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ARTICLE

The 1965 "Korea-Japan Claims Settlement Agreement" and Individuals' Claims Rights

Pae-Keun Park*

1. Introduction

As is well known, Korea and Japan concluded in 1965 "the Agreement on the Settlement of Problems Concerning Property and Claims and Concerning Economic Cooperation between the Republic of Korea and Japan"[1] (hereinafter "1965 Claims Agreement") and settled the so-called "claims rights" problem between the two States. Namely, the Agreement provides in Art. 2, para. 1, "The High Contracting Parties confirm that the problems concerning the property, rights, and interests of the two signatories and *their nationals* (including juridical persons) and the claims rights between the High Contracting Parties and between their nationals ... have been *settled completely and finally* (emphasis added)." When we read this clause plainly, it seems that Korean nationals, as individuals, ceased to have any right to bring lawsuit against either Japanese people (including Japanese juridical persons) or the Japanese Government. However, regardless of this clause, many Korean nationals have raised various kinds of "claims" in Japanese courts both against the Japanese Government and

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1 Signed in Tokyo on June 22, 1965 and entered into force on December 18, 1965.

against Japanese companies.[2] And recently, these "claims" even came to be raised in a Korean court[3] and United States courts.[4]

How can Korean nationals bring suits against the Japanese Government and people ? Were the individual rights to property, rights, interests and the claims rights of each state's nationals not waived by Art. 2, para. 1 of the 1965 Claims Agreement, and therefore is it not impossible for Korean nationals to bring suits against the Japanese Government and companies ? Or is it only the right of diplomatic protection by the state that was waived by the clause, and therefore is it still possible for the Korean nationals to bring such suits ? It may be said that this question has been one of the main legal issues in the several cases before Japanese courts. However they don't seem to have answered it clearly.[5] Moreover, it would clearly be one of the most important legal points in the cases before the Korean court and United States courts.

2. International Laws Concerning the Interpretation of Treaties

The question outlined above is a typical problem of treaty interpretation. And needless to say, the interpretation of treaties is regulated by international law. The current positive international law concerning this issue is "the Vienna Convention on the Law of Treaties" (hereinafter Vienna Convention on Treaties), concluded in 1969. Both Korea and Japan are signatories to this

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2 From 1972 to 2000, 66 so-called "after-war compensation" lawsuits have been brought to the Japanese Courts and many of them by Korean nationals. The list of the lawsuits can be seen at <http://www.geocities.co.jp/WallStreet/7486/saibandb/ichiran.htm> (visited June 11. 2001).

3 On May 1, 2000, 6 Koreans brought a lawsuit against Mitsubishi Heavy Industries in the Pusan District Court, Korea, claiming the compensation of damages, which, according to their argument, they suffered during their conscripted labor at the company before the end of World War II. They are also claiming the payment of unpaid wages. Report of Chosun Ilbo, May 2, 2000.

4 The so-called former "comfort-women" and conscripted laborers brought lawsuits against the Japanese Government and companies to the United States District Court (the District of Columbia and Northern District of California) and California State Court. Report of Dong-A Ilbo, June 9, 2000; Hankuk Ilbo, Sep. 16, 2000.

5 Those judgments passed upon the cases don't enter into the legal issue of the interpretation of Art. 2, para. 1 of the 1965 Claims Agreement because on the basis of other reason (for example prescription) than the interpretation of the clause they could make judgment on the merits.

Convention,[6] so it may appear to be applicable in interpreting the 1965 Claims Agreement. However, while the 1965 Claims Agreement was concluded and entered into force in 1965, the Vienna Convention on Treaties was concluded in 1969 and entered into force in 1980. Therefore, a problem of intertemporal law exists in applying the Vienna Convention to the 1965 Claims Agreement.

On this point, Art. 4 of the Vienna Convention on Treaties states, "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention *applies only to treaties which are concluded by States after the entry into force of the present Convention* with regard to such States" (emphasis added). This Article sets forth the principle of non-retroactivity for the Convention. Therefore, in interpreting the 1965 Claims Agreement, it is necessary to ascertain the international laws pertaining to treaty interpretation that existed at the time when the Korean-Japan Agreement was concluded.

Before the Vienna Convention on Treaties was concluded in 1969, no rules of international law regulating interpretation of treaties existed in the form of a "treaty." Therefore, to the extent that such rules of international law were in effect, they would have existed as norms of customary international law.[7] It is unclear whether in 1965, such norms of customary international law existed as to the issue of treaty interpretation, and even among scholars, the opinions were divided as between those who acknowledge that customary norms of treaty interpretation existed at the time and those who do not.[8]

In this context, the various approaches to treaty interpretation argued at that time can be summarized as follows: (1) the subjective (or intent of the

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[6] The Republic of Korea ratified the Convention on January 27, 1980; Japan, on August 1, 1981.

[7] Some differences of opinion exist as to whether the "general principle of law recognized by civilized nations," referred to in Article 38, section 1(c) of the Statute of International Court of Justice, can serve as a source of international law. It is also debatable whether such "general principles" concerning interpretation of law exist in the domestic law of states.

[8] *Report of the International Law Commission on the Work of Its Eighteenth Session*, reprinted in 61 American Journal of International Law 349 (1967).

parties) approach, which regards ascertainment of the intentions of the parties to the treaty as the aim and goal of treaty interpretation, (2) the objective (or textual) approach, which seeks to ascertain the meaning of the text of a treaty, and (3) the teleological (or object and purpose) approach, which argues that those who interpret a treaty must first ascertain the object and purpose of the treaty and then interpret it to give effect to that object and purpose.[9]

In attempting to ascertain the norms of customary international law which were in effect around the year 1965—and if such norms were not in existence, to ascertain the appropriate principles of treaty interpretation from the point of view of jurisprudence—most representative works of international law scholars published around the year 1965 may be consulted. In Hans Kelsen's work, published in 1966, the primary purpose of the interpretation of treaties is deemed to be the determination of the intent of the parties. To effectuate this purpose, it is said that the historical circumstances behind the conclusion of a treaty—including the political or economic circumstances at the time—are to be considered.[10] This methodology also incorporates interpretation according to its wording—the so-called logico-grammatical interpretation—as a method of interpreting treaties.[11] At the same time, endorsing this method, Kelsen adds, "The wording of a legal instrument may not be in conformity with the ascertainable intentions of its authors. The wording may go beyond, or remain behind, their intentions."[12] This point seems to be particularly relevant in interpreting the 1965 Claims Agreement.

