

Current International Legal Issues: Korea

Seokwoo Lee and Seryon Lee***

1 Introduction

South Korea today is an active participant in the international legal system, in large part due to Korea's vibrant export-oriented economy, its status as an Asian middle power, as well as the emergence of a robust democracy. These factors have contributed to the country becoming immersed in international legal issues which include significant legal matters that resulted from the Japanese occupation of Korea until the end of World War II. Additionally, Law of the Sea matters are of paramount interest to South Korea as a littoral state. South Korea's economy is dependent on seaborne trade as it is surrounded on three sides by water and is blocked access to the rest of the Asian continent because of North Korea. Moreover, with the conclusion of World War II, the Korean nation experienced the Korean War that resulted in the division of the Korean peninsula into North and South and that has brought about a number of important international legal issues pertaining to security. International law has become more important and relevant to South Korea as it has become more enmeshed in the global economy and security issues predominate given the threat of the proliferation of nuclear weapons on the peninsula. This note seeks to introduce a number of important current international law issues that are impacting Korea and its international relations.

2 Korea-Japan Relations

The legacy of the Japanese annexation of Korea is the presence of a number of unresolved issues that have lingered on to the detriment of South Korea-Japan relations which include the problem of 'comfort women' which encompasses South Korean demands for an apology and appropriate restitution along with compensation for Koreans who were engaged in forced labor.

Recently, there were two cases where the highest courts in Korea and Japan made significant rulings involving victims of forced labor and sexual slavery.

* Of the Board of Editors; Professor of International Law, Inha University School of Law, Korea.

** Professor, School of Law, Chonbuk National University, Korea.

Although the factual circumstances of the two cases were similar, the reasoning reached by the two Courts were quite different. The Supreme Court of Japan gave a very broad interpretation of the relevant provisions of the San Francisco Peace Treaty by creating and applying the concept called ‘the Framework of the San Francisco Peace Treaty.’ This Framework was heavily relied upon by the Supreme Court of Japan to deter victims of forced labor and sexual slavery from initiating damage claims before the courts in Japan. The two cases dismissed by Japan’s Court were respectively brought by kidnapped Chinese victims of forced labor and Chinese victims of sexual slavery.¹ The Court in both cases ruled by applying ‘the Framework of the San Francisco Peace Treaty’ that the Chinese plaintiffs had lost their rights to seek individual claims against the Japanese government and companies. The Court, moreover, stated that such Framework should be applicable to those non-contracting parties to the San Francisco Peace Treaty considering a pivotal role of the Peace Treaty in arranging the post-WW II world order. However, the Constitutional Court and the Supreme Court of Korea made it clear that individual claims may not be extinguished unless the relevant treaties have provided for such effects clearly and concretely. In contrast to the decision by the Japanese Court in 2007, Korean Courts decided that the loss of the right to initiate claims before the courts should be based on domestic legislation.² Some in Korea view Japan’s Supreme Court as misinterpreting the provisions of Article 21 of the San Francisco Peace Treaty, under which Article 14(a)(2)³ applies to China, but not to Korea. Therefore, the Framework of mutual waiver based on the aforementioned article would not be applicable to Korea since Korea was not entitled to dispose overseas properties of Japan or Japanese nationals at that time.

Another important matter in South Korean relations with Japan pertains to the comfort women agreement signed by South Korea and Japan in 2015. Since the 1990s, civic societies in Korea, including the Korean Council for Women Drafted for Military Sexual Slavery by Japan, have made significant efforts to publicize the so-called ‘comfort women issue.’ On 28 December 2015, a bilateral agreement was signed by the governments of Korea and Japan in an

1 SAIKŌ SAIBANSHO [Sup. Ct.] Apr. 27, 2007, 2004 (Ju) 1658, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1188 (Japan); SAIKŌ SAIBANSHO [Sup. Ct.], Apr. 27, 2007, 1969 HANREI JIHŌ 38 (Japan).

2 Supreme Court [S. Ct.], 2009Da22549, May 24, 2012 (S. Kor.).

3 See Treaty of Peace with Japan art. 14(a)(2), Sept. 8, 1951, 136 U.N.T.S. 45 (“Subject to the provisions of sub-paragraph (11) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of (a) Japan and Japanese nationals[.]”).

attempt to resolve the issue of “comfort women.” Korean President Moon Jae-In, after his inauguration in 2017, critically pointed out the fact that this agreement was done without fully consulting the surviving victims. As a follow-up to his statement, the Korean government publicly made it clear that the comfort women issue could not be settled through the 2015 agreement, even though Korea did not disaffirm or never intended to re-negotiate the 2015 agreement. It is generally understood that the 2015 Agreement was not intended to be an international treaty due to its non-binding terms and lack of formality. While this agreement is, at large, considered to be a political agreement or rather a gentlemen’s agreement, it cannot nevertheless be simply renounced. This agreement drew attention from the international community through the concluding observations by various UN human rights committees. Non-governmental organizations working at the international level as well as various human rights organs within the UN should continue to raise these issues to prompt changes in Japan’s attitude.

