J. East Asia & Int'l L. Vol. 12/No.2 (2019); 353-372
Publication type : Research Article
Section : Regional Focus & Controversies
DOI : http://dx.doi.org/10.14330/jeail.2019.12.2.07

# Who Violated International Law? Critical Analysis of Abe's Export Restrictions to Korea

Soojin Nam* & Eric Yong Joong Lee**

*Tensions are high between Korea and Japan as a result of Japan's export restrictions on three essential semiconductor materials exported to Korea and the removal of South Korea from their White List of countries. The Abe Administration announced that these measures were necessary to "ensure non-proliferation of weapons-related materials." However, it is widely suspected that these measures were adopted as a retaliation against the Korean Supreme Court's decision recognizing compensation for the forced labor victims during the Japanese occupation period. The Korean government filed a complaint concerning these measures at the WTO DSB for resolution under international law. In this research, the authors will critically analyze Japan's export restrictions under international law to facilitate a peaceful resolution to the current conflict. This paper will tackle the relevant issues under the WTO/GATT regulations and the Korea-Japan Claims Agreement to address the issue of who violated international law.*

**Keywords**
Export Restrictions, Semiconductor Materials, White List, WTO, Japan, Korea

* Assistant Professor at Department of International Economics and Law, Hankuk University of Foreign Studies. A.B. (magna cum laude) & J.D. (Harvard), M.A. (Science Po). ORCID: https://orcid.org/0000-0001-6632-1681. Nam acknowledges financial support from Hankuk University of Foreign Studies. The author may be contacted at: soojin.nam@hufs.ac.kr/ Address: HUFS Dept. of International Trade, 107, Imun-ro, Dongdaemun-gu, Seoul 02450 Korea.

** Professor of International Law at Dongguk University-Seoul, Korea; President of YIJUN Institute of International Law, B.A. (U. Washington), M.P.A. (Seoul N. U.), LL.M. (Leiden), Dr.iur. (Erasmus). ORCID: http://orcid.org/0000-0001-5640-490X. This work was supported by the research program at Dongguk University. The views reflected in this article, however, are the author's own. The author may be contacted at: grotian@hotmail.com/Address: 8, Achasan-ro 62-gil, Gwangjin-gu #402 (Taejin Suite) Seoul 05047 Korea. All the websites cited in this article were last visited on September 19, 2019.

# 1. Overview

In July 2019, the Japanese government announced that it would start restricting the export of three essential semiconductor materials to Korea.[1] Soon after, Japan decided to remove Korea from its White List of countries who are entitled to receive preferential treatment in trade with Japan.[2] These measures (hereinafter Export Restrictions) were arguably expected to cause a critical damage to the Korean semiconductor industry and more broadly the Korean economy. Semiconductor is a major export item of Korea as it constitutes approximately 22 percent of all Korean exports.[3]

The Abe Administration addressed that it decided to restrict the export of semiconductor materials to Korea because it was necessary to "ensure non-proliferation of weapons-related materials."[4] However, it is widely suspected that these measures are adopted as a countermeasure to the Korean Supreme Court's decision (October 30, 2018: 2013da61381) admitting the compensation (solatium) of the forced labor victims during the Japanese occupation period. Mr. Abe also complained that the current Moon Jae In administration is ignoring the message of the so-called Korean Comfort Women Joint Statement made by the Foreign Ministers of both countries on December 28, 2015.

Severely criticizing the Moon administration's approach, Mr. Abe maintains that Korea has broken the agreement between States and thus is an unreliable partner

1 *See Japan to effectively ban exports of semiconductor materials to South Korea*, Yomiuri Shimbun Daily, July 1, 2019, *available at* https://the-japan-news.com/news/article/0005845877. More specifically, Japan removed the previously-available simplified procedure for exporting these chemicals to Korea. Before, exporters of these chemicals to Korea were eligible for the "general bulk license," while the new measure requires individual license for each export, which is expected to cause significant delays in supplying these chemicals to South Korea. The three chemicals now subject to additional export screenings are fluorinated polyimide, photoresist, and hydrogen fluoride.

2 Satoshi Sugiyama, *Japan officially approves scrubbing South Korea from 'white list' of countries*, Japan Times, Aug. 2, 2019, *available at* https://www.japantimes.co.jp/news/2019/08/02/business/japan-officially-approves-removing-south-korea-white-list-countries/#.XXNLKWZ7k6Y. The removal of South Korea from the White List signifies that Japan may take additional export restrictions in addition to the measures concerning the three semiconductor materials. Removal of South Korea from the White List may potentially affect 1,100 items. *See also* Hyun-woo Nam, *Korea Faces Growing Trade Uncertainties on Japan's Further Export Curbs*, Korea Times, July 12, 2019, *available at* http://www.koreatimes.co.kr/www/nation/2019/07/120_272262.html. The removal of Korea from the White List prevents eligibility of bulk export license concerning all strategic items and requires individual license for non-strategic items with certain end-uses that was previously exempt.

