

cautious in considering the international implications of the Court's July 2018 ruling. First, Spanish constitutional provisions served as a legal basis for obliging the public authorities to give effect to the Views of the CEDAW Committee. Article 10(2) of the Spanish Constitution, according to which state organs are obliged to interpret constitutional rights to conform to human rights treaties, played an important role.<sup>39</sup> Second, the imperative vocabularies used in the *draft* version of General Comment No. 33 mentioned above met criticisms from several states.<sup>40</sup> The final version of General Comment No. 33 omitted the phrase concerning the "obligation to respect the views" and limited itself to reminding states of their "duty to cooperate with the Committee" based on the basic obligation to observe treaty provisions in good faith.<sup>41</sup> The story behind the adoption of General Comment No. 33 illustrates that other states parties may not be open to the position adopted by the Spanish Supreme Court. Finally, in the July 2018 ruling, the Spanish Supreme Court itself considered the case's "particularities" and suggested the limited applicability of the Court's reasoning to this specific case and to cases concerning the pecuniary liability of the state (pp. 13–14).

Overall, one must be cautious not to generalize the Supreme Court's ruling. It remains to be seen whether and to what extent the Spanish courts themselves will continue to acknowledge the obligatory characteristics of the Views of the CEDAW Committee, as well as those of other human rights treaty monitoring bodies.

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*South Korea—forced labor—illegality of Japan's colonial rule—treaty interpretation—individual's right to compensation claim—foreign investor protection*

YEO WOON TAEK V. NEW NIPPON STEEL CORPORATION. 2013 Da 61381. Compensation for Damages (Others). At <http://www.scourt.go.kr/news/NewsViewAction2.work?pageIndex=1&searchWord=&searchOption=&gubun=4&type=0&seqnum=6391>. Supreme Court of Republic of Korea, October 30, 2018.

On October 30, 2018, the South Korean Supreme Court, in an 11–2 decision, upheld the judgment of the lower court, which ordered New Nippon Steel Corporation, a Japanese company, to provide KRW 100 million (approximately USD 84,000) in compensation to each of the four plaintiffs, who were forced to work at Japanese steel mills during World War II.<sup>1</sup> In

<sup>39</sup> See Cesáreo Gutiérrez Espada, *La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión*, 10 CUADERNOS DE DERECHO TRANSNACIONAL 836, 847, paras. 30–31 (2018); Escobar Hernández, *supra* note 27, at 249–50.

<sup>40</sup> See Kanetake, *supra* note 26, at 205–06.

<sup>41</sup> Human Rights Comm., General Comment No. 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 15, n. 4, UN Doc. CCPR/C/GC/33 (June 25, 2009); Vienna Convention on the Law of Treaties, *supra* note 26, Art. 26.

<sup>1</sup> Supreme Court of Korea, 2013 Da 61381, Decided on Oct. 30, 2018 (S. Kor.). The English translation of the judgment is available at 7 KOREAN J. INT' & COMP. L. 88 (2019) (editorially noted and translated by Seokwoo Lee and Seryon Lee). Page numbers refer to the Korean version of the official judgment.

an earlier 2012 decision,<sup>2</sup> the Supreme Court remanded the case after holding that the claims were not precluded by the Agreement on the Settlement of Problems Concerning Property and Claims and the Economic Cooperation Between the Republic of Korea and Japan (Claims Agreement).<sup>3</sup> The Supreme Court held that the Claims Agreement was not a result of negotiation about compensation for Japanese colonization, but rather was a political agreement the purpose of which was to resolve the financial and civil debt/credit relationship between Korea and Japan.<sup>4</sup> On the final appeal, the Supreme Court concluded that plaintiffs' claims were directly related to the illegality of Japan's colonial rule over the Korean Peninsula and that the rights of the victims of forced labor to make a compensation claim did not fall within the scope of the Claims Agreement.

The four plaintiffs were born between 1923 and 1929 in Korea and worked at steel mills in Japan between 1941 and 1943. Japan occupied the Korean Peninsula from 1910 until 1945, when the Pacific War (World War II) came to an end. Running short of labor for munitions production due to its involvement in armed conflicts, including the Sino-Japanese War and the Pacific War, Japan enacted the National Mobilization Act to resolve its labor shortage. The Japanese government issued "guidelines on the transfer of Chosun People [Koreans] to Japan" in 1942 and recruited workers through job placement centers arranged by regional governments in the Korean Peninsula.

