CHAPTER 9

The Legal Advice System of the Ministry of Foreign Affairs of Japan: Between Legal Advisers and Foreign Policy Makers

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1 Introduction

Gaimusho [Ministry of Foreign Affairs of Japan (MOFA)] has been responsible for the conduct of the country’s international law practice, since it was established in 1869. In order to accommodate the demands of international law practice, the MOFA has employed various Legal Advisers, both foreign nationals and Japanese. Prominent among these have been Henry Willard Denison, Thomas Baty, Sakutaro Tachi and Yuichi Takano. The MOFA, however, has essentially followed the lawyer-diplomat system, since the departure of Takano in 1949. In other words, diplomats play the role of legal advisers. In the MOFA, they were organised within Joyakukyoku [Treaties Bureau (TB)] before

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1 The name Gaimusho was first used by Shokuin Rei [Order for Staff] in 1869. Gaimusho Hyakunenshi Hensan Inlkai (GHHI) [Committee for the One Hundred Year History of MOFA] (eds), Gaimusho no Hyakunen [One Hundred Years of MOFA] (Hara Shobo 1969) Jokan [vol I] 44.


4 See K Akashi, ‘Sakutaro Tachi: A Blend of Scholarship and Practitionership, and Its Fate in Japan’ (2013) 56 JYIL 122.


7 On the historical background to MOFA’s cessation of employing professional legal experts as legal advisers, see Y Takano, ‘Japan: Background Paper’ in HCL Merillat (ed), Legal Advisers and Foreign Affairs (Oceana Publications 1964) 65–6.
2004, and within *Kokusaihokyoku* [International Legal Affairs Bureau (ILAB)], the TB’s successor, since then.

The aim of this chapter is to describe the role of MOFA’s international law bureau (TB/ILAB) in Japanese diplomacy since 1952, when the San Francisco Peace Treaty came into force. For this purpose, this chapter, first, explains the constitutional framework of Japan for international law. Second, it clarifies how the Japanese lawyer-diplomats conducted international law practice. Finally, it points out the merits and shortcomings of the lawyer-diplomat system for Japan, as conclusions.

II The Constitutional Framework of Japan for International Law

Before discussing the role of the ILAB within the MOFA, it is necessary to describe the institutional framework of Japan for international law. Japan’s 1946 Constitution adopts a separation of powers; Article 41 of the Constitution stipulates that *Kokkai* [Diet], which is composed of *Shugiin* [House of Representatives] as the lower house and *Sangiin* [House of Councillors] as the upper house, is “the sole law-making organ of the State”; executive power is given to *Naikaku* [Cabinet] under Article 65; Article 76 vests all judicial power in *Saiko Saibansho* [Supreme Court] and *Kakyu Saibansho* [lower courts]. Those three powers are related to the international law practice of Japan.

The Cabinet is empowered to manage foreign affairs and to conclude treaties, under Article 73 of the Constitution. Within the government, *Gaimusho Setchi Ho* [MOFA Establishment Act] primarily allocates to the MOFA responsibility for matters of international law and foreign laws, ie the conclusion of treaties and other “international agreements” (Article 4(4)), the interpretation and implementation of treaties, other international agreements and “the established laws of nations” (Article 4(5)) and foreign legal matters which the

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9 The term “international agreements” in this contribution is the English translation of *Kokusai Yakusoku*. *Kokusai Yakusoku* is sometimes translated as “international compacts”. See M Orita, ‘Practice in Japan Concerning the Conclusion of Treaties’ (1984) 27 *Japanese Annual of International Law* (JAIL) 52, 53. In the terminology used by MOFA, *Kokusai Yakusoku* includes not only *Kokkai Shonin Joyaku* [Diet Approval Treaties], but also *Gyousei Torikime* [Executive Agreements], which do not need the approval of the Diet.

10 The term “the established laws of nations” is the English translation of *Kakuritsuusara-ta Kokusaihoki* under Art 98(2) of the Constitution. This is generally thought to mean