3 Nam-hyun Ha, *Historic high in the percentage of semiconductor exports (22.5%)... Side effects of semiconductor illusion in investment and business sentiment* [반도체 수출 비중 22.5%로 역대 최대…투자 · 체감경기, 반도체 '착시' 부작용], Joongang Ilbo Daily, Sept. 2, 2019, *available at* https://news.joins.com/article/22934670.

4 Kono Taro, *The Real Issue Between Japan and Korea Is Trust*, Bloomberg, Sept. 4, 2019, *available at* https://www.bloomberg.com/opinion/articles/2019-09-03/japan-south-korea-trade-spat-boils-down-to-trust.

who violates international law. Responding to this criticism, Korea also blames Japan as the real renegade of rule-based international order of the global community. The trade friction has transformed existing tensions into an all-out political dispute; Korea declared not to extend the General Security of Military Information Agreement ("GSOMIA") with Japan, while Japan removed Korea from the White List as scheduled. Both are driving ahead in a game of chicken. Korea finally took this issue to the World Trade Organization ("WTO") on September 11 maintaining that Japan's Export Restrictions violated the GATT regulations. There is no exit yet.

The primary purpose of this research is thus to critically analyze Japan's export restrictions of semiconductor materials to Korea from a viewpoint of international law to facilitate a resolution of the dispute. In this paper, the authors will analyze the WTO/GATT regulations and the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter Korea-Japan Claims Agreement) in order to address the issue of who violated international law.

## 2. "Security Exception" under GATT Article XXI

According to the Abe Administration, Japan decided to restrict the export of the three semiconductor materials to Korea because Korea had not adequately managed these chemicals. According to Japan, these chemicals concern materials and technologies that may be "diverted to military use" and Japan has a responsibility for managing the export of such dual-use materials.[5] Japan thus claims that their export restrictions are legitimate. In particular, Japan claims that such export restrictions are subject to the "National Security Exception" under GATT Article XXI.[6] Japan claims that the issue of the Korean Supreme Court's case on forced laborers is entirely separate from the export restrictions, albeit widespread suspicion even within Japan.[7]

### *A. Requirements of Article XXI*

In order to promote free trade, GATT Article XI prohibits restrictions to trade other

5 *Id.*
6 *Id.*
7 *Id.*

than duties, taxes or other charges.[8] Japan's export control measures would thus violate Article XI unless an exception applies.[9] The Japanese government maintains that the decision concerning export control measures was made "solely from the standpoint of national security" and invokes GATT Article XXI's "essential security interests" exception to justify their restrictions that would otherwise violate Article XI. Article XXI provides the conditions for "Security Exceptions" as follows:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXI exempts states from adhering to the GATT provisions to protect their "essential security interests" if there is one or more of the following at stake: (1) strategic security information; (2) 'fissionable' nuclear materials; (3) goods and services provisioned for military establishment; (4) war or other emergency in international relations; and (5) UN Charter obligations.

While there had been a long-standing controversy on the "self-judging" nature of Article XXI, in *Russian Transit*, the WTO finally made its first-ever ruling on this issue.[10] In this case between Ukraine and Russia, Russia invoked Article XXI to justify their measure restricting trade on the grounds of Russia's national security

8 GATT art. XI:1. It reads: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

9 It is reported that the Korean government submitted a complaint to the WTO Dispute Settlement Body arguing that the Japanese export restrictions violate the principles of non-discrimination under the GATT and that the restrictions are motivated by Japan's political interests. *See South Korea to file WTO complaint against Japan*, DW, Sept. 11, 2019, *available at* https://www.dw.com/en/south-korea-to-file-wto-complaint-against-japan/a-50376234.

10 Panel Report, *Russia-Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019). [hereinafter Russian Transit]

interests.[11] Here, the panel found that despite the "it considers" language of Article XXI, such language does *not* hand over a "blank check" to states to conduct a purely subjective determination when invoking the exception.[12] Rather, the panel held that a state's decisions to invoke Article XXI are reviewable by an adjudicating body and should be objectively justified by the state invoking the exception.[13] The panel first found that the particular circumstances in which a member may invoke Article XXI exception enumerated under the subparagraphs of Article XXI (b)–provisions for military establishment, "fissionable nuclear materials," "war or other emergency in international relations"–are those that can be objectively observed.[14] Thus, when in dispute, such circumstance "must objectively be found to meet the requirements" by an adjudicating panel.[15]

In reviewing whether Russia's actions met the requirements of Article XXI, the panel also defined "essential security interest" as a concept that is "evidently … narrower than 'security interests'" and continued that it "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[16] While acknowledging that a state enjoys some discretion in identifying an "essential security interest," the panel emphasizes that the invoking state nonetheless faces a good-faith obligation. The panel addressed:

> The discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI … in good faith. … The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. … It is therefore incumbent on the invoking Member to articulate the essential security interests … sufficiently enough to demonstrate their veracity.[17]

In other words, the good-faith obligation requires the invoking State to carry the burden of proof in showing that there is "sufficiently enough" evidence of specific interests directly relevant to the protection of its territory or population or internal

11 *Id.* at ¶ 7.4.
12 *Id.* at ¶¶ 7.77, 7.82 & 7.101. [Emphasis added]
13 *Id.*
14 *Id.*
15 *Id.* at ¶ 7.101
16 *Id.* at ¶ 7.130.
17 *Id.* at ¶ 7.133-4.

public order. Furthermore, the panel found that the good faith obligation also extends to the invoking state's showing of a plausible nexus between the essential security interests and the measure taken by the invoking state.

