu Bunka Kankyo Hozen Taisaku Chousa Soukatsu Houkokusho*, March 2006.

9) The Website of the Hokkaido Regional Development Bureau, Muroran Development and Construction, available at http://www.hkd.mlit.go.jp/mr/sarugawa_damu/tn6s9g0000003aqw.html.

10) The telephone interview with Koichi Kaizawa was conducted on 8 May 2017.

11) Hokkaido Prefecture, *Hokkaido Ainu Seikatstu Jittai Chosa Houkokusho*, 2013, p. 3.

Ainu through marriage or adoption could be identified as the Ainu. On the other hand, the survey did not target those who were considered to be Ainu descendants but refused to be identified.

In 2015, the Japanese government conducted surveys with regard to discrimination and prejudice against the Ainu. According to the surveys, 72.1% of the Ainu said discrimination and prejudice are still directed against their race¹²⁾. 36.6% said that they had actually experienced discrimination¹³⁾. Some examples of discrimination include: marriage or relationships meeting opposition from non-Ainu partner's families; having an unpleasant experience at school or in the workplace¹⁴⁾.

It was not until one year after the adoption of the UNDRIP that the Japanese government recognized the Ainu as an indigenous people. On June 6, 2008, the House of Representatives and the House of Councillors unanimously passed the "Resolution to Recognize the Ainu as an Indigenous People". The resolution referred to the adoption of the UNDRIP as reflecting the Ainu's long-cherished desire and required the government to recognize the Ainu as an indigenous people of Japan. In response to the resolution, the government finally recognized the Ainu as an indigenous people who have lived around the northern part of the Japanese Archipelago, especially in Hokkaido, and promised not only to enhance the Ainu policies taken so far, but also to make efforts to establish comprehensive Ainu policy measures, in reference to relevant clauses of the UNDRIP¹⁵⁾. The adoption of the UNDRIP, therefore, had a certain influence on the official recognition of the Ainu's indigenous status.

In July 2008, the Chief Cabinet Secretary called a high-level expert council, the

12) Comprehensive Ainu Policy Office, Cabinet Secretariat, Government of Japan, *"Kokumin No Ainu Ni Taisuru Rikaido Nituiteno Ishiki Chousa" No Gaiyou*, 2016, p. 1.

13) *Ibid.*, p. 2.

14) *Ibid.*, p. 3.

15) The Statement of the Chief Cabinet Secretary on 6 June 2008, available at <http://www.kantei.go.jp/jp/singi/ainusuishin/meibo.pdf>.

Advisory Council for Future Ainu Policy, to consider principles and measures for future Ainu policy. The Advisory Council, with one representative of the Ainu, submitted its Final Report to the Chief Cabinet Secretary in July 2009. There, the Advisory Council recognized the significance of the UNDRIP and said “although it is not legally binding, the Declaration should be fully respected as a general international guideline for indigenous policies”. The Council, nevertheless, limited the role of the UNDRIP in considering the Ainu policies as follows :

“However, just as the histories and current situations of the world’s 370 million indigenous people are enormously diverse, so are the countries in which they live. These individual conditions cannot be ignored as far as the Declaration is concerned. In this respect, Japan should establish its Ainu policy in line with the current conditions of the country as well as of Ainu people themselves, referring to relevant clauses of the Declaration and sincerely listening to the voices of Ainu people living today¹⁶⁾.”

The Ainu have not been recognized for any special or collective rights so far. Instead, some new Ainu policies are being considered at the Council for Ainu Policy Promotion, which was set up in December 2009 and is hosted by the Chief Cabinet Secretary. As of 12 February 2016, the Council consists of 15 members including 5 Ainu representatives¹⁷⁾.