3 Issues Pertaining to the Law of the Sea

South Korea is surrounded on three sides by water; towards the west is the West Sea (Yellow Sea), to the south is the Korea Strait, and to the east is the East Sea (Sea of Japan). Given that North Korea is to the north and because ground transportation is essentially blocked because of the Demilitarized Zone, South Korea relies on the oceans for its economic livelihood and well-being including fisheries and inbound and outbound sea freight traffic which has been crucial to South Korea’s rapid economic development as an export-oriented economy. As a result, sea lane safety and the securing of passageways has been necessary for South Korea to sustain its economic growth through foreign trade via shipping and securing sea power for national security. Situated at the center of the Northeast Asian Seas, the waters that surround South Korea are important from an economic, military, and strategic perspective. More recently, intensified competition over maritime jurisdiction and for marine resources among the Northeast Asian states along with island sovereignty disputes have made the issues of maritime order and safety of sea lanes a critical strategic concern, directly relevant to state survival, as well as to the peace and safety of the region. South Korea has had to engage in important legal matters pertaining to the Law of the Sea that are of vital importance especially in relation to maritime delimitation in the zones established through the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’) that have affected South Korea’s relations with China and Japan.

a *National Legislation*

Recently, a question has been raised as to whether Korea's laws on marine rescue are consistent with relevant international law. As the number of ship accidents on the coast of Korea continues to rise, it became urgent to enhance the rescue and salvage capabilities to protect the lives and property of the people. At the international level, the Convention on Salvage at Sea of 1989, which made substantial changes to the Convention Relating to Assistance and Salvage at Sea of 1910 due to changes in marine environment, is the most significant treaty of its kind. On the national level, Korean laws relating to assistance and salvage at sea are Commercial Act (Part v) and Act on Search and Rescue, Etc. in Water. There is a need to harmonize conflicting provisions between Commerce Act and the Act on the Search and Rescue, etc., in Water, in particular, on determination of remuneration and expenses of marine rescue operations.

Also, there has been a recently proposed bill on the development of the resources in the seabed. The Korean government has been actively working on deep sea mineral resource development as a means of expanding marine economic areas and securing steady sources of natural resources. Korea has recently become the third country after China and Russia to secure the exclusive right to explore sea-mines of three kinds of minerals namely manganese nodules, seafloor hydrothermal deposit, and manganese pavement, in the seabed. Korea has held a contract for the exploration for polymetallic sulphides in the Central Indian Ridge since 2014 and for polymetallic nodules in the Clarion-Clipperton Fracture Zone since 2001, for which a 5-year extension was signed in 2017. More recently, another 15-year contract was signed for exploration for cobalt-rich ferromanganese crusts in the east of the Northern Mariana Islands in the Western Pacific Ocean. While the participation by private sector companies is particularly important in development projects, the role of government should not be undermined as there will always be public sector participation during the development stage.

b *Other Maritime Issues*

South Korea has taken a keen interest in the Arctic region with the "Draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean," which was finally agreed upon at the 6th meeting in December 2017. Korea, as a non-arctic state, secured its right to participate for the first time in decision-making processes regarding Arctic governance. While this Agreement is intended to be a provisional agreement until a more comprehensive fisheries agreement is concluded, Korea will be entitled, as an original member state, to engage in the discussion on establishment of regional fisheries

management organizations in the future. It is essential to arrange a systematic mechanism for the implementation of joint scientific researches in the Arctic and northern areas. This can be a good precedent as Korea expanded the scope of its national interests from merely focusing on the fishery to the maintenance of order in deep-sea fishery and preservation of the ecosystem as a whole.

Another current matter pertains to a joint project undertaken by Korea and Japan. In January 1974, Korea and Japan concluded an Agreement Concerning Joint Development of the Southern Part of Continental Shelf Adjacent to the Two Countries. This Agreement is to remain in force for 50 years and continue until either party gives 3 year's written notice to the other party. While Korea positively saw the potential for oil resources in the joint development zone, Japan had an opposite view, thereby expressing its intention to terminate the agreement as well as joint researches in 2010. Korea has been taking measures necessary to effectively implement the agreement, at the same time, demanding Japan to implement the agreement in accordance with the terms set forth therein. Japan's non-implementation of the agreement is clearly the breach of a treaty triggering state responsibility for its internationally wrongful act. Now it remains to be seen whether Korea should terminate the agreement, in which case the joint development zone will be changed to a zone where maritime delimitation between the two countries is required. It might be a better option if Korea suspends the agreement in part, thereby possibly gaining the sole right of development in the joint development zone.