> The obligation of good faith … applies not only to the Member's definition of the essential security interests… but also, and most importantly, to their connection with the measures at issue. … [T]his obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.[18]

In essence, the panel here ruled that the state invoking Article XXI–such as Japan–must be able to objectively justify that there is in fact an enumerated circumstance that warrants the invoking of Article XXI and demonstrate the truth behind their claim. Also, the invoking state must carry the burden of proof that there is an *essential* security interest to be protected–distinguished from other types of security interest–that involves threats to its territory, population or internal order. [Emphasis added] Further, Japan must show that there is a plausible nexus between the trade restrictive measure taken and the essential security interest the state purports to protect. In fact, many scholars agree with the view of the panel that Article XXI measures are reviewable and that the invoking state must carry the burden of showing either the reasonableness of the measure or at least the good-faith basis of the measure taken under Article XXI.[19]

[18] *Id*. at ¶ 7.138.

[19] H. Schloemann & S. Ohlhoff, "*Constitutionalization*" *and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 Am. J. Int'l L. 445 (1999). The authors argued that Article XXI is subject to a proportionality test, which requires "the reasonableness of the measure," and that a state's classification of an interest as 'essential' must "meet some higher standard in relation to other 'normal' security interest." *See also* Jaemin Lee, *Commercializing National Security? National Security Exceptions' Outer Parameter under GATT Article XXI*, 13 Asian J. WTO & Int'l Health L. & Pol'y 277-310 (2018). (arguing that proper invocation of Article XXI requires a showing by the invoking state that that the specific requirements set forth in Article XXI are satisfied and that such invocation is subject to WTO panel's review on the "genuineness and reasonableness of the measure"). The International Law Commission's Draft Articles on "Responsibility of States for Internationally Wrongful Act" requires the invoking state to show that there is a "grave or imminent peril" and that their measure does not "seriously impair an essential interest of the State toward which the obligation exists" in order to invoke a necessity exception to an international obligation. Article 25 of the Draft Articles provides: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."

## 3. Lack of Evidence Warranting Invocation of GATT Article XXI

Following *Russian Transit*, for Japan to properly invoke Article XXI, it must first show objective evidence of a particular enumerated circumstance that warrants invocation of Article XXI. Additionally, at a minimum, Japan must be able to show evidence that the Export Restrictions to the three semiconductor materials and removal of South Korea from the White List are based on good-faith, by articulating the veracity of their claim behind an "essential security interest" that needs protection and the plausibility of the measures taken to protect the identified essential security concerns. However, Japanese government has yet to show any evidence of these claims.

The Japanese government does not yet claim that: (i) the Export Restrictions are related to Japan's security information; (ii) There is fissionable, nuclear material at stake;[20] (iii) Japan faces any war or international emergency that warrants the measure; or (iv) Korea violated any obligation of the UN Charter.

Instead, Japan suggests that their Export Restrictions would be justified under Article XXI (b)'s military provision exception that concerns circumstances "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment."[21] As justifications for their Export Restrictions, the Japanese government asserts that the three semiconductor materials subject to the Export Restrictions are wrongfully provisioned for either Korean or other military.[22] According to the Japanese government, this is because the Korean laws concerning the management of dual-use items, including the three semiconductor materials, are defective. In particular, the Japanese government blames the South Korean laws' "catch-all" provision concerning strategic items claiming that it only concerns weapons of mass destruction and does not include conventional weapons.[23] Japan also mentions the weakening 'trust' between the two countries as an issue.

[20] A "fissionable material"– which is not a defined term in the GATT – generally refers to "a nuclide that is capable of undergoing fission after capturing either high-energy (fast) neutrons or low-energy thermal (slow) neutrons." *See* United States Nuclear Regulatory Commission, Fissionable Material, *available at* https://www.nrc.gov/reading-rm/basic-ref/glossary/fissionable-material.html. The three chemicals subject to Japan's export control are not nuclides capable of undergoing fission.

[21] GATT art. XXI (b)(ii)

[22] Taro, *supra* note 5.

[23] Ha-yan Choi, *Canada lacks catch-all regulations for conventional weaponry like South Korea*, Hankyoreh Daily, July 24, 2019, *available at* http://english.hani.co.kr/arti/english_edition/e_international/903138.html.

