INTERPRETING THE CLAIMS AGREEMENT: JAPAN, KOREA, AND THE LONG SHADOW OF WORLD WAR II IN ASIA

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I. INTRODUCTION

Japan and Korea have a long and complicated relationship. Despite their many similarities—both are developed, aging democratic societies, U.S. allies, and states apprehensive of rising Chinese power in the region—a number of issues hinder these two states from further developing their ties. Chief among these difficulties is the legacy of Japanese colonization and war time policies. As part of its campaign in the Pacific, Japan used forced laborers, many of whom were Korean, to support war time production in large Japanese conglomerates including Mitsubishi and Nippon Steel.[1] These large companies continue to be the focus of suits by Korean citizens who were forced laborers, and the resulting litigation has generated acrimony between the two countries.[2]

This Annotation explores the dynamics animating these disputes, with a particular focus on the Korean Supreme Court's interpretation of the 1965 Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between the

1. Yuri Kageyama, *Japan's Legacy of Forced Labor Haunts Ties with Neighbors*, AP News (Aug. 8, 2020), https://apnews.com/article/world-war-ii-tokyo-forced-labor-asia-international-news-9e116e397c4bb2a5064d4c5778ac22c3.

2. *Id.*

Republic of Korea and Japan (Claims Agreement).[3] The court read the Claims Agreement to not preclude human rights claims "with direct links to the Japanese Government's unlawful colonial domination of the Korean Peninsula and waging wars of aggression."[4] This narrow reading of the treaty may well be plausible, but it is a weak construction, especially in light of the widely recognized principles of treaty interpretation in Article 31 of the Vienna Convention on Treaties.[5] The better interpretation of the Claims Agreement would preclude such claims and remove courts from the equation, leaving the issue's resolution to each nation's diplomatic organs—the parts of the respective governments best positioned to handle the problem.

II. BACKGROUND ON THE 1965 CLAIMS AGREEMENT AND ITS IMPLEMENTATION IN KOREA

In the latter half of the nineteenth century, Japan began to transform its political, economic, and military structures along European lines to both stave off imperialist powers who were then running amok in China and to assert Japanese influence in the region.[6] Korea, seen as a "a dagger pointed at the heart of Japan" by military strategists, took an outsized role in this project.[7] Japan would go on to fight two wars—one with China and one with Russia—over the Korean Peninsula. After its costly victory in the Russo-Japanese War, Japan formally annexed Korea in 1910, officially incorporating it as part of the Japanese Empire. It then continued to exercise imperial control over Korea until the Second World War was ended by the Treaty of San Francisco.[8]

However, South Korea was never a party to the Treaty of San Francisco and therefore never received the benefits of Article 14 which provided for reparations "for the damage and suffering caused by [Japan] during the war."[9] Instead, Korea and Japan entered into negotiations in 1951, the same year the Treaty of San Francisco was signed, to

3. Agreement on the Settlement of Problems Concerning Property and Claims on Economic Co-operation, Japan-S. Kor., art. I, June 22, 1965, 583 U.N.T.S. 173 [hereinafter Claims Agreement].

4. Daebeobwon [S. Ct.], Oct. 30, 2018, 2013Da61381 (JIP 33, 388) (S. Kor.).

5. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

6. *The Meiji Restoration*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Meiji-Restoration/Accomplishments-of-the-Meiji-Restoration (last visited Jan. 8, 2023).

7. Victor D. Cha, *Japan's Grand Strategy on the Korean Peninsula: Optimistic Realism*, 1 JAPANESE J. POL. SCI. 249 (2000).

8. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

9. *Id.* art. 14.

establish diplomatic relations and resolve other matters related to the war.[10] After a long and arduous process, the Treaty on the Basic Relations Between the Republic of Korea and Japan and the Claims Agreement, a supplementary treaty, were concluded and both entered into force in 1965.[11]

Under Article I of the Claims Agreement, Japan agreed to pay $300 million in grants to Korea to be made in increments of $30 million a year and agreed to provide an additional $200 million in the form of loans.[12] There is relatively little controversy surrounding Article I. Instead, current disputes center around Article II. The most important provision, Article II, Section 1, reads:

> The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph *(a)* of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.[13]