The key project under consideration is the development of the Symbolic Space for Ethnic Harmony, a national center for revitalizing Ainu culture, in Shiraoi, Hokkaido. Within the Symbolic Space, a new national museum concerning Ainu history and culture is to be established. The plan to repatriate Ainu ancestral remains, which had been exhumed by Japanese scholars and kept at local universities, to their descendants is also in progress. Some remains that are unidentified are to be aggregated in a memorial facility established in the Symbolic Space¹⁸⁾. These policies, however, are not taken to

16) Advisory Council for Future Ainu Policy, *Final Report*, July 2009, p. 21.

17) The Website of Council for Ainu Policy Promotion, available at http://www.kantei.go.jp/jp/singi/ainusuishin/index_e.html.

18) The Website of Council for Ainu Policy Promotion, available at http://www.kantei.go.jp/jp/singi/ainusuishin/dai4/siryou2_2.pdf.

implement the UNDRIP. The UNDRIP is only taken into account in considering these policies. The impact of the UNDRIP in considering the Ainu policies has been limited.

III. Forest Certification and the Ainu

Forest certification is the process of inspecting forests to assess their management according to an established set of standards. In Japan, two forest certification schemes, namely the Forest Stewardship Council[®] (FSC), an international NGO, and the Sustainable Green Ecosystem Council (SGEC), an independent organization operating only in Japan, have been carrying out such initiatives. In June 2016, the SGEC obtained the endorsement by the Programme for the Endorsement of Forest Certification (PEFC), an international NGO. While the FSC is a standard setter and sets its own global standards, the PEFC is not a standard setter but a mutual recognition scheme¹⁹⁾. The PEFC was set up as an endorsement process, to assess independent national forestry management schemes against internationally recognized criteria for sustainable forest management. It is remarkable that the Japanese branch of the FSC (FSC Japan) and the SGEC are currently drafting or revising their national standards which require the protection of indigenous peoples' rights in consultation with the Ainu Association of Hokkaido.

1. FSC and the protection of indigenous peoples' rights

The forest management certification standard of FSC has 10 principles, which are applied to forests to be certified. Principle 3 relates to indigenous peoples' rights. Version 5-0 of the FSC Principles and Criteria (P&C V5-0)²⁰⁾, approved in February 2012, requires the organization holding or applying for certification to "identify and uphold indigenous peoples' legal and customary rights of ownership, use and

19) As to the basic differences between FSC and PEFC, see PEFC, PEFC and FSC : Global Sustainable Forest Management Certification Schemes, November 2011, available at http://www.easyfairs.com/uploads/tx_ef/PEFC_FSC_Factsheet-1-.pdf; Norihiko Shiraiishi, "Yutakana Mori Wo Sodateru, Atarashii CSR Katsudou No Katachi", 13 February 2008, available at <http://www.wwf.or.jp/activities/upfiles/20080213fsc02.pdf>.

20) Forest Stewardship Council[®], FSC Principles and Criteria for Forest Stewardship, FSC-STD-01-001 V5-0 EN (2015).

management of land, territories and resources affected by management activities (3-1)".

In this regard, it is noteworthy that P&C V5-0 refers to the UNDRIP as follows :

"3-4 The organization shall recognize and uphold the rights, customs and culture of Indigenous Peoples as defined in the United Nations Declaration on the Rights of Indigenous Peoples (2007) and ILO Convention 169 (1989)."

This means the organization holding or applying for certification needs to comply with the UNDRIP irrespective of its non-binding nature as well as ILO Convention 169 regardless of its ratification status.

In applying the P&C in forest management evaluation, indicators need to be made at national level to meet the different local condition. To improve the consistency and quality of National Forest Stewardship Standards, however, in March 2015, the FSC Board of Directors approved the International Generic Indicators (IGI)²¹⁾, which is the starting point to develop national standard. It is notable that the IGI refers to free, prior and informed consent (FPIC) of indigenous peoples more concretely :

"3.2.4 Free, prior and informed consent is granted by Indigenous Peoples prior to management activities that affect their identified rights through a process that includes :

...3) Informing the Indigenous Peoples of their right to withhold or modify consent to the proposed management activities to the extent necessary to protect their rights, resources, lands and territories ; ...