Beyond the assertions, however, the Japanese government has yet to provide any objective evidence supporting such claims or a reasonable nexus between their claims and the specific measures taken. First, there is no evidence provided by Japan that the three semiconductor materials facing additional export restrictions are wrongfully provisioned to a military. Instead, the three materials are crucial inputs in semiconductor production-an important industry to Korea. The three materials-fluorinated polyimide, photoresist, and hydrogen fluoride-are chemicals used to make flexible organic light-emitting diode displays, to apply a layer that transfers circuit pattern to semiconductor substrate, and as an etching gas necessary for semiconductor fabrication, respectively. Without any evidence of wrongful provision, the restrictions simply concern chemicals that are vital to Korea's semiconductor industry and those that the Korean industry depends upon Japanese manufacturers for its supply.[24]

Second, while the Japanese government claims defects in Korean laws and waning trust between the two countries to justify removal of Korea from its White List, the Japanese government failed to provide any specific instances in which the alleged defects resulted in questionable or unlawful uses of exported items or how the current export control laws-in place since around 2002[25]-suddenly threatens Japan's "essential security interests." In fact, the Korean government maintains that contrary to Japan's assertion, it introduced the catch-all controls recommended to member states by the four international export controls regimes: the Wassenaar Arrangement ("WA"), the Nuclear Suppliers Group ("NSG"), the Australia Group ("AG"), and the Missile Technology Control Regime ("MTCR"). The Korean government further argues that it maintains a well-functioning catch-all provision for military uses including conventional weaponry.[26] Some outlets also claim that Korea's catch-all provisions are actually stricter than the catch-all provision of Japan[27] and that jurisdictions such as Canada who still is on Japan's White List has a very similar catch-all provision to Korea's.[28] In any case, the Japanese government has so far failed to show any evidence of its assertions concerning the defects in Korean

24 Ji-hye Shin, *Why is Korea so dependent on Japanese materials*, Korea Herald, July 11, 2019, *available at* http://www.koreaherald.com/view.php?ud=20190711000653.

25 Korea was an original member of the WA (1996) and joined NSG (1995) AG (1996) and MTCR (2001).

26 ROK Ministry of Trade, Industry and Energy, Letter by the ROK government regarding Japan's plan to revise its export controls (Summary), Press Release, (July 30, 2019), *available at* http://english.motie.go.kr/en/pc/pressreleases/bbs/bbsView.do?bbs_seq_n=725&bbs_cd_n=2. For details *see* Ha-yan Choi, *S. Korea's export regulations more strict than Japan's*, Hankyoreh Daily, July 15, 2019, *available at* http://english.hani.co.kr/arti/english_edition/e_international/901892.html.

27 *Id*.

28 Choi, *supra* note 23.

laws, let alone a reasonable link between their unsupported claims and the drastic remedy of removing Korea from the White List.

In essence, Japan's assertions do not meet the Article XXI standard articulated in *Russia Transit*, which would require Japan to show, at a minimum, objective evidence of wrongful military provisioning of the controlled materials and how their essential security interest is plausibly protected by the measures taken. Without more, the targeting of three chemicals central to semiconductor manufacturing and the timing of the Export Regulations–right after the Supreme Court decision on forced laborers but long after the current Korean export regime was put in place–would suggest that Japan's Export Restrictions are 'politically' motivated. Such export restrictions based on a political motive would not justify the invocation of Article XXI of the GATT. If such exception cannot be properly invoked, Japanese Export Restrictions would violate multiple provisions of the GATT. In addition to Article XI as mentioned above, Article I of the GATT prohibits discrimination, especially targetting a particular country with the aim of applying pressure to accomplish a political objective.[29] Thus, Japan's Export Restriction, if in fact is a measure taken as a retaliation to the Korean Supreme Court adjudication on the forced laborers as reported,[30] would also violate the non-discrimination principle. Furthermore, such retaliatory measure would not pass muster under the standard of international export regimes for strategic items that also prohibit bad faith invocation of export control regimes to hinder trade.[31]

# 4. Article 2 of the Korea-Japan Claims Agreement

## *A. The Korean Supreme Court's Decision for the Forced Labor Victims and Japan's Response*

Japan also blames Korea for violating the Korea-Japan Claims Agreement (1965) by pointing to the Supreme Court's decision on the Japanese forced labor victims. In October 2018, the Supreme Court of Korea confirmed the judgment of the Seoul High Court dated July 10, 2013 that awarded compensation (solatium) for the plaintiffs (forced labor victims). The Supreme Court held:

29 G. Patterson, *Non-Discrimination in International Trade*, 46 Nordic J. Int'l L. 20 (1977).

30 *Supra* note 1.

31 WA art. 1, ¶ 4 (The Initial Elements). It provides: "This Arrangement will not be directed against any state or group of states and will not impede bona fide civil transactions."