To effectuate these provisions, Korea passed a series of laws in the 1970s.[14] Under these laws, some of the grant money paid by Japan to Korea under the Claims Agreement was distributed to Korean citizens, although initially only the family members of those who were "recruited or conscripted by Japan as a soldier, an army civilian, or a laborer, and had died before August 15, 1945" could lay claim to the money.[15] By June of 1977, the Korean government distributed just under 10% of the $300 million grant as payments under these laws.[16] Eligibility for these "consolation payments" was significantly broadened in the 2000s to include living persons who were forced into labor or conscripted by the Japanese government during the war.[17]

III. BACKGROUND ON THE DISPUTES OVER MITSUBISHI AND

10. Daebeobwon [S. Ct.], Oct. 30, 2018, 2013Da61381, 397 (JIP 33, 388) (S. Kor.).
11. *Id.*
12. Claims Agreement, *supra* note 3.
13. *Id.* art. II.
14. 2013Da61381 at 399.
15. *Id.*
16. *Id.*
17. *Id.* at 400-01.

NIPPON STEEL

Several Korean citizens who were forced laborers during World War II or their descendants initially began actions against Mitsubishi and Nippon Steel in the Japanese legal system.[18] These cases ran all the way up to the Japanese Supreme Court where they were ultimately rejected.[19] Though the reasons for rejecting the claims varied, Japanese courts dismissed actions against Mitsubishi under the argument that the Claims Agreement extinguished claims against the Japanese government or its citizens by Korean citizens.[20] The plaintiffs in those cases, joined by some new plaintiffs in Korea, then brought nearly identical actions for damages in Korean courts.[21]

In the case of Nippon Steel, the lower court in Korea dismissed the claims, determining that the Japanese decisions precluded action by the plaintiffs in Korean courts.[22] The Supreme Court of Korea however reversed, ruling that 1) the Japanese court decisions were opposed to the fundamental principles of the Korean Constitution; and 2) the Claims Agreement did not apply to human rights claims directly connected to Japanese colonization.[23] The case was remanded, and the lower court ordered $100 million per plaintiff in damages.[24]

The cases against Mitsubishi followed a similar track with the Supreme Court again determining that the Claims Agreement did not preclude the suit.[25] Lower courts subsequently carried out these rulings by, for example, recently ordering the sale of two of Mitsubishi's patent rights, though Mitsubishi has appealed those decisions.[26]

In reaction to the Korean Supreme Court's rulings on these cases, the respective governments of Japan and Korea took different postures, ranging from indignant outrage by the former to cautious apprehension by the latter. The Japanese government viewed the Mitsubishi

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18. *Kankoku sengo hoshō saiban sōran* [Overview of Post-War Compensation Cases in Korea], Houritsu jimusho no ākaibu [Law Firm Archive], http://justice.skr.jp/souran/souran-kr-web.htm (last visited Dec. 1, 2022).

19. *Id.*

20. *Nihon sengo hoshō saiban sōran* [Overview of Post-War Compensation Cases in Japan], Houritsu jimusho no ākaibu [Law Firm Archive], http://justice.skr.jp/souran-jp-intro.html (last visited Dec. 1, 2022).

21. Houritsu jimusho, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *South Korean Court Orders Sale of Seized Mitsubishi Heavy Assets*, JAPAN TIMES (May 2, 2022), https://www.japantimes.co.jp/news/2022/05/02/national/crime-legal/mitsubishi-seized-assets/.

decision as a clear violation of Article II of the Claims Agreement and expressed its right to seek an international court decision or take corrective measures.[27] The Korean government, on the other hand, emphasized its efforts to find a diplomatic solution over fears of worsening an already strained Korea-Japan relationship in a brief to the Supreme Court before the decision came down.[28] The concerns of both states fell on deaf ears.