Next, in his textbook of international law published in 1959, A. Verdross, on the basis of his review on prior case precedents and the works of international

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9 Ian Sinclair, *The Vienna Convention on the Law of Treaties* 114-5 (2nd ed., 1984).

10 "INTERPRETATION OF TREATIES. In order to ascertain the intentions of the authors of a legal instrument, the historical, that is the political and economic, circumstances under which the instrument was established may be taken into consideration." Hans Kelsen, Revised and Edited by Robert W. Tucker, *Principles of International Law* 458-9 (2nd ed., 1966).

11 Id. 459.

12 Id.

law scholars, presents 11 principles of treaty interpretation. Key portions of these principles are as follows: 1. The leading principle says that the true intention of the parties must be pursued because all international treaties are *negotia bonae fidei*. 2. However, the intention of the parties must be found first of all from the treaty itself. Therefore, if a clear and plain meaning comes out from the context of a treaty, then it is only when the meaning leads to an absurd result, or when the fact that the parties wanted some other meaning is proved, that interpretation may deviate from the wording. 3. Ambiguous treaty norms are to be interpreted in the light of general international law, as well as the principles which regulate the material matters to which the treaty belongs. ... 7. When dubious, the formulation history of the treaties (*travaux préparatoires*) can also be invoked. ... 11. Because the treaties of contracting character are applied only to the specific relations which are within the sights of the treaties, an application of a treaty norm, by analogy, to similar cases is in principle allowable only to the treaties which include the *general* norms.[13]

If we are to assume that the intentions of the parties to a treaty are reflected in the text of the treaty, then the subjective and objective approaches are in essence different expressions of the same methodology. The representative works of international law scholars can be said to have endorsed the position that the subjective and objective approaches must be utilized in the way of supplementing each other. And, if a teleological approach is added to them, the principles of treaty interpretation as described above may be said to be fully applicable in interpreting the 1965 Claims Agreement. In other words, Art. 2, para. 1 of the 1965 Claims Agreement should be interpreted according to its purposes, by way of ascertaining the intent of the parties through making the meaning of the text clear. In the interpretation, the historical circumstances of the time when the 1965 Claims Agreement was concluded must be considered.

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[13] A. Verdross, *Völkerrecht* 114-6 (1959).

And, if the text of the treaty is ambiguous, the preparatory materials of the treaty (*travaux prêparatoires*) must also be used to aid the task of interpretation.

3. The Purpose of the 1965 Claims Agreement and Related Circumstances

The fundamental purpose of the Agreement was to normalize relations between the states and in doing so, to resolve the complicated issues of property rights between them. In order to accurately understand the purpose of the 1965 Claims Agreement, as well as the meaning of the Agreement's text and the intentions of the parties, it is necessary to review the circumstances that led up to the conclusion of the Agreement.

One of the main problems that needed to be resolved in normalizing relations between Korea and Japan was the issue of property rights and claims, namely the issue of Japanese property existing in Korea and property claims that might be thought to be held by the Japanese government or Japanese nationals against the Korean government or Korean nationals, and conversely, the issue of Korean property existing in Japan and property claims that might be thought to be held by the Korean government or Korean nationals against the Japanese government or Japanese nationals. These issues existed because, in the process of ruling Korea as a colony, Japan often brought Japanese property into Korea or took Korean property to Japan. The nationals of each country also crossed into the other country to conduct economic activities there.

As to Japanese property existing in Korea, this property came to be vested in the Military Government in Korea through Ordinance No. 33, issued on December 6, 1945 by the Headquarters of the United States Army Forces in Korea. On September 11, 1948, it was then transferred to the Government of Korea pursuant to the "Initial Financial and Property Settlement between the Government of the Republic of Korea and the Government of the United States of America." At the time, Japan objected to such measures, claiming that they violated international law and were unlawful. However, the U.S. took the

position that Japan's property rights were extinguished by Art. 4, para. 2 of the 1951 Peace Treaty and that Japan could not make valid claims as to those rights. The U.S. notified both Korea and Japan of this position. Ultimately, Japan accepted the position of the U.S. on December 31, 1957, and consequently, the only issue that remained between Korea and Japan was the problem of Korean property existing in Japan and property claims that might be thought to be held by the Korean government or Korean nationals against the Japanese government or Japanese nationals.[14]

During the negotiations regarding the normalization of relations, Japan took the position that it would recognize only the "claims" having an irrefutable legal foundation and proof of facts. However, in light of the fact that during the war there had been heavy bombing and destruction in Japan, and that the Korean War erupted in 1950 and had lasted to 1953, substantiating the proof of facts or legal foundations for these claims was obviously difficult. As a result of these difficulties, the two states decided to resolve the problem through a "political agreement." It was under this circumstance that Art. 2, para. 1 of the 1965 Claims Agreement was concluded.

It has been asserted that the 1965 Claims Agreement was concluded pursuant to the 1951 Peace Treaty between Japan and the Allied Powers, and specifically pursuant to Art. 2 and Art. 4 of this Treaty.[15] However, it is axiomatic that a treaty is not binding on those states that are not parties to it. As Korea was not a party to the 1951 Treaty, it was not bound by any provision of that Treaty when it concluded the 1965 Claims Agreement. As the work of Professor In-Sup Chung makes clear, while the 1951 Treaty may had played a political role in sparking the Korea-Japan talks, it did not create the legal framework for the 1965 Claims Agreement.[16] It is crucial that a clear, legal distinction be

[14] Lee, Won-Duk, *HanilKwagoesa Choerieui Wonjeum* [*The Origin of Korea-Japan Historical Settlement*], 17-22, 96-7 (1996).