> A claim by the plaintiffs for compensation against the defendant should not be considered to be included within the scope of application of the Claims Agreement for the following reasons:
>
> (1) First and foremost, we have to make it clear that the plaintiffs' claim for compensation at issue refers to a claim by the victims of forced labor for compensation (hereinafter "claims of compensation") against a Japanese corporation, which is premised on the inhumane and wrongful act of the Japanese corporation directly related to Japan's unlawful colonial rule over the Korean Peninsula and its war of aggression. The plaintiffs did not make a claim against the defendant merely for unpaid wages or compensation, but in fact filed a suit to seek damages for the suffering related to the aforesaid claim of compensation.
> (2) According to the process and circumstances surrounding the conclusion of the Claims Agreement, it appears that the Claims Agreement was not intended to be a negotiation concerning compensation claims against Japan's unlawful colonial rule, but rather, its purpose was to basically resolve financial, civil debts and credit relations between Korea and Japan pursuant to Article 4 of the San Francisco Treaty through a political agreement.
> (3) It is not clear whether the economic cooperation funds provided by Japan to Korea in accordance with Article 1 of the Claims Agreement are legally related to the settlement of the problem concerning rights under Article 2.
> (4) During the course of negotiations over the Claims Agreement, the Japanese government fundamentally denied legal compensation for the harm caused by forced labor while also failing to acknowledge the illegality of its colonial rule. The two governments of Korea and Japan, consequently did not reach a consensus on the nature of Japan's control over the Korean peninsula.
> (5) The evidence submitted by the defendant to the court below after the case was remanded is not deemed to be without prejudice to the above judgment that the right to make a claim for compensation is not included within the scope of the application of the Claims Agreement.[32]

Responding to the Supreme Court's decision, Japan's Foreign Minister Kono Daro stated:[33]

> 1. Japan and the Republic of Korea have built a close, friendly and cooperative relationship based on the Treaty on Basic Relations between Japan and the

[32] Unofficial translation of the decision summary from Seokwoo Lee & Seryon Lee, Decision of the Korean Court on Japanese Forced Labor re New Nippon Steel Corporation (Supreme Court, Case 2013 Da 61381, Final Judgment), 7 Korean J. Int'l & Comp. L. 103-4 (2019).

[33] Kono Taro, Regarding the Decision by the Supreme Court of the Republic of Korea, Confirming the Existing Judgments on the Japanese Company, *available at* https://www.mofa.go.jp/press/release/press4e_002204.html?fbclid=IwAR28x66VEw7fgCNE4IUj36epWViteic8KJHiCtU-5jadoT2nxJX7b_CCP2E.

Republic of Korea and other relevant agreements that the two countries concluded when they normalized their relationship in 1965. The Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea (hereinafter the Agreement), which is the core of these agreements, stipulates that Japan shall supply to the Republic of Korea 300 million USD in grants and extend loans up to 200 million USD (Article I), and that problems concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) as well as concerning claims between the Contracting Parties and their nationals are "settled completely and finally," and no contention shall be made thereof (Article II). As such, the Agreement has provided the basis for the bilateral relationship up until now.

2. In spite of the above, today on October 30, the Supreme Court of the Republic of Korea decided to confirm the previously existing Korean judgments as final, which ordered Nippon Steel & Sumitomo Metal Corporation, inter alia, to pay compensation to the plaintiffs. This decision is extremely regrettable and totally unacceptable. This decision clearly violates Article II of the Agreement and inflicts unjustifiable damages and costs on the said Japanese company. Above all, the decision completely overthrows the legal foundation of the friendly and cooperative relationship that Japan and the Republic of Korea have developed since the normalization of diplomatic relations in 1965.

3. Japan once again conveys to the Republic of Korea its position as elaborated above, and strongly demands that the Republic of Korea take appropriate measures, including immediate actions to remedy such breach of international law.

4. Furthermore, if appropriate measures are not taken immediately, Japan will examine all possible options, including international adjudication, and take resolute actions accordingly from the standpoint of, inter alia, protecting the legitimate business activities by Japanese companies. As part of such effort, in order for the Ministry of Foreign Affairs to fully address this matter, today, the Ministry of Foreign Affairs has established the Division for Issues Related to Claims between Japan and the Republic of Korea in the Asian and Oceanian Affairs Bureau.

## *B. Article 2 of the Korea-Japan Claims Agreement*

Foreign Minister Kono Daro severely criticized that the Korean Supreme Court's decision broke the agreement between States and challenged even the postwar international order. His statement is based on Article II(1) of the Korea-Japan Claims Agreement which provides:

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

Minister Kono believes personal claims attributed to the Japanese occupation of Korea were *completely and finally* settled by the Korea-Japan Claims Agreement in 1965 and thus no unsettled claim exists between the two countries. [Emphasis added]

His position is, however, based on an misinterpretation of Article II of the Korea-Japan Claims Agreement. The claims referred to in this Agreement are uncollected amount, monetary compensation, and other claims, but both countries agreed to renounce only their "rights to diplomatic protection" for their peoples' personal claims. This has been the consistent position of the Japanese government, as well. In the 121th interpellation of the Japanese Diet (national budget committee of the Senate), Director of Treaty Bureau of the Ministry of Foreign Affairs, Mr. Yanai Shunji [柳井俊二] responded:

> The question of claims between the two states have been finally resolved. The resolution includes the claims between citizens of Japan and Korea but it means that the two states-Japan and Korea - renounced their rights to diplomatic protection. Hence, it does not mean that individual right to claim has been extinguished under domestic laws. The governments of the two countries cannot discuss the issue of individuals' right to claim by exercising the states' right to diplomatic protection.[34]

[34] House of Councilors of Japanese Diet Minutes of the Budget Committee No. 3 (Aug. 27, 1991), at 10, *recited from* Changrok Kim, Korea-Japan Claims Agreement" Did Not Extinguish An Individual Korean Citizen's Right to Claim [「한일청구권」으로 한국인 개인의 청구권은 소멸되지 않았다] (Expert Opinions to Court).