IV. KOREAN SUPREME COURT'S ANALYSIS OF THE CLAIMS AGREEMENT

In both the Nippon Steel and Mitsubishi cases, the Korean Supreme Court interpreted the Claims Agreement to not apply to the claims of Koreans conscripted for forced labor as part of the war effort. The court reasoned that the Claims Agreement "was basically intended for the resolution of the financial and civil-dent relations between Korea and Japan via a political agreement based on Article 4 of the San Francisco Treaty" and "did not seek to claim damages for the unlawful colonial domination by Japan."[29] Article 4, which is specifically mentioned in the language of the Claims Agreement, posits that the debts and claims between Japan and other states are to "be the subject of special arrangements between Japan and such authorities."[30] The authorities mentioned were those administering geographic areas referred to in Article 2 at the time the treaty was signed (almost all former territories of the Japanese Empire), a group that included Korea.[31] Therefore, according to the Korean Supreme Court, the 1965 Claim Agreement was just one of these "arrangements" provided for in Article 4.[32]

The Korean Supreme Court made several additional arguments to further buttress its interpretation. First, it reasoned that there "was no legal connection between Articles I and II of the Claims

27. Gaimu daijin danwa [Foreign Minister's Comment], *Daikanminkokuhōin ni yoru Nihon kigyō ni taisuru hanketsu kakutei ni tsuite* [Regarding the Final Judgement Towards Japanese Corporations by the Supreme Court of the Republic of Korea] (Nov. 29, 2018), https://www.mofa.go.jp/mofaj/press/danwa/page4_004550.html.

28. *Kankoku Gaimushō ga saikōsai ni ikensho moto chōyōkō meguri "doryokuchū"* [The Korean Ministry of Foreign Affairs Submitted an Opinion to the Supreme Court Regarding Former Forced Industrial Laborers; "We're Making an Effort"], NIHON KEIZAI SHINBUN (July, 30, 2022), https://www.nikkei.com/article/DGXZQOGM301WF0Q2A730C2000000/.

29. Daebeobwon [S. Ct.], Oct. 30, 2018, 2013Da61381 (JIP 33, 388) (S. Kor.).

30. Treaty of Peace with Japan, *supra* note 8, art. 4.

31. *Id.* art. 2.

32. 2013Da61381 at 403.

Agreement."[33] The loans and grants promised in Article I were merely for the "economic development" of Korea and were not reparations for harms suffered during the war or under the colonial government.[34] Any payments to individual Koreans paid out of the funds provided by Japan were undertaken as a mere "ethical responsibility" of the Korean government and were not evidence of an understanding that the money was to be used as a form of reparations.[35]

Finally, the court pointed to the negotiating history of the Claims Agreement. It noted that Japan refused to "admit to the unlawfulness of their colonial domination" during negotiations and that the parties were "unable to come to an agreement with respect to the nature of the Japanese occupation."[36] It further noted that the Korean government had originally demanded $1.22 billion before settling for $500 million.[37] Therefore, as there was no agreement on the legal responsibility of the Japanese government regarding colonization, and in light of the Korean government's willingness to settle for far less than originally demanded, the Supreme Court reasoned that there was strong evidence that the Claims Agreement was not intended to cover the claims at issue here.

V. ANALYZING THE CLAIMS AGREEMENT IN LIGHT OF THE VIENNA CONVENTION

The Supreme Court's decision, however, is not in line with generally accepted principles of treaty interpretation as laid out in the Vienna Convention on the Law of Treaties (VCT). The convention, to which both Japan and Korea are parties, provides a framework for the interpretation of treaties.[38] Though the treaty came into force after the Claims Agreement was ratified, many of its provisions, including the rules of treaty interpretation, are considered to be customary international law predating the Convention, and are therefore applicable to an analysis of the Claims Agreement.[39]

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33. *Id.* at 404.

34. *Id.*

35. *Id.* at 400.

36. *Id.* at 405.

37. *Id.*

38. Vienna Convention, *supra* note 5, art. 31.

39. "…Articles 31 and 32 of the Vienna Convention on the Law of Treaties…may in many respects be considered as a codification of existing customary international law on the point." Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, 1991 I.C.J. 53, ¶ 48 (Nov. 12).

Article 31 of the VCT lays out the general principles of interpreting treaties.[40] Section 1 reads, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[41] The object and purpose of the treaty is to be determined by reference to the text, preambles, annexes, and "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."[42] When this framework is applied, the Korean Supreme Court's interpretation appears to stand on shaky ground.

Beginning with the text of the treaty, the terms on their face seem to preclude the exact kinds of claims at issue in the Mitsubishi and Nippon Steel cases. As the dissenting opinion in the Nippon Steel case points out, the preamble declares that the parties aim "to settle [the] problem concerning property of the two countries and their nationals and claims between the two countries and their nationals," and Article II reads that all claims are "settled completely and finally."[43] These phrases together lend a strong sense of finality to the document, especially when understood in the larger context of the Claims Agreement being part and parcel of a broader agreement to normalize relations after a turbulent period of violence and war.