The Nippon Steel Corporation (Old Nippon Steel) was established around January 1934 and operated steel mills in Kamaishi, Yawata, and Osaka, Japan. The Steel Control Association, which was responsible for overseeing steel producers in Japan, including Old Nippon Steel, was established as the backbone of the military industry on April 26, 1941. The Steel Control Association was determined to aggressively expand the work force from Korea, and consequently, mobilized workers in cooperation with the Japanese government. Old Nippon Steel played a leading role within the Steel Control Association; its CEO served as chairman of the Association around 1943. Old Nippon Steel advertised in Korea to recruit factory workers for the Osaka Steel Mill in Japan. The plaintiffs saw this advertisement, were interested in acquiring technical skills in Japan and finding employment in Korea afterwards, and applied for positions. The plaintiffs were subjected to arduous and dangerous work conditions, kept under constant surveillance, and not permitted to take time off.

Beginning in late 1951, the South Korean and Japanese governments began discussions to normalize diplomatic relations and settle post-war reparation issues. After a series of meetings,<sup>5</sup> the two governments signed the Treaty on Basic Relations Between the Republic of Korea and Japan and the Claims Agreement on June 22, 1965. The Claims Agreement

<sup>2</sup> Supreme Court of Korea, 2009 Da 68620, Decided on May 24, 2012 (S. Kor.). The English translation of the judgment is available at 2 KOREAN J. INT'L & COMP. L. 93 (2014) (editorially noted and translated by Seokwoo Lee). See also Seokwoo Lee and Youngkwan Cho, *Historical Issues Between Korea and Japan and Judicial Activism: Focus on the Recent Supreme Court Decision on Japanese Forced Labor*, 2 KOREAN J. INT'L & COMP. L. 5 (2014).

<sup>3</sup> 583 UNTS 173. The official texts are in the Korean and Japanese language, although an English version is provided by each country. The PDF version of the agreement includes related Protocols, exchange of notes, and agreed minutes along with the Claims Agreement and is available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20583/v583.pdf>.

<sup>4</sup> Supreme Court (2012), *supra* note 2, at 104.

<sup>5</sup> After the First Korean-Japan Talks began, seven preliminary meetings were held along with numerous preparatory meetings, political talks, and subcommittee meetings between 1951 and 1965, which all culminated in the conclusion of the Treaty on Basic Relations and the Claims Agreement. Supreme Court (2018), *supra* note 1, at 7.

entered into force on December 18, 1965 upon the exchange of the instruments of ratification. The Claims Agreement set forth in its preamble that:

Japan and the Republic of Korea, [d]esiring to settle the problem concerning property of the two countries and their nationals and claims between the two countries and their nationals, ... [d]esiring to promote the economic co-operation between the two countries ... [h]ave agreed as follows:

Article 1 of the Claims Agreement stipulated that Japan was to supply USD 300 million on a non-repayable basis within ten years and USD 200 million in loans.

The relevant portion of Article 2 reads as follows:

1. 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,<sup>6</sup> is settled completely and finally.

Responding to continuing information disclosure requests for documents that related to the negotiations over the Claims Agreement and pursuant to the judgment of the Seoul Administrative Court that ruled in favor of disclosure in 2004<sup>7</sup>, the South Korean government released some portions of these documents and established a Joint Private and Public Committee on Follow-up Measures upon the Release of the Documents of the Korea-Japan Meeting in 2005.<sup>8</sup>

The Joint Private and Public Committee officially expressed its opinion that:

the Claims Agreement was not intended to make a claim for compensation for Japan's colonial rule over Korea, but rather to resolve the financial and civil debts/credit relationship between Korea and Japan pursuant to Article 4 of the San Francisco Treaty; that the inhumane and wrongful acts, including the Japanese military comfort women issue, committed by Japanese state authorities should not be deemed to be settled by the Claims Agreement. (Pp. 9–10)

<sup>6</sup> Article 4(a) reads that:

Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, in so far as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

Treaty of Peace with Japan, Sept. 8, 1951, 3 UST 3169; 136 UNTS 45, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf>.

<sup>7</sup> Seoul Administrative Court, 2002 Gu-Hap 33943, Decided on Feb. 13, 2004 (S. Kor.) (on file with authors).

<sup>8</sup> For the main contents of the documents and relevant information on this Committee, see Supreme Court (2018), *supra* note 1, at 9–10.

In 1997, two of the plaintiffs in this case brought a lawsuit against the defendant in Japanese court, which subsequently ruled against them. The judgment by the Japanese court held that it was valid to apply Japan's National Mobilization Law and National Conscription Ordinance to the plaintiffs because Japan's colonial rule over the Korean Peninsula and Korean people was lawful. The Supreme Court of Japan brought the case to an end with its final decision against the plaintiffs in 2003.