Until recently, the position of the Japanese government on this issue has been clear and consistent. Through various reiterations, the Japanese government stated that (i) the Agreement simply resolves the issue of diplomatic protection; (ii) Article II(1) of the Claims Agreement's "completely and finally resolved" language hence concerns resolution between the two states; (iii) individual interests in property and right to claim have not been extinguished by the Agreement. Such position is confirmed by the following official statements by representatives of the Japanese government.

> 1. On November 5, 1965, the Special Committee on Treaties and Agreements between Japan and the Republic of Korea, Foreign Minister Shiina [椎名悦三郎] confirmed several times that through the Agreement, the states had given up only the right to diplomatic protection.[35]
> 2. Japan's Commentary to Japan-Korea Treaty and Domestic Law [日韓條約と國内法の解說] promulgated in March 1966, also states that under the provisions of Articles 2-3 of the Agreement, the States commit to refrain from exercising its right to diplomatic protection under international law."[36]
> 3. On August 27, 1991, during the meeting of the Budget Committee of the House of Councilors, Foreign Minister Tanino [谷野作太郎] said: "As a result of the negotiations in [19]65, these issues are fully and finally resolved *between the state and the state*."[37]
> 4. On May 26, 1993, during the meeting of the Budget Committee of the House of Representatives, the Director of the Treaty Division of the Minister of Foreign Affairs, Mr. Tanba [丹波實] said: "… in relation to the right of claim, we are abandoning our right to diplomatic protection. If there is a right to individual claim, such right would not be subject to diplomatic protection, but it can exist in that form."[38]
> 5. On March 25, 1994, during the meeting of the Cabinet Committee of the House of Representatives, Deputy Director-General of the Foreign Minister Takeuchi [竹内行夫] said: "… on the issue of the right to claim the property of Japanese and Korean citizens, the two countries gave up their right to diplomatic protection as nations. As it has been said before, the provisions of the Agreement itself do not directly extinguish the right to individual right to claim or property under domestic laws."[39]

35 House of Representatives of Japanese Diet, Minutes of Special Committee regarding the Treaties and Agreements between Japan and Korea, No. 10 (Nov. 5, 1965), at 17ff, *recited from* Kim *id*.

36 Masami Tanida et al., Japan's Commentary to Japan-Korea Treaty and Domestic Law [日韓條約と國内法の解說 (時の法令 別冊)] 64 (Japanese Ministry of Finance, 1964), *recited from* Kim *id*.

37 *Supra* note 33, at 9. [Emphasis added]

38 House of Representatives of Japanese Diet Minutes of the Budget Committee No. 26 (May 26, 1993), at 37, *recited from* Kim *id*.

39 House of Representatives of Japanese Diet Minutes of the Cabinet Committee No. 1 (Mar. 25, 1994), at 8, *recited from* Kim *id*.

This position of the Japanese government is also reflected in the interpretation of Article 6 of the Russo-Japanese Joint Declaration concerning the renunciation of claims.[40] On March 26, 1991, at the Cabinet Committee of the House of Councilors, Deputy Director-General of the Foreign Minister Takashima [高島有終] stated: "What we have repeatedly said is that the abandonment of the right to claim under the Joint Declaration is the right to diplomatic protection of the state. Therefore, it does not abandon the rights of the [Japanese] citizens to clami against the Soviet Union or the citizens of the Soviet Union."[41] On March 25, 1994, at the Cabinet Committee of the House of Representatives, Head of the Russian Department [Euro-Asia Bureau] of the Foreign Ministry, Mr. Nishida [西田恒夫] stated, "under Paragraph 6, while the State waives the right to claim, this does not mean that the [Japanese] nationals have waived their righ to claim against Russia or their citizens."[42] On March 4, 1997, at the First Preparatory Committee of the Budget Committee of the House of Representatives, Deputy Director-General of the Foreign Minister Mr. To Ogo [東郷和彦] said, "although we abandon all rights to claim under Article 6, Paragraph 2, it is not intended to interfere with an individual's claim."[43] Even the then Foreign Minister (current Defense Minister) Kono Taro acknowledged that [under the Claims Agreement] the right to claim of individual citizens is not extinct.[44]

Meanwhile, on December 17, 1965, Japan enacted Property Right Action Law (hereinafter Law No. 144) to implement Article II of the Claims Agreement. Article 1(1) of Law No. 144 provides:

> Except as provided in the following paragraphs, the assets and interests specified in Article 2, Paragraph 3 of the Japan-Korea Claims Agreement shall be extinguished on June 22, 1965. However, the rights of third parties (excluding those falling under the property and interests of Paragraph 3) shall not be extinguished as necessary for the exercise of those rights.