[15] Kim, Myung-Ki, *Chungshindaewa Kukjepeop* [*Comfort Women and International Law*], 72 (1993).

[16] Chung, In-Sup, *A Study on the Scope of the Agreement on the Settlement of Problems*

made between peace treaties (like the 1951 Treaty) that seek to resolve postwar problems between belligerents, and agreements (like the 1965 Claims Agreement) that relate to the establishment of diplomatic relations between states together with the resolution of property disputes.

4. Intentions of the Governments

(1) Japanese Government

When one examines accessible public records, it is easy to see that the Japanese government has clearly represented that Art. 2, para. 1 of the 1965 Claims Agreement does not extinguish individual rights but only the state's right of diplomatic protection, leaving no room for question on this point. For example, when Mr. Ishibashi, a member of the House of Representatives of Japanese Diet, inquired on November 5, 1965 at the "Special Committee on the Treaty between Japan and Korea" whether the treaty extinguished not only the right of diplomatic protection but also individual claims rights, Mr. Shiina, Minister of Foreign Affairs, responded, "In my view, the expression that the individual claims rights are extinguished is not proper ... It is not that the government first took the individual claims rights to its hand, and then relinquished them. It is only that the government waived its right of diplomatic protection as to claims against Korea, meaning that as a result, even if Japanese people were to make claims individually [against the Korean Government or Korean people], Korea would not acknowledge such claims ... If I have ever used the expression of 'waiver of them [individual claims rights],' I would like to take this opportunity to correct it."[17] This statement by Foreign Minister Shiina was made in the consideration and ratification process of the 1965 Claims Agreement and as such, has a decisive importance on the interpretation of Art.

Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, 1965, 25 Sung Kok Ronchong, 515 (1994).

[17] Minutes of the House of Representatives, 50th Diet, Special Committee on the Japan-Korea Treaty, November 5, 1965, 10 Kaigiroku 18.

2, para. 1 of the Agreement.

This position on the part of the Japanese government has been consistent, and was repeated on several occasions in response to the inquiries in the Diet. The most widely known example of this position came out from the Committee on Budget of the House of Councilors held on August 27, 1991. At the Committee, then government delegate Mr. Yanai stated, "By the so-called Japan-Korea Claims Agreement, the claims rights problem between the two states are settled finally and completely. The meaning of this is that all are settled including the claims rights of the nationals of both nations as existed before. However this means waiving of the rights of diplomatic protection which both Japan and Korea possessed as States. Accordingly, this *does not mean the extinguishments of so-called individual claims rights* (emphasis added) in the sense of domestic law. It only means that the Korean and Japanese governments, as Governments, cannot raise problems regarding these claims by exercising their respective rights of diplomatic protection."[18] This statement shows the Japanese Government's interpretation of the clause clearly.

Several records of Japanese Diet also support both Mr. Shiina's and Mr. Yanai's statements. On April 6, 1993, at the Committee on Foreign Affairs of the House of Councilors, Mr. Tanba, the Director-General of Treaties at Ministry of Foreign Affairs at the time, stated, "[Our] government has long been representing that *the claims rights individuals may have are not waived directly by the effect of the Treaty* (emphasis added)."[19] He also stated on May 26, 1993 at the Committee on Budget of the House of Representatives, "What is said in Art. 2, para. 1 of the Treaty is *only a relinquishment of the right of diplomatic protection*, (emphasis added) with regard to all the 'property, rights and interests' and 'claims rights'. In this point, things are just as you [Mr.

[18] Minutes of the House of Councilors, 121st Diet, Committee on Budget, August 27, 1991, 3 Gaigiroku 10.

[19] Minutes of House of Councilors, 126th Diet, Committee on Foreign Affairs, April 6, 1993, 3 Gaigiroku 11.

Utsnomiya, a member of the House of Representatives] said."[20]

On March 25, 1994, at the Committee on Cabinet of the House of Representatives, Mr. Takeuchi, Foreign Minister's Secretary, stated that "with regard to property claims issues between Japanese and Korean citizens, the right of diplomatic protection, which both states have as State, was waived ... As we have stated before, *the terms of the treaty itself does not extinguish individual property rights or their claims rights directly* (emphasis added) within the meaning of domestic law."[21]

And as recently as March 14, 2000, Mr. Fukushima, a member of the House of Councilors, inquired, "What about Foreign Affairs Ministry's then Director-General of Treaties Yanai's statement of August 27, 1991 that only the right of diplomatic protection was waived and that individual claims rights were not extinguished?" Mr. Hosokawa, Director-General of Civil Affairs of the Ministry of Justice, responded, "We are well aware of Mr. Yanai's answer, and we also agree with his statement."[22]

In addition, in relation to the interpretation of Art. 14(a)(2)(I)[23] and Art. 19(a)[24] of the 1951 Peace Treaty, the Japanese government has consistently taken the position that the waiver of "rights to claims" encompassed only the state's right of diplomatic protection and did not extend to individual rights.[25] Japan has also taken this position in relation to the interpretation of Art. 6 of the "Joint Declaration of Japan and Union of Soviet Socialist Republics."[26] On

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[20] Minutes of House of Representatives, 126th Diet, Committee on Budget, May 26, 1993, 26 Gaigiroku 36.

[21] Minutes of House of Representatives, 129th Diet, Committee on Cabinet, March 25, 1994, 1 Gaigiroku 8.

[22] Minutes of House of Councilors, 147th Diet, Committee on Judicial Affairs, March 14, 2000, 2 Gaigiroku 18.

