

出國報告(出國類別:學術交流合作)

香港中文大學法學院與交大科法所 國際交流合作

服務機關:科技法律研究所

姓名職稱:倪貴榮教授/王立達副教授/

薛景文助理教授

前往國家:香港/香港中文大學

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摘要

基於香港中文大學法學院與交大科法所長期交流與深度合作之共識,並作為國際百大合作計畫之一環,而執行「貿易、科技與法律-兩岸、區域與多邊體系之研究」計畫。於2012年9月28日,與香港中文大學聯合舉辦「科技、能源與國際經濟法」工作坊,交大科法所由所長倪貴榮教授、王立達副教授、薛景文助理教授代表出席該工作坊,並提出各自提出一篇報告,並於會後商討香港中文大學法學院以及科法所進一步合作事宜。就學術合作而言,雙方同意於目前合作之基礎上,持續學術研究合作計畫,包括共同舉辦國際研討會或共同申請跨國研究計畫等;就教學合作而言,雙方就兩校交換生以及實習計畫形成初步構想。

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本文

基於香港中文大學法學院與交大科法所長期交流與深度合作之共識,並作為國際百大合作計畫之一環,由香港中文大學主辦,交大科法所協辦「科技、能源與國際經濟法」工作坊。交大科法所由所長倪貴榮教授、王立達副教授、薛景文助理教授代表出席該工作坊,並提出各自提出一篇報告,並於會後商討兩校進一步合作事官。

(一)目的

科法所於 2011 年 11 月 1 至 2 日即與香港中文大學法學院副院長 Prof. Bryan Mercurio 共同主辦「International Conference on Trade, Science, Technology, and Justice」,第點選在交大交映樓,共計有來自包括 11 個國家,13 位外國學者發表論文。延續前一年的合作經驗,並為建立雙方所預期之長期、穩定以及堅實的關係,今年科法所持續與中文大學法學院進行各項學術交流與合作計畫,因而於 2012 年 9 月於香港中文大學聯合舉辦學術工作坊,本次研究主題為「貿易、能源與科技」。於此合作架構之下,交大科法所必須派代表協力參與中文大學法學院所舉辦之研討活動。交通大學與香港中文大學的合作之中期目標為建立東亞經貿與兩岸貿易法制如 ECFA 等議題的研究中心,其中更兼含兩岸智慧財產保護議題、生物檢疫暨食品安全議題以及貿易爭端解決議題之研究。

依據 QS 的全球法學院排名,香港中文大學法學院列為一百名以內。其中 Michael Pendleton 教授不僅是香港智財保護的專家,更是大陸智慧財產權的權威 之一,經常與已故的中國社會科學院鄭成思研究員合著相關專論,夙有盛名;其 法學術副院長 Bryan Mercurio 教授,更是自由貿易協定及智財保護規定的專門研究學者,著有多篇專論,並且在兩大冊的 FTA 專書:《Bilateral and Regional Trade Agreements》之中,撰寫智慧財產權專章,其研究團隊成員包括 Julian Chaisse, Michael DU Ming 及 Gonzalo Villalta Puig等,其主要以國際經際法為研究領域,研究成果皆已發表於國際著名期刊。是故此次與中文大學法學院之合作,實屬國際百大合作計畫重要之一環,亦即為科法所申請之「貿易、科技與法律一兩岸、區域與多邊體系之研究」計畫執行的一部分。換言之,此次之短期出國研修,除了有學術研究之意義外,更為履行交大科法所與中文大學雙方所作之合作承諾,並同時亦為執行校方所批准的計畫。

(二)過程

此次「科技、能源與國際經濟法」聯合工作坊,由香港大學負責所有行政事務,科法所則是由所長倪貴榮教授、王立達副教授、薛景文助理教授代表出席,並發表三篇報告,而香港中文大學則由 Julien Chaisse 副教授、Bryan Druzin 助理教授以及杜明助理教授,三位發表報告。此外,此次工作坊也邀集香港大學、香港城市大學之學者專家,並也邀請了對國際經濟法素有研究之律師發表各自的研究成果。