In addition to this, there was also an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."[44] The agreed to minutes, which declare that "the Governments of Japan and the Republic of Korea have reached the following understandings concerning the [Claims Agreement],"[45] clarify that "any claim falling within the scope of the . . . so-called 'Eight Items'" is included within the meaning of Article II.[46] The Eight Items were a list of demands by Korea during the negotiations, and Item Five on that list includes "claim[s] for repayment of outstanding receivables, compensations, and other rights to claim of the conscripted Koreans."[47] The Korean Supreme Court attempts to explain

40. Vienna Convention, *supra* note 5, art. 31.

41. *Id.*

42. *Id.*

43. Daebeobwon [S. Ct.], Oct. 30, 2018, 2013Da61381, 418 (JIP 33, 388) (S. Kor.) (citing the Claims Agreement).

44. Vienna Convention, *supra* note 5, art. 31.

45. Agreed to Minutes on the Agreement on the Settlement of Problems Concerning Property and Claims on Economic Co-operation, Japan-S. Kor., June 22, 1965, 583 U.N.T.S. 17.

46. *Id.* art. 2(g).

47. 2013Da61381 at 418.

away this inconvenient provision by reasoning that "no other part of the Eight Items is premised on the unlawfulness of Japan's colonial domination. Therefore, Item Five was not . . . either." [48] This is a peculiar argument; the meaning of one item on a list is not undercut by the fact that no other item of the list has the same meaning. This also shows how much the court's analysis relies on the "colonial domination" argument, a vague invocation of some sort of deeper principle that is never clearly defined or elaborated on.

The Supreme Court's interpretation is further undermined by the subsequent practice of the states. Article 31 of the VCT allows courts to consider "any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation" as part of the surrounding context.[49] As mentioned above, Korea set up a system of compensation for Korean conscripts and forced laborers under which it paid out sums using the grant money from Japan.[50] These cases did not even begin to arise in earnest until the 2000s, and besides one "White Paper" from 1965 before the Claims Agreement was even finalized, the court relies on interpretations of the intent of the Claims Agreement from a committee in 2005.[51] For forty years after the agreement was ratified, Korea's behavior lined up with the idea that claims like the ones at issue here were precluded by the Claims Agreement.

VI. CONCLUSION

The Korean Supreme Court's interpretation of the Claims Agreement may very well be plausible. However, other considerations should caution a less antagonistic approach. The Japanese government has maintained its belief that these types of claims are precluded by the Claims Agreement. Its reading of the treaty is not only reasonable, but likely correct. The Korean government, for its part, has emphasized its efforts to find a diplomatic solution, though its refusal to more strenuously object to its own Supreme Court's activities likely speaks volumes of the status of Korean public opinion. Nevertheless, both governments have expressed at a minimum some apprehension about the path the court has embarked on. Surely this should mean something in the Supreme Court's analysis, yet the decision says nothing about either the serious toe-stepping concern involved in the seizure of Japanese

48. *Id.* at 403.
49. Vienna Convention, *supra* note 5, art. 31.
50. 2013Da61381 at 399.
51. *Id.* at 404.

property for eighty-year-old crimes or the lukewarm attitude of the Korean government.

In particular, the decision appears remarkable in that it entirely upends the Claims Agreement, which could rightly be considered one of the foundations of Japan and Korea's post-war relations. While the desire of the Korean Supreme Court to rectify terrible past wrongs is admirable, the responsibility ought to lie with the political branches of both Korea and Japan. The Korean government agreed, for better or worse, that the claims against Japan for wartime and colonial atrocities were settled in exchange for $500 million. If that amount is now viewed as insufficient, the Korean government is well within its rights to demand more from the Japanese government. Though the possibility of Japan paying is small, that is no excuse for the Supreme Court's actions here. To allow courts to ex post facto revise decades old treaties viewed as insufficient by current public opinion would open up a Pandora's Box of historical controversy without any clear legal basis for doing so. Indeed, the Korean Supreme Court's opinion appears at odds with international law as expressed in the VCT. It, and other courts, should refrain from such contrived readings of treaties, even if the manipulation is done with the best of intentions.