The FSC Japan has been drafting the national standards in accordance with the IGI. In drafting the national standards with regard to indigenous peoples' rights, the FSC Japan has been consulting with stakeholders and experts on indigenous peoples' issues including the Ainu Association of Hokkaido. According to the Ainu Association of Hokkaido, their opinions are mostly reflected in the standard setting, thus generally satisfied with its national standards.

Although no collective rights to lands of the Ainu have officially been recognized,

21) Forest Stewardship Council[®], International Generic Indicators, FSC-STD-60-004 V1-0 EN (2015).

organizations holding or applying for FSC certification must identify and not violate their customary right to lands. In addition, organizations holding or applying for FSC certification should not violate the UNDRIP and ILO Convention 169, though the Japanese government has emphasized the former's non-binding nature and does not ratify the latter.

In Hokkaido, where most Ainu people live, three organizations have acquired FSC certification so far. None of them formally identified the customary right to lands of the Ainu. One organization, however, made an agreement with the local Ainu Association, and has been conducting the forest management, with consideration of the preservation and promotion of the Ainu culture. The local Ainu Association expressed satisfaction in the implementation of the agreement²²⁾. According to the Ainu Association of Hokkaido, the existence of the Ainu people directly affected by the forest management should have been recognized in another one case.

2. SGEC & PEFC and the protection of indigenous peoples' rights

The PEFC endorses national forest certification schemes that comply with PEFC Council requirements. National forest certification schemes are subject to regular evaluation based on PEFC Council requirements. With regard to the rights of indigenous peoples, PEFC Council requirements²³⁾ approved in November 2010 stipulate as follows :

“5.6.4. Forest management activities shall be conducted in recognition of the established framework of legal, customary and traditional rights such as outlined in ILO 169 and the UN Declaration on the Rights of Indigenous Peoples, which shall not be infringed upon without the free, prior and informed consent of the holders of the rights, including the provision of compensation where applicable. Where the extent of rights is not yet resolved or is in dispute there are processes for just and fair resolution. In such cases forest managers shall, in the interim, provide meaningful opportunities for parties

22) The telephone interview with the local Ainu Association was held on 10 May 2017.

23) PEFC, Sustainable Forest Management – Requirements, PEFC ST 1003 : 2010 (2010).

to be engaged in forest management decisions whilst respecting the process and roles and responsibilities laid out in the policies and laws where the certification takes place.”

In 2012, the PEFC Council selected TJConsulting to carry out an independent and impartial assessment of the SGEC scheme documentation against the PEFC Council requirements. In the final report published in April 2016, TJConsulting pointed out the minor non-conformity based on the following argumentation :

“- Mandatory nature of ILO 169 and UNDRIP is not clear. They are listed amongst “international conventions”, ratified or not, that are expected to be respected (2-5). However, chapter 2-5 also states that forest owner shall follow domestic acts relating to the areas relevant to such areas. Chapter 5-1 then states that only “ratified conventions” shall be complied with. ILO 169 has not been ratified ; UNDRIP is not the international convention and as such has not been ratified. Therefore, there is uncertainty between 2-5 and 5.1/5-1-1 and it is unclear whether ILO 169 and UNDRIP should be followed, respected or complied with.

- The document does not include provisions relating to the “Free, Prior and Informed Consent” although note 1 to 5-2-5 envisages communication with the indigenous people in free and open manner prior to certification.”²⁴⁾

Following the evaluation of the SGEC scheme against the PEFC Council’s requirements, TJConsulting recommended to the Board of Directors to endorse the SGEC scheme with the following condition resolving the minor non-conformity identified in the assessment :

“SGEC to actively engage with AINU Association of Hokkaido in order to develop a mutually acceptable solution for recognition of AINU people’s rights in the SGEC forest management standard (6).”²⁵⁾

The endorsement of SGEC scheme was formally approved by the PEFC Council board meeting held in April 2016 and the subsequent PEFC General Assembly in June 2016²⁶⁾. As the above-mentioned condition recommended by the TJConsulting was

24) TJConsulting, *Assessment of the SGEC forest certification scheme against the requirements of the PEFC Council, Final Report*, 4 April 2016, p. 66.