In 2005, the plaintiffs, joined by two others, filed suit on the same cause of action in the Seoul District Court in South Korea. However, the Seoul District Court dismissed the case, recognizing the validity of the final decision of the Japanese Court. The Seoul District Court further held that Old Nippon Steel and the defendant, New Nippon Steel, did not have the same legal personality and that the plaintiffs who worked at Old Nippon Steel were not entitled to exercise their right to claim compensation against the defendant. The District Court also found that the statute of limitations had expired.<sup>9</sup> Although the plaintiffs appealed to the Seoul High Court, the Seoul High Court found no errors in the decision of the District Court, and the case was dismissed.<sup>10</sup>

However, in 2012, the Supreme Court overturned the lower court's decision to dismiss the lawsuit and ruled in favor of the plaintiffs. The Supreme Court remanded the case to the Seoul High Court, reasoning that the decision of the Japanese courts, which had been premised on the legality of Japan's colonial rule, was contrary to the spirit of the Korean Constitution and thus not acceptable.<sup>11</sup> The Supreme Court held that South Korea could not recognize the Japanese court's judgment nor acknowledge its effect.<sup>12</sup> It decided that the compensation claims based on the illegality of colonial rule were not subject to the Claims Agreement and that a citizen's individual right to make a claim may not be extinguished without the individual citizen's consent even under the circumstances where the state waives diplomatic protection.

After the case was remanded to the Seoul High Court, the key issues that were examined included whether Old Nippon Steel and the defendant have the same legal personality; whether the claims of the plaintiffs were subject to the Claims Agreement; and whether the defendant could raise the defense of the expiration of the statute of limitations. First, consistent with the Supreme Court's ruling, the Seoul High Court found that Old Nippon Steel

<sup>9</sup> Seoul District Court, 2005 Ga-Hap 16473, Decided on Apr. 3, 2008 (S. Kor.). The English translation of the judgment is available at 2 KOREAN J. INT'L & COMP. L. 68 (2014) (editorially noted and translated by Seokwoo Lee). Korea's Civil Act stipulates in Article 766 that:

- (1) the right to claim for damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing from the date on which the injured party or his/her legal representative becomes aware of such damage and of the identity of the person who caused it.
- (2) The provisions of paragraph (1) shall also apply if ten years have lapsed from the time when the unlawful act was committed.

The English translation of the above Civil Act is provided by the Korea Legislation and Research Institute, available at [https://elaw.klri.re.kr/kor\\_service/main.do](https://elaw.klri.re.kr/kor_service/main.do).

<sup>10</sup> Seoul High Court, 2008 Na 49129, Decided on July 16, 2009 (S. Kor.). The English translation of the judgment is available at 2 KOREAN J. INT'L & COMP. L. 89 (2014) (editorially noted and translated by Seokwoo Lee).

<sup>11</sup> Supreme Court (2012), *supra* note 2, at 101.

<sup>12</sup> *Id.*

had been dissolved pursuant to Japanese law. Nonetheless, the fact that the successor companies, including New Nippon Steel, were established through the process of statutory merger and annexation according to the laws of Japan did not bar the plaintiffs from pursuing their claims against Old Nippon Steel as well as the defendant.<sup>13</sup> Second, the Seoul High Court held that the compensation claims for inhumane and unlawful acts by Japan were not subject to the Claims Agreement because the treaty did not cover compensation for Japan's colonial rule, but rather was meant to resolve the financial and civil debt/credit relationship between the two governments. Accordingly, the plaintiffs' individual right to make a claim, which is independent of Korea's right to exercise diplomatic protection, was not extinguished by the Claims Agreement. Even if it were possible for a state to extinguish a citizen's individual right to make a claim under international law, a treaty could not do so without the individual's consent or an explicit provision eliminating such claims. Finally, the Seoul High Court found that this case was not barred by the statute of limitations. The Seoul High Court found no merit in the defendant's assertion that the statute of limitations had expired. Although the Japanese law that was enacted subsequent to the Claims Agreement prohibited compensation claims to be brought in Japanese courts, the Seoul High Court held that this was of no relevance to compensation claims brought in Korea.<sup>14</sup>