工作坊分成四個子題,均圍繞著科技、能源、環保相關的國際貿易法以及投資法議題。第一個子題為重要新興科技相關議題,由科法所王立達副教授擔任首位報告人,中文大學 Bryan Mercurio 教授擔與談人。王副教授的題目是 Stalled Development Agenda and Intellectual Property Strategies for Developing Countries(延宕的發展議題以及開發中國家的智慧財產權策略),主要討論國際智慧財產權法中的發展議題,報告點出現今國際智慧財產權法制並未顧及開發中國家發展之需要,並且提出開發中國家面臨此一困境應有之策略。文中特別指出兩個可行之方向,其一為內生策略,亦即利用公共領域(public domain)之概念,涵蓋開發中國家發展之需要,其二為外生策略,可能可以藉由人權、傳統知識(traditional knowledge)或基因資源保護(genetic resources)的面向切入。然而此諸策略彼此間可能會產生衝突,於文末王副教授則提出調和方法,整合出一個對開發中國家而言較為適當的發展策略。同一場次香港中文大學提出報告者為 Bryan Druzin 助理教授,其討論在網路世界裡,獨裁政權控制言論之方式,報告對比阿拉伯之春事件以及中國的網路控管系統,說明為何中國之網路言論審查制度何以成功。

第二個子題則為能源投資議題,二位報告人分別為香港中文大學之 Julien Chaisse 副教授,以及杜明助理教授。Chaisse 教授則是討論亞洲主權投資在能源產業之相關投資法議題,說明亞洲主權性資金投資於能源資產的趨勢,以及應如何規範此類投資,並且討論應以和種機制有效處理此類投資事件所生之爭議。杜明教授則介紹中國能源公司布局全球時所產生的問題,以及將來之發展趨勢。

第三個子題則針對能源相關國際爭議之討論,由中文大學 Gonzalo Villalta Puig 擔任與談人。由 Romesh Weeramantry 律師針對 White Industries v India一案,評析國家如何及應否因內國司法裁決而產生國家(賠償)責任。而倪貴榮所長之題 目為 Legal Aspects (Barriers) of Applying Compulsory Licenses on Green Technologies,針對綠能科技採取強制授權在適用上可能遭遇的法律上困境,一方面強制授權的確有助於開發中國家達到環保之要求,然而另一方面,若逕准予強制授權可能反而阻礙綠能科技之發展與技術移轉,對開發中國家亦未必有利。倪

所長之報告以 Philips 公司與台灣智財局關於強制授權的爭端為例,說明開發中國家採取強制授權時所面臨的挑戰,台灣的案例顯示主管機關很難證明強制授權符合 TRIPs 協定之要求,而擁有專利之國家對於強制授權之反彈力道亦相當強勁。總的而言,開發中國可能只能以強制授權作為技術移轉協商之籌碼。

第四個子題則關於個別國家或國際組織對於氣候變遷以及環境損害之回應。由香港大學助理教授 Jolene Lin 報告歐盟生質能源的標章制度,討論歐盟是否已環保標章之名,行產業保護之實。科法所薛景文助理教授則針對歐盟的能源補貼加以分析評論,其主張歐盟對於能源部貼之管制其實是不足的,會員國可以輕易的通過執委會的審查,實際上很可能會形成不當之貿易障礙。工作坊最後由香港城市大學的 Rajesh Sharma 的助理教授的報告結尾,其討論涉及環境之爭議中,是否應採取「預防原則」以防風險實現所造成之損失無法彌補。

工作坊結束後,由中文大學法學院院長 Christopher Gane 設宴,Gane 院長日前剛剛從英國參加圖書館開幕活動回來,隔天即親自歡迎科法所一行來訪,足感其盛情。席間除交換紀念品等拜會外,倪所長以及 Gane 院長研商科法所以及中文大學明年度的學術以及教學合作計畫,並就就交換生計畫以及實習事達成有初步之共識,另雙方也確定明年度的合作計畫將持續進行。

(三)心得及建議

此次短期參訪計畫相當成功,就學術交流而言,科法所代表所提出的報告,均引發熱烈討論,而深獲重視,同時香港中文大學之成員以及其所邀請之學者專家,亦提出精闢的報告,針對環保、科技之國際經濟法議題,雙方均有所精進。此外,就教學交流而言,雙方更研議雙方教學合作的可能性,簡言之中文大學對於交換生計畫以及雙方同學之短期實習計畫,均顯示濃厚的合作意願,亦期待短期內能達成具體的共識。

儘管雙方的合作有初步之成果,然而不可諱言的,人文學科的合作往往需要較長的時間,始能展現明顯成效。中文大學法學院與交大科法所均認為,此次成功的合作經驗,為將來長期而深化合作之基礎,期望雙方能根據自身的研究優勢,進行跨國的整合研究。遠期目標為創設「亞太貿易法制研究」中心,為達此目的,需要累積研究能量,建議如下:

- 1. 國立交通大學和香港中大雙方共同舉辦國際研討會,邀請國外專家學者參與,促進國際學術交流;並集結前開專家論著出版專論。
- 將兩校合作研究成果共同發表、投稿於國際期刊,提高我國及本校國際能見度。
- 3. 香港中文大學與本校教授持續進行互訪並共同開設課程,凝聚並交換研究心得與共識,使研究成果能透過教育推廣扎根,並提升本校學生學習視野及高度。
- 4. 共同籌組並架設貿易科技暨兩岸貿易法制資料庫、網站,彙整研究資訊並作 為交流之窗口平台。
- 5. 兩校共同爭取國內(如:經濟部、國貿局)或國際組織(如:世界貿易組織) 之研究計畫,促進兩校之研究與學術發展,並增加國際參與機會,使學術研究 與國際接軌。

附錄

香港中文大學之報告人以及其邀請講者之報告內容,涉及著作權而無法檢附 於報告書中,於此僅附上本所報告人之英文摘要(共三篇),以及工作坊議程。

參訪照片:



參訪照片(一):中文大學法學院學術副院長 Bryan Mercurio 受贈交大紀念品



參訪照片(二):交大科法所倪貴榮所 参訪照片(三):中文大學法學院院長 長受贈中文大學紀念品



Christopher Gane受贈紀念品

Legal Aspects (Barriers) of Applying Compulsory Licenses on Green Technologies

Kuei-Jung Ni Professor of Law & Director Institute of Technology law, NCTU, Taiwan

Abstract

To develop and use of green technologies has been considered as a useful means to meet the challenges to mitigate global warming. When developing countries have become major emitters of greenhouse gases, they hardly invent and own the technologies that are dominated by developed nations like U.S., European countries and Japan. Within the agenda to promote technology transfer under the United Nations' Climate Change regime, they especially argue intellectual property on the technologies needs to be addressed, considering compulsory licensing on green technologies would be instrumental in meeting the global duty to mitigate global warming

The paper aims to examine the legal issues (including barriers) of granting compulsory licenses on green Technologies. I would analyze the legal challenges facing the application if they do authorize such licenses especially from perspective of WTO/TRIPS and national practices like Taiwan.

It is submitted that Taiwan's experience regarding compulsory license on Phillips' CD-R patents may not tell the whole story about the severe challenges faced with national competent authorities. But, it did reveal the cost and burden that not all WTO members can afford. It may be premature to jump into conclusion that the move to avail compulsory licenses for green technology access is simply illusory. The legal huddles and burden nevertheless may dissuade them from putting the agenda into a real practice.

Stalled Development Agenda and Intellectual Property Strategies for Developing Countries

Richard Li-dar Wang Tien-Hsin Wang*

Under the urge of developing countries, the main international intellectual property (IP) organizations—WIPO and WTO—respectively adopted development agenda in the past decade, paying special attention to the impact that IPs may create to economic growth, social development or the pursue of demarginalization in the world system. Those development agenda, however, have not achieved substantial progress so far in the two international forums. Against this backdrop, this essay is aiming for analyzing possible strategies that developing countries may deploy to tackle the present stall. The authors sum up those strategies into two categories: endogenous approaches and exogenous ones. The public domain approach is the most visible endogenous strategy. The exogenous strategies include the human right approach and the genetic resource and traditional knowledge approach. This essay delves into the origin of each approach, reviews its key contentions against worldwide IP expansions, and assesses their individual values for developing countries. In the last part of this paper, the authors further discuss the interaction of those strategies. This essay detects potential conflicts between those approaches. Through careful analysis, the authors try to figure out the possibilities of reconciliation, which might lead to combining them into a more coherent and comprehensive IP strategy.

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^{*} Richard Li-dar Wang is Associate Professor of Law, National Chiao Tung University (Hsinchu, Taiwan). S.J.D. 2007, Indiana–Maurer (U.S.); Tien-Hsin Wang is a LL.M. candidate, Institute of Technology Law, National Chiao Tung University.

A Balance of Environmental Protection, Competition and Trade: A Review of Legal and Illegal Energy Subsidies in EU