[23] "Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate, or otherwise dispose of all property, rights, and interest of

(a) Japan and *Japanese nationals* ..." (emphasis added)

[24] "Japan waives all claims of Japan and its *nationals* (emphasis added) against the Allied Powers and their nationals arising out of the war ...".

[25] Yoshio Hirose, *Horyo No Kokusaihojo No Chii* 51 (1990).

[26] The Joint Declaration was signed on October 19, 1956 and entered into force on December 12, 1956. Article 6 of the Joint Declaration reads as follows:

March 25, 1994, at the Committee on Cabinet of the House of Representatives, Mr. Nishida, Direct of Russia Division of Europe-Asia Bureau, stated as follows: "In Art. 6 of the Japan-USSR Joint Declaration which is currently in effect between Japan and Russia, the governments waived their rights to claims. As only the governments' own rights to claims and the so-called right of diplomatic protection are waived, *claims of our citizens against Russia or against its citizens were not waived by the clause* (emphasis added)."[27] Also, on March 4, 1997, at the First Sub-Committee of the Committee on Budget of the House of Representatives, Foreign Minister's Secretary Togo stated, "Though all rights to claims were waived in Art. 6, para. 2 of the Japan-USSR Joint Declaration, *it does not mean that the Declaration prevents individuals from raising claims* (emphasis added).[28]

(2) Korean Government

Immediately after the conclusion of the 1965 Claims Agreement, in regard of Art. 2, para. 1 of the Agreement, the Korean government appears to have adopted a different interpretation from that of the Japanese government. The Korean government issued a publication on August 15, 1965, in which the government explains that all rights to property and claims rights on the part of both states and their nationals were extinguished by the 1965 Claims Agreement.[29] However, if it is true that Korea intended to waive all property rights and claims rights through the Agreement, then there exists an unequivocal

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"The USSR waives all rights to compensation claims as against Japan. Japan mutually waives all claims of Japan, its organizations and nationals, as against the other government, its organizations and nationals, arising as a result of the war after August 9, 1945."

Japan has consistently interpreted this clause as only the right to diplomatic protection, not individual rights to claims.

[27] Minutes of House of Representatives, 129th Diet, Committee on Cabinet, March 25, 1994, 1 Gaigiroku 6.

[28] Minutes of House of Representatives, 140th Diet, Committee on Budget, First Sub-Committee, March 4, 1997, 2 Gaigiroku 20.

[29] Government of the Republic of Korea, *The Explanation of the Treaty and Agreements between the Republic of Korea and Japan* 84-85 (1965).

difference of intent between the two contracting parties.

The significance of this difference of intent is as follows: A treaty signifies, by definition, a manifest *agreement* of intentions of the contracting parties. If such an agreement of intentions did not occur in the conclusion of the 1965 Claims Agreement, Art. 2, para. 1, then this would mean that the provision of the Agreement could not have become a treaty and is therefore null and void for that reason. If this is what really happened, Art. 2, Para. 1 of the 1965 Claims Agreement could not have regulated the property issues as a valid treaty provision, and again the result would be that an invalid provision has been misconstrued as a valid one by both governments. However, this conclusion doesn't seem to be a logically reasonable one, especially since this provision has had a certain concrete regulatory force in the past. If good faith is to be maintained in interpreting a treaty provision, it must be interpreted in the way of making it meaningful and valid rather than making it meaningless and invalid.

One important fact to be taken note of is that the Korean government's position in relation to Art. 2, para. 1 has not been consistent. As can be seen above, in its publication issued directly after the conclusion of the 1965 Claims Agreement, the Korean government took the position that all property, right, and interests, and the claims rights of Korean nationals had been extinguished. However, the Korean government changed their attitude and has adopted the position that the Agreement did not extend to claims by individuals, and this position has been expressed repeatedly. In July 10, 1991, Minister of Foreign Affairs Sang Ok Lee stated in a response to a question in the Korean National Assembly, "*At the governmental level* (emphasis added), this issue [problems of the property, rights, and interest and claims rights] has been resolved by the Treaty Regarding Claims and Economic Cooperation, concluded in 1965 during the normalization of relations between Korea and Japan".[30] On September 20,

[30] Minutes of the House of Councilors, 121st Diet, Committee on Budget, August 27, 1991, 3

1995, Minister of Foreign Affairs No Myoung Kong stated in the Reunification and Foreign Affairs Committee of the Korean National Assembly, "*From a governmental standpoint* (emphasis added), I believe that our government has resolved the issue of monetary compensation from Japan".[31] At the same meeting, he also stated, "The government *acknowledges the claims rights of individuals* (emphasis added)."[32] These statements clearly show that the Korean government is not of the opinion that individual rights were extinguished by the Agreement.

As recently as October 24, 2000, the Korean Ministry of Foreign Affairs and Trade responded to an inquiry by a member of National Assembly, Mr. Won Woong Kim, who inquired, "Is it the Korean government's position, as Japan asserts, that all claims for compensation have been extinguished by the 1965 Claims Agreement ? If this is the government's position, what is the basis for this opinion ? Are these claims extinguished only as to governmental claims, or as to individual claims as well ? I request that the Korean government present its *official position* (emphasis added) on this matter." Mr. Chung Bin Lee, Minister of Foreign Affairs and Trade, responded, "The Korean and Japanese governments, in order to resolve issues regarding claims such as forced laborers and forced military draftees, concluded 'The Agreement on the Settlement of Problems Concerning Property and Claims and Concerning Economic Cooperation between the Republic of Korea and Japan' in 1965. The claims problem was thereby settled as between the two *governments* (emphasis added)... However, the Korean government's position is that the Agreement *does not affect individuals' claims rights or their rights to bring lawsuits* (emphasis added) or other legal actions."[33]

Gaigiroku 10.

[31] Minutes of National Assembly, Reunification and Foreign Affairs Committee, September 20, 1995, 3 Hoieurok 64.