Law No. 144, however, cannot justify the position that an individual Korean citizen's

40 Article 6 of the Russo-Japanese Joint Declaration reads: "The Union of Soviet Socialist Republics renounces all reparations claims against Japan. The USSR and Japan agree to renounce all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August 1945."

41 House of Councilors of Japanese Diet Minutes of the Cabinet Committee No. 3 (Mar. 26, 1991), at 12, *recited from* Kim *id*.

42 *Supra* note 38, at 5.

43 House of Representatives of Japanese Diet Minutes of Budget Committee's First Division No. 2 (Mar. 4, 1997) at 19, *recited from* Kim *id*.

44 Minutes of the Foreign Affairs Committee of the 197th House of Representative (Nov. 14, 2018), at 29.

interests in property and rights have been extinguished within Korea. Japan's Law No. 144 has the effect of extinguishing an individual Korean's rights to claim within Japan under the Japanese domestic laws. The extinguishment of the rights within Japan is the effect of Law No. 144, not the effect of the Korea-Japan Claims Agreement.[45]

Such position has been recognized by the Japanese court. In a lawsuit in which forced labor and atomic bomb victims filed against Mitsubishi Heavy Industries Co., Ltd., the Hiroshima High Court denied compensation for damages and the payment of the wages on the basis that such claims concern "property, rights and interests" as defined under Article II, Paragraph 3 of the Claims Agreement and thus under the scope of Law No. 144 implementing the Agreement. The Court declared that the assets, rights and interests concerned were all extinct on June 22, 1965.[46] In other words, the Hiroshima High Court judgment is based on the understanding that the right to claim for compensation by the victims of forced labor has been extinguished in accordance with Law No. 144 and hence, only within Japan. This Japanese domestic law has no effect within Korea. In Korea, domestic laws extinguishing such rights do not exist. The Korean Supreme Court was thus able to recognize an individual right to claim compensation for forced labor victims under the Agreement and relevant Korean domestic laws

Another legal reference allegedly pertinent to the right to individual claim for compensation is the *Jurisdictional Immunities of the State* case of 2012 (hereinafter *Ferrini* case) before the International Court of Justice ("ICJ").[47] Yet, this case is irrelevant to the issues raised in Korea's Supreme Court decision. From 2004 to 2008, in a series of lawsuits, Italian courts ordered Germany to pay compensation to Italian plaintiffs who were the victims of crimes against humanity and/or war crimes committed by the German Reich during World War II.[48] On December 23, 2008, Germany filed an application against Italy before the ICJ, "in respect of a dispute originating in 'violations of obligations under international law'" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity

45 Kim, *supra* note 33, at 7-12.

46 Hiroshima High Court, 2005, 206 Court Report, Nos. 3, 5 & 6. For details, *see* Keechang Kim & Najin Choi, *Korea-Japan Claims Agreement of 1965 and Compensation Claims of Korean Victims of Forced Labour* [한일 청구권 협정과 강제동원 피해자의 손해배상청구권], 24 J. Comp. Private L. [비교사법] 831 (2017).

47 Jurisdictional Immunities of the State (F.R.G. v. Italy: Greece intervening), Judgment, 2012 I.C.J. Rep. (Feb. 3), *available at* https://www.icj-cij.org/en/case/143/judgments.

48 Ferrini v. Germany (Supreme Court, Italy, Mar. 11, 2004); Mantelli v. Germany (Court of Cassation, Italy, May 29, 2008); and The Prosecutor v. Max Josef Milde (Supreme Court, Italy, Oct. 21, 2008).

which ... Germany enjoys under international law."[49] Although there is no doubt that the crimes committed by German Reich during World War II was a serious violation of the international law of armed conflict applicable in 1943-45, the ICJ considered:

> It is not called upon to decide whether these acts were illegal, a point which is not contested, but whether, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the fact that immunity is governed by international law and is not a mere matter of comity.[50]

The ICJ simply held that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.[51] In other words, in the *Ferrini* case, the ICJ only acknowledged that the Italian courts had violated international law by exercising jurisdiction over Germany which denies the principle of State Immunity. This adjudication is thus unrelated to the renunciation by treaty of an individual right to claim against natural or legal persons.

## 5. Korea-Japan Basic Treaty

Minister Abe's assertion presupposes an extremely controversial understanding of the past that Japan's forced occupation of Korea was not illegal from a viewpoint of intertemporal international law. Abe's view reflects the position that Japan's occupation of Korea and its colonial governance were "legitimate albeit unethical." Professor Yuno Fukuju further explains this position in his book, Study on the Annexation History of Korea [韓國併合史 研究]:

> Korean Annexation is legitimate under international law, and Japan's rule of Korea was legal. However, this does not mean that Japan's Korean annexation or colonial rule was just. Under imperialism, however, colonial rule was lawful under

49 ICJ, Jurisdictional Immunities of the State (F.R.G. v. Italy: Greece intervening), *available at* http://www.internationalcrimesdatabase.org/Case/1231.

50 *Supra* note 47, at 3.