Ching-Wen Hsueh

Assistant Professor Institute of Technology law, NCTU, Taiwan

Climate change has caused tremendous economic losses, and the external costs of tradition energy thus are no more hypothetical, but rather are tangible. For the present time, the material benefits of renewable energy are yet to see, while the costs for transformation are high. The national states and the international organizations could accelerate the transformation process by internalizing the external costs, or by providing financial supports. The financial supports provided by states or by international organizations might distort the market and could be harmful for the competition and trade, because the recipients may have advantages, which their competitor do not have. The main purpose of this paper is to address one simple but significant question: "Dose the European Union promote the environmental protection by subsidies at the cost of competition and free trade?" The practices of the European Union in this regard is of great reference value, given that the national states seldom place weigh on competition and trade in the context of environmental protection. European Union, as sui generis international organization, is obliged both to maintain the function of common market and to promote environmental protection. In the first section, the author would like to picture the role of subsidies for renewable energy in EU by sketching the policy scheme for renewable energy. In order to explore the criteria to balance the needs of environmental protection and of competition and trade, the practices of the Commission and the opinions of European Justice of Court (ECJ) would be reviewed in the second section. In the third section, the author would analyze the decisions of Commission and the judgments of the ECJ to find whether the EU values more the needs of environmental protection, or just the opposite. In doing so, the insufficiency and the problems of the EU system would be revealed.

Joint-workshop on 'Technology, Energy and International Economic Law'

DATE:

28 September 2012

VENUE:

Lecture Theatre 4, Cheng Yu Tung Building, Chinese University of Hong Kong Shatin, Hong Kong

> Organized by: Chinese University of Hong Kong, Faculty of Law

> > In collaboration with:

National Chiao Tung University, Institute of Technology Law Start-up Funding for Collaboration with Strategic Partners in Taiwan

Workshop Programme

9:30 – 9:45	Arrival and Registration
9:45 - 10:00	Welcome Statement: Opening Address
	Bryan Mercurio, Professor and Associate Dean (Research), CUHK Faculty of Law
10:00 - 11:30	Session I: Emerging technology-related issues
	Richard Li-dar Wang, Associate Professor, Institute of Technology Law, National Chiao Tung University Stalled Development Agenda and Intellectual Property Strategies for Developing Countries
	Danny Freidmann, PhD Candidate, CUHK Faculty of Law Does Participative Technology Require a Paradigm Change of Trademark Law?
	Bryan Druzin, Assistant Professor, CUHK Faculty of Law Authoritarianism's new Leash on Speech: The Arab Spring and the precarious Success of Chinese Internet Censorship
	Bryan Mercurio, Professor and Associate Dean (Research), CUHK Faculty of Law Discussant
11:30 – 11:45	Coffee/Tea Break
11:45 - 12:45	Session II: Energy investment in focus
	 Speakers Julien Chaisse, Associate Professor, CUHK Faculty of Law Asian sovereign investments in energy assets: trends, regulation and prospects for litigation Michael Du Ming, Assistant Professor, CUHK Faculty of Law When Chinese Energy Corporations Go Global: Issues, Challenges and Prospects
	Bryan Mercurio, Professor and Associate Dean (Research), CUHK

	Faculty of Law
	Discussant
12:45 - 14:00	Lunch
14:00 - 15:15	Session III: Energy-related issues and disputes
14.00 15.15	Session III. Energy-related issues and disputes
	Speakers
	Romesh Weeramantry, King & Wood Mallesons State of the Control of the Contr
	State responsibility for decisions domestic courts – the White
	Industries v India experience
	Professor Kuei-Jung Ni, Director and Professor, Institute of
	Technology Law, National Chiao Tung University
	Legal aspects (barriers) of applying compulsory licensing on green
	technologies
	Gonzalo Villalta Puig, Professor, CUHK Faculty of Law
	Discussant
15:15 - 15:30	Tea Break
15:30 - 17:00	Session IV: National responses to combating climate change and
	environmental degradation
	Speakers
	Jolene Lin, Assistant Professor, Hong Kong University
	Is Your Biofuel Affixed with An Approved Seal?: Examining the
	European Union Biofuels Certification Regime
	Ching-wen Hsueh, Assistant Professor, Institute of Technology Law, No. 1 Ching To Maria Inc. 1
	National Chiao Tung University
	National Chiao Tung University Legal and illegal energy subsides in the European Union
	National Chiao Tung University Legal and illegal energy subsides in the European Union Rajesh Sharma, Assistant Professor, City University of Hong Kong,
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	 National Chiao Tung University Legal and illegal energy subsides in the European Union Rajesh Sharma, Assistant Professor, City University of Hong Kong, School of Law Use of Precautionary Principle in the Environment Related Disputes:
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	 National Chiao Tung University Legal and illegal energy subsides in the European Union Rajesh Sharma, Assistant Professor, City University of Hong Kong, School of Law Use of Precautionary Principle in the Environment Related Disputes:
18:30 - 20:30	 National Chiao Tung University Legal and illegal energy subsides in the European Union Rajesh Sharma, Assistant Professor, City University of Hong Kong, School of Law Use of Precautionary Principle in the Environment Related Disputes: It is better safe than sorry?