[32] Id. at 65.

[33] Response of the Ministry of Foreign Affairs and Trade, October 24, 2000, Republic of Korea, National Assembly, Document Number 2981.

How can these contradictory pronouncements by the Korean government be analyzed and understood ?

The first possibility is to conclude that the government's position, as described in "The Explanation of the Treaty and Agreements between the Republic of Korea and Japan", did not express the true intentions of the Korean government. Alternatively, one could conclude that the intentions expressed after 1965, namely that the 1965 Claims Agreement did not extinguish individuals' claims rights, did not reflect the true intentions of the Korean government. The final possibility is to conclude that the intentions of the Korean government changed over time.

Among these three possible conclusions, the second seems to be the most unreasonable interpretation as Korean government's intentions expressed after 1965 have been repeated several times and also are recent ones. Therefore, the remaining possibilities of understanding these *prima facie* contradictory attitudes of the Korean government are either to regard the Korean government as having the opinion that individual claims were not extinguished though there were discrepancy between its real intention and its expression, or to regard it as having changed its own opinion over time.

If the Korean government is seen to have changed its opinion, then the problems of the conclusion and validity of the treaty arise again. Taking this point into account, and considering the fact that Japan's position has remained remarkably consistent, the most reasonable interpretation that upholds the validity of the treaty seems to conclude that the parties agreed not to extinguish the rights of individuals.

5. Interpretation of the 1965 Claims Agreement

(1) Text of the Agreement and Its Interpretation

Art. 2, para. 1 of the 1965 Claims Agreement states, "[t]he problems concerning the property, rights and interests of the two signatories and their

nationals (including juridical persons) and the claims rights between the High Contracting Parties and between their nationals ... have been settled completely and finally." As is shown above, the Japanese government has consistently taken the position that this provision of the Agreement did not extinguish the claims rights of individuals; it only waived the rights of diplomatic protection as to those claims. The Korean government's position has been less consistent, but recent pronouncements, repeated over time, have expressed the position that individuals' claims rights were not extinguished. Japan's consistent position, repeated several times through communications to the Japanese Diet, has become a matter of public record. The Japanese government's interpretation also has the character of the "*authoritative interpretation*" of the text.

When all of these points are taken into consideration together, it is clear that the wording of the 1965 Claims Agreement cannot be interpreted simply as a complete waiver of all claims of the governments and their nationals. Here exists really a situation as pointed out by Kelsen, "The wording of a legal instrument may not be in conformity with the ascertainable intentions of its authors. The wording may go beyond, or remain behind their intentions." This is the reason why the 1965 Claims Agreement should be interpreted as having waived only the right of diplomatic protection.

(2) Meaning of "Property, Rights, Interests" and of "Claims Rights"

If Art. 2, para. 1 of the 1965 Claims Agreement only waived the right of diplomatic protection, then the next question is, "What kinds of rights were waived as a matter of diplomatic protection ?" This is the problem of interpreting the words, "property, rights, and interests" and "claims rights."

Generally speaking, "property, rights, interests" seem to be the rights that can be realized under national law, and that "claims rights" seem to be the rights that are recognizable under international law. However, when we review the way that these terms were used during the negotiations that led up to the 1965

Claims Agreement, it is apparent that the terms should not be understood in their "general ordinary meaning". As a matter of fact, the parties to the treaty, Korea and Japan, attributed specific meanings to those words.

Professor In-Sup Chung has accurately pointed out that "during the negotiations for the conclusion of the Agreement, the Korean government had used the term 'claims rights' as substantial rights that could be claimed against Japan on a clear legal foundations."[34] The so-called "Eight Items," or the Outline of Claims which were argued by the Korean government during the treaty negotiations, were a kind of consolidated contents of those "claims rights." However, in the process of the codification of the Agreement, Japan also took the position that "claims rights" must mean only the legal status of being able to make claims, not the substantial rights. Art. 2 was drafted in such a way as accepting this argument of Japan.[35] And accordingly, the provision of section 2(a) was included in the Agreed Minutes annexed to the 1965 Claims Agreement, which states: "It is understood that the words 'Property, rights, and interests' mean all kinds of substantial rights of which the property values are recognized on the basis of law."

It is natural that the Japanese government understands the meaning of the terms, "property, interests, rights" and "claims rights," in this manner. The Director-General of the Treaties Bureau, Mr. Tanba, stated in a response to the Japanese Diet, "'Property, rights, and interests' mean all kinds of substantial rights which are recognized under law to be of property value. The term 'claims rights,' referenced in the Claims Agreement, is not included in the concept of 'property, rights, and interests,' and refers to the legal status of being able to make claims for which the existence of legal rights itself is in question."[36] The concrete examples of "property, rights, and interests" offered in the

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[34] Chung, In-Sup, *supra* at 21.
[35] Id.
[36] Minutes of the House of Representatives, 126th Diet, Committee on Budget, May 26, 1993, 26 Gaigiroku 35.

Japanese Diet included "creditor's rights, rights to collateral, and the right to demand payment of receivables," and the examples of "claims rights" included "claims for compensation for damages for which evidence is lacking, pain and suffering claims, wage claims, etc."[37]

Therefore, the most significant difference between the terms "property, rights, and interests" and "claims rights" is that, while the former mean established rights with clear and solid legal foundations, the latter are unsettled rights for which the legal foundations can be disputed.

(3) Government's Capacity to Waive Individual Rights

One of the main legal issues concerning the interpretation of Art. 2, para. 1 of the 1965 Claims Agreement is "Whether a State can extinguish its nationals' individual rights through a treaty or not."

It is generally said that a State may compromise or release claims, leaving the individual or corporation concerned without any remedy.[38] However, some international law scholars have different views on this problem. For example, Professor Dong-Hoon Kim argues in his article on the 1965 Claims Agreement that a government may not waive individuals' property and rights,[39] and another scholar argued that this is the common view.[40] Therefore, there seems to be no settled opinion on this issue among the scholars of international law.