4 Investment and the Environment

Measures related to climate change and international technology transfer have been closely interwoven and embodied in the provisions concerning environment-friendly technology transfer in most international environmental instruments. Particularly relevant to South Korea are the issues related to green climate technology in the Paris Agreement which entered into force in November 2016. Green climate technology is the technologies related to carbon-reduction, carbon-utilization and climate change adaptation. One of the difficulties of transferring technologies lies in the fact that most technologies are, in fact, possessed by transnational corporations and other private sector entities. In order to undertake the commitment under the Paris Agreement, the governments of developed countries additionally bear the burden of conforming the commercial activities of their respective private sectors to the level of promised international obligations. This is the point where the discussion converged into potential conflicts with a number of provisions such as Most-Favored

Nation (MFN), National Treatment (NT), Fair and Equitable Treatment (FET), Expropriation, and Prohibition on Performance Requirements prevailing in international investment agreements. Therefore, a thorough review of possible conflicts is essential in order to fulfill the international obligation of good faith as well as to prevent unnecessary investor-state disputes.

Regarding energy issues, in 2017 the Korean government announced a dramatic shift in national energy policies. South Korea's new nuclear phase-out policy poses a number of challenges in fulfilling the obligations under the Paris Agreement with a particular concern to Korea's committed Nationally Determined Contribution (NDC). South Korea recently adopted an energy transition policy to phase out both coal and nuclear power and secure renewable energy. The impact of this energy policy on the accomplishment of NDC is significant as Korea declared greenhouse gas reduction of 37% as an NDC under the Paris Agreement. It has been pointed out that South Korea can utilize the market mechanism under Article 6 of the Paris Agreement,⁴ and have a more balanced negotiation strategy to facilitate the accomplishment of an NDC.

5 International Security in Relation to North Korea

Though there was a cessation of active armed conflict with institution of the armistice between North and South Korea, both Koreas have engaged in sporadic skirmishes that have resulted in the deaths of civilians and soldiers from both sides in the area of the disputed Northern Limit Line (NLL) in the West Sea (Yellow Sea) and the Demilitarized Zone.

Although relations between North and South Korea have recently improved due to summit meetings between South Korean President Moon Jae-in and North Korean leader, Chairman Kim Jong-eun and US President Donald Trump's historic summit with Chairman Kim in Singapore in 2018, tensions were quite high between the U.S. and North Korea in 2017. These tensions produced a heated debate over options for a pre-emptive strike on North Korea. The discussion on this issue within the U.S. was primarily based on its national law such as the Constitution and War Powers Act rather than international law.

4 Paris Agreement art. 6, opened for signature Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016) (providing the framework of international transfers of mitigation outcomes to be counted toward NDCs, the development of cooperation mechanisms and non-market cooperation). It is commonly known as "market provision."

The UN Charter prohibits the use of force against another state unless such force can be justified as an act of self-defense. From the perspective of international law, a discussion on a pre-emptive strike has centered on the right of self-defense. In particular, this presentation drew attention to the interpretation of the term 'armed attack' within the meaning of Article 51 of the UN Charter and the possibility of exercising collective self-defense. Furthermore, it was pointed out that opinions were sharply divided on whether the U.S. could possibly exercise its right of self-defense without consent of South Korea. In sum, it is more likely that the option of pre-emptive strike would be contrary to the principles of necessity and proportionality under international law. What is more worrisome is that a pre-emptive strike, if and ever justified, can be a precarious precedent in international relations.

6 Refugees

The issue of refugees has recently raised a number of important questions as it involves individuals crossing international borders, causing a dilemma on the part of receiving-states to maintain the balance between national security and their international obligations. The common concern with refugee issues would be how to efficiently incorporate both the drive for protection and the value of deterrence for security reasons. The enactment of the Refugee Act⁵ in Korea reflected the Korean government's continuous efforts and commitments to meeting its obligation under international law and provided a critical momentum for its refugee policy to shift from mere immigration control towards more human rights-based approach. However, with ever-increasing numbers of applications for refugee status, it became urgent to revise the existing Refugee Act to make necessary changes in terms of refugee admission and appeal procedures. While different approaches are proposed to make the procedure more efficient, there remain some concerns primarily over the long refugee screening process. Although Korea's refugee policy is currently in the process of significant change with challenges ahead, it is anticipated that the current discussion on this issue will ultimately lead to the establishment of an integrated and effective refugee admission procedure.

5 Nanmin beob [Refugee Act], Act No. 11298, Feb. 10, 2012 (S. Kor.). Refugee Act was enacted in 2012 and went into effect in July 2013.

7 Conclusion

South Korea has and continues to be forced to manage its relations with North Korea and its two powerful neighbors, China and Japan, along with its principal ally, the United States. South Korea has found itself in need of the processes of international law and the means by which it allows states to engage each other peacefully. The South Korean experience with international law as a mid-power state within the geopolitical circumstances of Northeast Asia offers the lesson that international law is an indispensable means to sustain order in a volatile region.