51 *Supra* note 45, ¶¶ 107-108.

international customs at that time.[52]

However, underlying the "legitimate but unethical" argument is the position that Japanese colonial occupation was beneficial for Korea and Korean citizens, as asserted by the statements of the Japanese representative Kubota [久保田貫一郎] during the Korea-Japan Meeting.[53] Additionally, such a view assumes that the 1965 Treaty on Basic Relations between the Republic of Korea and Japan (hereinafter Korea-Japan Basic Treaty) has resolved the issue of legality and ethics so that no further discussion of such issues are necessary.[54]

Article II of the Korea-Japan Basic Treaty provides: "It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are *already null and void*." [Emphasis added] Both sides have interpreted the final sentence–already null and void–in an opposite manner. The supporters of the "legitimate albeit unethical" view–a popular position in Japan–maintain that "all treaties or agreement" became already null and void at the time (June 22, 1965) of concluding the Korea-Japan Basic Treaty because Korea had regained its sovereignty on August 15, 1945, while many others, particularly in Korea, argue that those treaties and agreements had been already null and voice since August 22, 1910 because the annexation treaty itself was originally illegitimate on both substantial and procedural grounds.

The "legitimate albeit unethical" position is based on the intertemporal law theory. The supporters assert that under the international customary laws of the early 20th century when Japan's annexation of Korea took place, colonial rule was legal. Moreover, they argue that Korea's sovereignty was transferred in accordance with an international treaty, which renders such annexation'legitimate.' However, this position misunderstands international law of the time. In the late nineteenth century, there was no rule of international law that legalized the invasion of armed forces or military aggression. The international society merely tolerated the lawlessness or illegality. Additionally, in 1927, the League of Nations commissioned the Harvard Law School to conduct research on international treaties. The Research in International Law published in 1935 as a result of such efforts clearly indicates that a treaty signed under coercion is null and void as a matter of international law. As

52 Yuno Fukuju, Study on the Annexation History of Korea <韓國併合史 研究> 80-1 (Chung J.J. trans. into Korean, 2008). <available only in Korean and Japanese>

53 Il-yung Chung, Foreign Relations of Korea and International Law [한국외교와 국제법] 472 (2011). <available only in Korean>

54 Shigeru Oda, *The Normalization of Relations between Japan and the Republic of Korea*, 61 Am. J. Int'l L. 35-56 (1967).

an example of such treaty, the Research names precisely the 1905 Protectorate Treaty entered into between Japan and the Korean Empire.[55] The Protectorate Treaty–signed under coercion–lacks the royal seal of the Korean emperor–the right holder–and did not follow the procedural requirements necessary to enter into international treaties as required by the general practices of the time.

Japan's annexation of Korea occurred in multiple premeditated steps, starting with the Protectorate Treaty of 1905 to the Annexation Treaty of 1910. Because the later Annexation Treaty was concluded when the Korean Empire forfeited all rights to international relations under the null and void Protectorate Treaty, the Annexation Treaty is definitely null and void. In addition to the procedural defects, there is also a significant problem with the substance. The position that a treaty under which a state transfers its entire sovereignty to another state was concluded legally at the beginning of the 20th century defies common sense.[56] It reflects a fundamental misunderstanding of international legal history.

## 6. Conclusion: Who Violated International Law?

While the Japanese Government under the Abe administration emphasized cooperation and co-prosperity rather than confrontation at the recent G20 meeting in Osaka, the Japanese Export Restrictions that target Korean semiconductor industry came–unfortunately and likely unlawfully–only a few days after the G20 meeting. As noted above, restricting trade for political purposes is a serious violation of international law. While the Abe administration insists that Korea first violated Article II of the Korea-Japan Claims Agreement, such argument is unsupported. Also, such argument ignores a central pillar of contemporary international law: the principle that an individual claim based on fundamental human rights cannot be denied by a treaty provision. While the Japanese government further argues that the Korean government has not responded to the arbitration requested under the Article III of the Claims Agreement,[57] the relevant provisions of the Agreement provide that a dispute in the interpretation or implementation of the Agreement should first be

55 *See* Research in International Law, ch. 32, *recited from* 29 Am. J. Int'l L. Spec Supp 1157 (1935).

56 Treaties of this kind are similar to treaties that agree on armed invasion of third countries or treaties allowing slave trade. These treaties cannot be valid because they are in violation of peremptory norms (jus cogens).

57 Korea-Japan Claims Agreement art. 3(2). It provides: "Any dispute which cannot be settled under the provision of paragraph 1 above shall be submitted for decision to an arbitral commission of three arbitrators."

settled through diplomatic channels.[58] The Japanese government's unilateral and arbitrary decision to restrict exports targeting Korea's semiconductor industry may boomerang on Japan and further endanger global free trade order. Efforts in honest reflection of the past as well as the present would be necessary to ensure the desired goals of cooperation and co-prosperity between the two countries and to answer the question of who violated international laws.

[58] *Id*. art. 3(1). It provides: "Any dispute between the High Contracting Parties concerning the interpretation or the implementation of this Agreement shall be settled primarily through diplomatic channels."