What is decisive, however, regarding the interpretation of Art. 2, para. 1 of the 1965 Claims Agreement is whether Japan has, in real fact, extinguished individual rights or not. It does not automatically follow that, in concluding a treaty, states always do, in fact, what they are able to do in theory.

It would have been possible for the Japanese government to obtain the

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[37] Id.
[38] Ian Brownlie, *Principles of Public International Law*, 508 (5th ed., 1998).
[39] Kim, Dong Hoon, Sengo Hosho O Meguru Hoteki Shomondai, in: Sengo Hosho Mondai Kenkyukai ed., *Zainichi Kankoku Chosenjin no Sengo Hosho* 168 (1991).
[40] Jutaro Higashi, Heiwa Joyaku 4 Jo (b) Ko Ni Yoru Zaigaizaisan No Soshitsu To Kuni No Hosho Gimu, 445 Jurist 140.

consent of the Korean government to extinguish the rights of the Korean and Japanese people by the terms of the treaty rather than by separate domestic measures. However, Japan did not actually do so. Japan did not extinguish the rights of the Japanese and Korean nationals by the Agreement, but only diplomatic protection of those rights. Thus, the rights of the citizens of the respective countries could not be extinguished without internal measures extinguishing them.

Even though the Japanese government could have secured a waiver of individuals' rights through the terms of the 1965 Claims Agreement, Japan in fact did not and could not seek such a clause. This is likely a result of the democratic controls over the treaty ratification procedure. Article 73 of the Japanese Constitution requires that the treaties negotiated by the Cabinet be first approved by the Diet, thereby institutionalizing democratic control over the treaty ratification process. The Japanese government likely was fully aware of the fact that a treaty extinguishing the individual rights of the Japanese citizens would not have been approved by the Diet, in which case there would be no ratification and the treaty would not have entered into force. As already discussed above, at the Special Committee on the Treaty between Japan and Korea, Mr. Ishibashi as a member of the House of Representatives strongly challenged the government by asking whether the Treaty extinguished the rights of the Japanese citizens, and in response, Foreign Minister Shiina stated that the Treaty "only waives rights to diplomatic protection but not individual rights."[41]

6. Meaning of Domestic Measures in Korea and Japan

If Art. 2, para. 1 of the 1965 Claims Agreement is interpreted as set forth above, then it can be said that only the state's right of diplomatic protection, not individuals' rights, was waived. If the meaning of "property, rights and inter-

[41] Minutes of the House of Representatives, 50th Diet, Special Committee on the Japan-Korea Treaty, November 5, 1965, 10 Kaigiroku 18.

ests" and also of "claims rights" is understood in this manner, then we must ask, "What is the legal significance of the domestic legislation passed in Korea and Japan following the conclusion of the 1965 Claims Agreement ?"

(1) Japan's Legislation No. 144

In the same year that the 1965 Claims Agreement was concluded, Japan enacted on December 17 the "Law Regarding Measures to be Taken with Respect to the Property Rights of the Republic of Korea upon Enforcement of Article II of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea" (hereinafter "Law No. 144"). Through this legislation, Japan attempted to extinguish the "property, rights and interests" of Korean nationals.

The specific rights of Korean nationals purportedly extinguished by Law No. 144 included the creditor's rights, rights to collateral, possessory rights, and rights related to securities. It is unquestionable that these rights correspond to the "property, rights and interests" provided in Art. 2, para. 1 of the 1965 Claims Agreement. However, it is also beyond any question that Law No. 144 does not include rights which correspond to the "claims rights" under the 1965 Claims Agreement. The reason for this is that Law No. 144 contains no provisions relating to "claims rights." Moreover, the "claims rights" provided in the 1965 Claims Agreement refer to those claims that are not yet settled and therefore, cannot be extinguished by law. Therefore, the "claims rights" of Korean nationals have not been extinguished, even by Japanese domestic law, namely Law No. 144.

This point is again affirmed by the position of the Japanese government as expressed through its response to the Diet. Specifically, Director-General of Treaties, Mr. Tanba has stated, "In referring to the waiver of claims rights, *the waiver does not also extinguish individuals' rights to bring suit in the other state's courts* (emphasis added) ... How those courts decide cases brought by

individuals, in this case Philippines or *Korean nationals* (emphasis added), is up to the Judiciary, and the Administration is paying close attention."[42]

In addition, Secretary to the Minister of Foreign Affairs, Mr. Takeuchi also stated with regard to Art. 2, para. 1 of the 1965 Claims Agreement, "Regarding our domestic legal treatment of matters, an individual's own government — in this case, Korea — cannot exercise, according to the built-in mechanism of the treaty, its right of diplomatic protection. With regard to an individual's claims right ... *an individual's right to bring a suit in court is not deprived by the treaty* (emphasis added)."[43]

It may be argued that Law No. 144 is "the implementing legislation" of the 1965 Claims Agreement. However, if the Agreement is interpreted to be only a waiver of the right of diplomatic protection, then it is impossible to adopt this view. The Agreement waives the right of diplomatic protection and therefore it is secured that Korea, on the governmental level, cannot submit any objection to Japan's domestic measures.[44] It was on this basis that Japan enacted domestic legislation and attempted to unilaterally extinguish the property, rights, and interests of Korean nationals. The domestic legislation was not meant to implement the 1965 Claims Agreement. Rather, having secured the guarantee that Korea could not make any objection, Japan enacted the legislation to unilaterally extinguish individual rights of Korean nationals. Also of decisive importance is the fact that Law No. 144 contains no provisions regarding "claims rights," and therefore did not extinguish individual rights as to those claims.