The defendant appealed the Seoul High Court's ruling to the Supreme Court (pp. 11–19). In this final appeal, the Supreme Court, applying the general principles of treaty interpretation under the Vienna Convention on the Law of Treaties, extensively examined the defendant's arguments regarding the nature of the Claims Agreement. Noting that supplementary means of interpretation should be taken into account where the application of the general rule of interpretation leads to an ambiguous or obscure result,<sup>15</sup> the Supreme Court carefully considered all of the preparatory work and the circumstances surrounding the conclusion of the Claims Agreement. It concluded that a claim by the plaintiffs for compensation against the defendant should not be considered to have been within the scope of the Claims Agreement. The Supreme Court held that the Claims Agreement was primarily intended to resolve the financial and civil debts/credit relationship between Korea and Japan pursuant to Article 4 of the 1951 Treaty of Peace with Japan (San Francisco Treaty).<sup>16</sup> According to the White Paper on the Korea-Japan Talks published by the South Korean government in 1965, Article 4 of the San Francisco Treaty formed the basis of the claims for compensation between South Korea and Japan. Article 2, paragraph 1 of the Claims Agreement, quoted above, states that questions regarding claims, including those provided for in Article 4(a) of the San Francisco Treaty, are settled completely and finally. The text of the Claims Agreement and the annexes to the Agreement, however, do not refer to the illegality of Japan's colonial rule. The Supreme Court found no room for an interpretation that claims other than those provided for in Article 4(a) could be barred by the Claims Agreement (pp. 12–18).

The plaintiffs' claims at issue, the Supreme Court explained, were based on the inhumane and wrongful acts of the Japanese corporation that arose out of Japan's unlawful colonial rule

<sup>13</sup> Seoul High Court, 2012 Na 44947, Decided on July 10, 2013, at 122–26 (S. Kor.). The English translation of the judgment is available at 2 KOREAN J. INT'L & COMP. L. 109 (2014) (editorially noted and translated by Seokwoo Lee).

<sup>14</sup> *Id.* at 128–29.

<sup>15</sup> Vienna Convention on the Law of Treaties, Art. 32, May 23, 1969, 1155 UNTS 331.

<sup>16</sup> Treaty of Peace with Japan, *supra* note 6.

over the Korean Peninsula. Therefore, the plaintiffs were not simply making claims against the defendant for unpaid wages, but in fact, brought suit to seek damages for their suffering because of Japan's colonial rule.

The Supreme Court further found that the statute of limitations had not expired. As the Seoul High Court had explained on remand, it was widely understood in Korea, prior to the release of the documents related to the Claims Agreement in 2005, that the Claims Agreement comprehensively settled the individual right of Korean nationals to make claims against Japan or its nationals following Korea and Japan's formal normalization of diplomatic relations in 1965. As such, the plaintiffs would have faced a legal bar to the exercise of their rights against defendant. Only after the release of those documents, could the plaintiff have reasonably brought their case. The Supreme Court also held that "the defendant's refusal to perform its obligation toward the plaintiffs by reason of an expiration of the statute of limitations had expired amounted to an abuse of right," which should not be permitted as contrary to the principle of good faith (p. 18).

The Supreme Court determined that "there [was] no reversible error as a matter of law as to any notable lack of reasonableness in calculating the amount of compensation as asserted in the ground for final appeal" (p. 19).

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In its earlier decision, confirmed in 2018, the Supreme Court ruled that an individual's right to make a compensation claim for wartime forced labor did not fall under the scope of the Claims Agreement and further held that a defense based on the expiration of the statute of limitations amounted to an abuse of right because the factual circumstances would bar the plaintiffs, as victims of forced labor, from exercising their right to seek compensation. Since the plaintiffs initiated their first lawsuit in Japan in 1997, it took twenty-one years to secure a final ruling which acknowledged the victims' right to bring their claims.

The Supreme Court ruled that forced mobilization and the conditions faced by the victims of forced labor were inhumane and wrongful. Japanese courts also found that the human rights of these victims were violated. Two of the plaintiffs who were forced to work at the Osaka Steel Mill filed a claim against New Nippon Steel Company in Osaka District Court in Japan before they brought suit in Korea. Both the Osaka District Court and the Osaka High Court characterized the labor conditions as forced labor and acknowledged the company's responsibility to compensate for their wrongful conduct. Although the Japanese courts eventually dismissed the cases, they determined that human rights violations were committed and acknowledged the responsibility to compensate.

The main thrust of the majority decision of the Korean Supreme Court (eleven out of thirteen justices) was that the Claims Agreement was not designed to prevent reparations for Japan's illegal colonial rule, but rather to settle the financial and civil debt/credit relationship between South Korea and Japan pursuant to Article 4 of the San Francisco Treaty. Therefore, notwithstanding the provisions of Article 2, paragraph 1 of the Claims Agreement, the majority held that individual claims that arose out of Japan's illegal colonial rule were not included within the scope of the Claims Agreement.