25) *Ibid.*, p. 5.

adopted by the PEFC Board of Directors, the SGEC is currently revising its national standards concerning the rights of indigenous peoples in consultation with the Ainu Association of Hokkaido. According to the Ainu Association of Hokkaido, they partly disagree with the current draft revision of SGEC standard because, in particular, it does not introduce the requirement of their FPIC properly.

The SGEC is the largest certification framework in Hokkaido, where most Ainu people live. As of 31 May 2016, the SGEC certification covers 19% of Hokkaido's forests, including both public and private ones²⁷⁾. The revision of SGEC standards concerning the rights of indigenous peoples, thus, will affect the management of national forests and Hokkaido prefectural forests certified by the SGEC.

Conclusion

In communicating with some international bodies, the Japanese government was denying the indigenous status of the Ainu. In the Nibutani Dam case, however, the Sapporo District Court recognized the Ainu as an indigenous people of Japan. This was for the first time that an organization of state affirmed the indigenous status of the Ainu. Interpreting the domestic law, the Court also acknowledged that the Ainu people should enjoy the cultural right of persons belonging to minorities by referring to the article 27 of the ICCPR as well as article 13 of the Japanese Constitution. The Court, thereafter, mentioned that, in deciding and implementing policies that might affect the culture of indigenous minority people, the Minister of Construction, an administrative organ of state, had a responsibility to seriously take into account their culture as to not unjustly violate their rights. After the judgment, constructing the Biratori Dam, the cultural impact assessment was conducted with the participation of the local Ainu. The plan of the dam construction was, nevertheless, rarely modified based on the assessment. On the other hand, the developer has been transplanting woods and plants which are necessary for the Ainu culture along the nearby river to mitigate the impact on the

26) The Website of PEFC, available at <http://pefc.org/news-a-media/general-sfm-news/2137-sgec-endorsement-by-pefc-a-beacon-of-light>

27) The Website of Hokkaido Prefecture, available at <http://www.pref.hokkaido.lg.jp/sr/srk/ninsyo-syutokujoukyou.pdf>

Ainu culture and further enrich it, in cooperation with the Biratori City. This project includes the establishment of an alternative place for the Ainu ceremonies.

One year after the adoption of the UNDRIP, in June 2008, the Japanese government recognized the Ainu as an indigenous people of Japan. The adoption of the UNDRIP definitely had a certain influence on the official recognition of the Ainu's indigenous status. The Council for Ainu Policy Promotion, which was set up in December 2009, has been considering some new Ainu policies, taking into account the UNDRIP, with the participation of 5 Ainu members. No collective rights including land rights, nonetheless, have been recognized to the Ainu so far. Therefore the impact of the UNDRIP in considering the Ainu policies has been limited.

On the other hand, on a private level, an interesting development with regard to forest certification schemes could be identified. The FSC Japan has been developing the national standards in consultation with stakeholders and experts on indigenous peoples' issues including the Ainu Association of Hokkaido. These draft standards demand that organizations holding or applying for FSC certification must identify and not violate the customary right to lands of indigenous peoples. In addition, organizations holding or applying for FSC certification are required not to violate the UNDRIP and ILO Convention 169, though the Japanese government has emphasized the former's non-binding nature and does not ratify the latter. The SGEC, which was endorsed by the PEFC, has also been revising the national standards, consulting with the Ainu Association of Hokkaido. At this moment, however, the Ainu Association of Hokkaido is dissatisfied with the way requirements of their FPIC are introduced there.