Additionally, it is highly likely that Japan's attempt to extinguish individual rights of Korean nationals through Law No. 144 violates the Japanese Constitution. Art. 29, sec. 1 of Japan's Constitution protects "the right to property" and

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[42] Minutes of the House of Councilors, 126th Diet, Committee on Foreign Affairs, April 6, 1993, 3 Gaigiroku 11.

[43] Minutes of the House of Representatives, 129th Diet, Committee on Cabinet, March 25, 1994, 1 Gaigiroku 8.

[44] 1965 Claims Agreement, Art. 2, para. 3.

prohibits the violation of that right. The intended beneficiaries of this provision are not specified in the Constitution, but can be interpreted as including foreign nationals. Therefore, Law No. 144 may be said to be null as it violates Article 29 of the Japanese Constitution.

Moreover, Art. 29, sec. 3 of the Japanese Constitution states, "Private property may be taken for public use upon just compensation therefor." The rights of Korean nationals were *prima facie* extinguished by Japanese domestic legislation, but "just compensation" was never provided. Because this also is in violation of the Constitution, it can be said that Korean nationals' rights were not extinguished either by treaty or by Japanese domestic law.

(2) Korea's Domestic Measures

In 1966, Korea enacted the "Legislation Concerning the Distribution and Management of the Claims Treaty Fund." In January 1971, Korea enacted the "Legislation Concerning Report of Individual Claims Against Japan," and began processing property claims of Korean nationals against Japan and Japanese nationals. In December 1974, Korea enacted the "Legislation Concerning Compensation of Individual Claims Against Japan." Under this legislation, Korea distributed compensation funds pursuant to the reported claims by Korean nationals according to the 1971 law. All these laws were repealed in December 31, 1982 as their objectives were deemed to be fulfilled.

It has been argued that after having received Japan's lump sum payment of funds under the 1965 Claims Agreement, the duty to compensate Korean nationals were transferred from the Japanese government to the Korean government, and that the latter carried out this duty by enacting domestic legislation. However, this view seriously miscomprehends the fundamental objectives of Korea's domestic measures. The funds that were paid to Korea by Japan have no *legal* relationship to the "property, rights, interests" or the "claims rights," the diplomatic protection for which was waived pursuant to Art. 2, para. 1 of the

Agreement. The explanation of the Japanese government is clear on this point: "As Korea says, the $500,000,000 fund provided to Korea under Art. 1 does not have the character of a debt or liability for the claims of Korea against Japan. This fund was provided solely for the purpose of economic cooperation."[45]

As Professor Yoshio Hirose points out, the decision of whether or not to distribute the funds received pursuant to the Agreement was entirely assigned to Korea as a matter of domestic jurisdiction. The 1965 Claims Agreement did not create any obligations of international law, under which Korea was obligated to distribute the funds to its own nationals. On this point, the Agreement is fundamentally different from, for example, the Peace Treaty signed by Italy and the Allied Powers after the World War II. Articles 74(E), 76(2), and 79(3) of that Treaty impose obligations on Italy to provide compensation to its own nationals in relation to their claims against the Allied Powers.[46] In contrast, Korea had no obligations under the 1965 Claims Agreement to provide compensation, on behalf of Japan, to Korean nationals.

Korean government was of the intention to use the funds "to construct multi-purposed dams, to import vessels and equipment for fishing, to expand railroads and ports and other infra-structures, without using them for the specific individual, groups of individuals or region."[47] The fact that Korea had no intention of distributing these funds to its nationals as compensation for the waiver of claims was unequivocally communicated to and understood by Japan during the negotiations for the conclusion of the Agreement. In consideration of the fact that the Korean government had given up the right of diplomatic protection, and that on this basis Japan had enacted legislation unilaterally extinguishing the individual rights possessed by Korean nationals, Korea pro-

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[45] Toki No Horei, *Japan-Korea Treaties and Explanation of Domestic Laws* 63 (issued by the Japanese Ministry of Finance, 1966).

[46] Yoshio Hirose, *Senso Songai To Kokusai Jindoho*, 54 Meiji Gakuin Daigaku Hogaku Ronso 46 (1994).

[47] Shigeo Sugiyama, *Nikkan Kihon Joyaku Oyobi Zaisan, Seikyuken Shori Kyotei No Shomondai*, 327 Jurist 14-15 (1965).

vided through a domestic legislation a remedy in the context that the exercise of rights or submission of claims by individuals had become, from a "practical" standpoint, quite difficult.

Even putting aside the legal analysis, if we assume that all "property, rights, interests" and "claims rights" of Korean nationals were waived by treaty and that the received funds represented compensation for those rights, then each of the approximately 1,700,000 victims would have received $176 each in compensation for their suffering. Some commentators view this to be a ridiculous result of such an interpretation.[48]

8. Remaining Issue — Interpretations of Japanese courts

As both Art. 2, para. 1 of the 1965 Claims Agreement and Art 14, (a) 2 (I) and Art. 19 (a) of the 1951 Peace Treaty waived Japanese nationals' property rights, these clauses seem to have some similarity. And the Japanese government interprets these clauses to waive only diplomatic protection and not individual rights. However, concerning the interpretation of Art 14, (a) 2 (I) and Art. 19 (a) of the 1951 Peace Treaty, Japanese courts have rejected the government's view for the most part. In other words, contrary to the Japanese government's position, the majority of Japanese courts interpret the clauses to directly extinguish Japanese nationals' individual rights.[49]

However, almost all of the judgments of Japanese domestic courts are about the 1951 Peace Treaty. The 1951 Peace Treaty and the 1965 Claims Agreement have two very different goals and objectives. Hence, the propriety of applying the same analysis used in the interpretation of the 1951 Peace Treaty to the 1965 Claims Agreement is highly questionable. The 1965 Claims Agreement is

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[48] Kokusai Jinken Iinkai ed., *Ianfu Kyosei Renko Sekinin to Tsugunai* 34 (1993).