None of the opinions issued by the Supreme Court held that an individual's right to claim for compensation was completely extinguished by the Claims Agreement. The Supreme Court of Japan eventually shared the same view on this point. In 2007, the Supreme

Court of Japan ruled in a Chinese forced labor case (the *Nishimachi* decision)<sup>17</sup> that a waiver of the right to make a claim under the San Francisco Treaty was a waiver of diplomatic protection by the state. Accordingly, the Supreme Court concluded that an individual's right to make a claim was not substantially extinguished.

Whether the Korean Supreme Court's interpretation of the scope of the treaty was appropriate in light of the general principles of treaty interpretation is one of two relevant international law issues in this case. A second issue regards foreign investor protection. If the plaintiffs seek enforcement of the Supreme Court's judgment, the Japanese company whose local assets are seized and eventually sold may argue that such an exercise of governmental power is tantamount to an unjust expropriation of their property.

After the Supreme Court's final decision in the matter, the plaintiffs' lawyers visited the headquarters of New Nippon Steel on November 12, 2018 and December 3, 2018 and requested consultations, but to no avail. On December 31, 2018, the plaintiffs requested that the Daegu District Court in the city of Pohang seize 2.34 million shares (estimated to be worth about KRW 11 billion (approximately USD 9.2 million)) held by New Nippon Steel in PNR, a joint venture with Korean steelmaker, POSCO.<sup>18</sup> The Daegu District Court subsequently approved the request. Although requests to seize shares are normally accompanied by requests for authorization to sell the shares, the lawyers for the plaintiffs did not file a motion for an order to compel a sale. Lawyers for the plaintiffs explained that consultations with New Nippon Steel were their priority. If a sale of the seized assets is eventually undertaken, it is likely that dispute settlement under international law will ensue.

South Korea and Japan, as a former colony and a former occupying power respectively, cannot simply put the past behind them. The two countries continue to face challenges emanating from the legacy of colonialism. While a forward-looking approach may make an amicable settlement achieved through joint diplomatic efforts between the two governments possible, avoiding legal responsibility for war crimes committed during Japan's occupation will certainly not be a viable option so long as the victims of such war crimes are living. A resolution can only be reached through adequate compensation and a genuine apology to those victims who are living witnesses of this unjust history.

The South Korean government also bears some blame for its lengthy neglect and passive attitude toward the victims of forced labor and military sexual slavery.<sup>19</sup> The government

<sup>17</sup> Supreme Court of Japan (2d Petty Bench), *Nishimatsu Construction Co. v. Song Jixiao* (Apr. 27, 2007) (Japan), available at <http://www.courts.go.jp/english/judgments/text/2007.04.27-2004.-Ju.-No..1658.html>.

<sup>18</sup> *Court Approves Seizure of Japanese Steelmaker's Assets Over Forced Labor Ruling*, YONHAP NEWS AGENCY (Jan. 8, 2019).

<sup>19</sup> The Constitutional Court of Korea reached a decision in 2011 concerning the issue of "Military Sexual Slavery," also referred to as "Comfort Women for the Japanese Military," holding that a dispute of interpretation existed between Korea and Japan as to whether the compensation claims for "Military Sexual Slavery" were extinguished pursuant to Article 2(1) of the Claims Agreement (*supra* note 3). The Court held that the failure of the Ministry of Foreign Affairs to resolve the dispute over the interpretation of Article 3 of the Claims Agreement violated the Constitution. Constitutional Court of Korea, 2006 Hun-Ma 788, Aug. 30, 2011 (23-2(A) KCCR, 366) (S. Kor.). English translation available at [http://search.court.go.kr/ths/pr/eng\\_pr0101\\_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400](http://search.court.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400). See also Seokwoo Lee, Yoonkyeong Nah & Youngkwan Cho, *Historical Issues Between Korea and Japan and Judicial Activism: Focusing on the Recent Decision of the Korean Constitutional Court Concerning Comfort Women*, 35 U. HAWAII L. REV. 859 (2013). The subsequent events following the Court's decision, including the Comfort

hastily agreed to the inclusion of the broad term of “all claims” in the Claims Agreement while negotiating post-war reparation issues with Japan, and made no subsequent effort to remove that obstacle to the victims’ right to make claims. Many of the victims have since died without receiving either proper compensation or an apology. Meanwhile, the South Korean judiciary has taken an active role in these circumstances by confirming the limited scope of the Claims Agreement and intervening in this situation of historical injustice. Although concerns have been raised regarding potential adverse effects caused by this form of judicial activism in South Korea’s international relations, as well as its strict interpretation of the Claims Agreement, the Supreme Court’s ruling in this case delivered justice to the victims of forced labor who had been denied it for so long.

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Women Agreement in 2015 and the continuing conflict between Korea and Japan over the development and content of the Agreement, indicate a serious deadlock between both sides.