[49] Some examples are: Judgment Aug. 20, 1956, Tokyo District Court, commented by Kuwata at 185 Jurist 65-7 (1959); Judgment Jan. 30, 1965, Tokyo High Court, commented by Hirose at 325 Jurist 125-8 (1965); Judgment Aug. 31, 1967, Osaka District Court, commented by Hirobe at 413 Jurist 209-11 (1969); Judgment Nov. 22, 1968, Kyoto District Court, commented by Higashi at 445 Jurist 138-40 (1970).

wholly different in its legal character from the Peace Treaty which settles war reparations by waiver of rights of a state and its citizens. In addition, not all Japanese courts have adopted this position. In interpreting Article 14(a)(2)(I) of the 1951 Peace Treaty, the Japanese Supreme Court found on July 4, 1969, that the clause "cannot be interpreted as disposing abroad properties belonging to Japanese nationals to fill up the amount of war reparations, on the basis of the exercise of autonomous exercise of governmental power to dispose properties of Japanese nationals. This is to be referred as only a promise not to exercise right to make objection or right of diplomatic protection, which might be exercised in order to avoid disparate treatment of the property abroad by the foreign governments."[50]

The Japanese Supreme Court's decision is consistent with its government's position that despite the fact that the 1951 Peace Treaty specifies a waiver of Japanese "*nationals*," only the diplomatic protection was waived by the Treaty. In addition, the various lower court decisions concluding otherwise, as numerous as they may be, remain lower court decisions, while this Supreme Court decision in agreement with the Japanese government is that of the highest court in Japan.

9. Conclusion

Based on the above examination it may be concluded as follows.

First, Art. 2, para. 1 of the 1965 Claims Agreement did not extinguish the "property, rights and interests" and "claims rights" of the nationals of one state against the government and nationals of the other. Rather, the Agreement only extinguished the states' rights to provide diplomatic protection as to the rights of their nationals. This interpretation is supported by the Japanese government's own consistent position and the corresponding Korean government's

[50] Judgment, July 4, 1969, Supreme Court, 23 Saikousai Minshu 1322, reprinted in: Shigekazu Imamura, *Heiwa Joyaku Dai Kyu Jo (a) Ko Ni Yoru Songai Baisho Seikyuken No Soshitsu to Kuni Ni Taisuru Hosho Seikyu No Kyohi*, 62 Minshoho Zasshi 845.

positions.

Second, the fact that the two governments were only able to extinguish diplomatic protection but not individual rights is a result of the democratic controls that were placed over the treaty ratification procedures.

Third, because the 1965 Claims Agreement did not extinguish Korean nationals' "property, rights and interests" against Japan or its nationals, Japan attempted to extinguish those rights by a domestic measure, legislation of Law No. 144. During treaty negotiations, the Korean government agreed not to object to such legislation, which is precisely the type of diplomatic protection waived by the treaty. However, Legislation No. 144 was in violation of the Japanese Constitution because it did not provide any compensation in exchange for its unilateral waiver of rights.

Fourth, even if Law No. 144 is valid, it only waived Korean nationals' "property, rights and interests" against Japan and not their rights to "claims." This is so because a "claims rights" in the context of the 1965 Claims Agreement refers to the "status where, if the legal existence of a right is in dispute, the alleged holder may make a claim or bring suit." The claims rights of individuals cannot be extinguished until they are consolidated as rights.

Fifth, the Korean government's distribution of the amount of the funds received from Japan was not to fulfill its obligations under the 1965 Claims Agreement. Korea had never owed such an obligation.

In conclusion, Korean nationals' "property, rights and interests" against Japan and its nationals are *prima facie* extinguished pursuant to Japanese domestic law, and all corresponding diplomatic protection by Korea as a state has been waived. On the other hand, Korean nationals' "claims rights" against the Japanese government and Japanese nationals are not extinguished by Japanese domestic law or by the 1965 Claims Agreement, though the diplomatic protection of them by Korea has been waived. Thus, even under Japanese domestic law, "claims" or the right to seek adjudication of the existence of a

legal right survives. Therefore, even under Japanese domestic law, Korean nationals may make "claims" and can bring suit to settle the existence of legal rights against both the Japanese government and Japanese nationals. As appropriately expressed by lawyer and Diet member Utsunomiya, "[The Agreement] provides that the Korean government will not say anything, but does not extend to provide that Korean nationals will not say anything either."[51]

Needless to say, the above conclusion also applies to the Japanese nationals' property, rights, and interests and the claims rights against the Korean government and people. In other words, according to the above conclusion, Japanese nationals' property, rights, and interests and the claims rights were not extinguished by the Japanese government in the 1965 Claims Agreement, and therefore they can bring, for example, lawsuits against the Korean government and people in spite of the Ordinance No. 33 of the Military Government in Korea, the "Initial Financial and Property Settlement between the Government of the Republic of Korea and the Government of the United States of America" and Japanese government's acceptance of these measures in 1957. If Japanese nationals begin to claim their own rights and bring lawsuits, the so-called "claims rights" problem will go back to the time before 1965. It goes without saying that this is the most undesirable situation for both States. Therefore, it is fully agreeable that the 1965 Claims Agreement should have settled completely and finally the problems concerning the property, rights, and interests and the claims rights of the nationals.

However, until now not any lawsuit has been brought by Japanese nationals against the Korean government or nationals, and it doesn't seem likely to happen in the future. What does this fact mean ? To the author's view, this means that the so-called "after-war compensation claims" raised by Korean nationals are the result of not having liquidated the negative historical heritage

[51] Minutes of the House of Representatives, 125th Diet, Committee on Budget, May 26, 1993, 26 Gaigiroku 36.

between the two Sates, and those who have suffered from that are "Korean" nationals. And again, many peoples seem to admit the interpretation that Art. 2, para. 1 didn't extinguish the individuals' claims rights. This may be the result of the request that the so-called after-war claims raised by Korean nationals should not be thwarted by a specific treaty clause.