Forced Labor during World War II — Individual's Right to Bring Claims against the Wrongful State — Articles 2(1) and (3) of the Agreement between Japan and the Republic of Korea on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation — The Convention Concerning Forced or Compulsory Labour — The Slavery Convention and Customary Rules on the Prohibition of Slavery

Nagoya High Court (Kanazawa Branch), Judgment, March 8, 2010;
not yet reported*

X *v.* State of Japan and Y

During World War II, in order to cope with labor shortages, Japan recruited Korean young women to work in munitions factories on a "voluntary" basis (*Joshi kinroteishintai* or Female Labor Volunteer Corps). Several former members of the Corps (X), nationals of the Republic of Korea (hereinafter, "the ROK"), brought the present case against Japan and Y (a Japanese enterprise), seeking compensation for mental and financial damages inflicted by such recruitment.

The Toyama District Court in its judgment of September 19, 2007,[1] found that X were forcibly brought to munitions factories by fraud or extortion but rejected X's claims, considering that Article 2 of the Agreement on the Settlement of Problems concerning Property and Claims and on the Economic Co-operation between Japan and the Republic of Korea[2] (hereinafter, "the Agreement") extinguished X's ability to litigate such claims, referring to the Supreme Court judgment of April 27, 2007.[3] X filed an appeal with the Nagoya High Court (Kanazawa Branch).

Held: '1. All the claims of the appellants shall be dismissed.'
'3. The entire cost of appeals shall be borne by the appellants.'

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* Translated by Shiho Sugiki and Tomoko Yamashita.

1 53 *Shomu Geppo* (2) 324 [2007].

2 *United Nations Treaty Series*, Vol. 583, p. 173; *Japanese Annual of International Law*, No. 10 (1966), p. 284.

3 An English translation is available at *Japanese Yearbook of International Law*, Vol. 51 (2008), p. 518.

Upon the grounds stated below:[4]

'5. Issue 5 (Admissibility of the Claims Based on International Law)

(1) International law regulates rights and obligations between a State and another State or an international organization. It follows that, as a matter of principle, even international law rules directly relating to rights and obligations of nationals cannot be applied by courts to the relations between a private person and another private person or a State, and that a national of a State who suffered damages caused by another State or a national of another State cannot directly invoke international law to seek remedies for the damages. In order that a treaty provision directly relating to rights and obligations of nationals be applied before a domestic court, it needs, in general, to be adapted by domestic legislation. Exceptionally, a treaty provision may be directly enforceable as a rule of domestic law and may regulate legal relations between private persons on the condition that it clearly stipulates, among other things, conditions for effectuating rights and obligations of private persons and their effects, as well as the procedures to put them into effect so that it is enforceable before a court without supplementation or adaptation by domestic law. This applies also to customary international law rules.

(2) The appellants appear to advance claims based on Article 1 or 14 of the Convention concerning Forced or Compulsory Labour.[5] While these provisions oblige States parties, or their competent organs, to prohibit forced labor or to take measures to ensure that any labor should be remunerated, they are not rules directly regulating legal relations between private persons. It is, therefore, impossible for a private person to claim reparations for forced labor, as defined in the Convention, against another private person or a State directly on the basis of the Convention.

(3) The appellants also advance claims based on the Slavery Convention,[6] the Treaty of Saint-Germain-en-Laye,[7] and ILO Conventions No. 5 and No. 59. Even if these treaties could possibly be interpreted to require the States parties, or their competent organs, to abolish or prohibit slavery or slave trade (note, however, that Japan has ratified neither the Slavery Convention nor ILO Convention No. 59; also, while ILO Conventions No. 5 and No. 59 require States parties to abolish child

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[4] Unless amended by the High Court, the original judgment of the court of first instance, including the reasons for the judgment, is incorporated in the judgment of the High Court. The following translation incorporates and consolidates the relevant parts of the original judgment as amended by the High Court.

[5] ILO Convention No. 29.

[6] *League of Nations Treaty Series*, Vol. 60, p. 253.

[7] *League of Nations Treaty Series*, Vol. 8, p. 25.

labor, it is difficult to conclude that the recruitment of the appellants for the Female Labor Volunteer Corps was in violation of Convention No. 5, which provides that children over twelve years of age may be admitted into employment if they have finished their course in elementary school,[8] since all the appellants were over twelve years of age at the time of their recruitment), they do not directly regulate legal relations between private persons. Therefore, a private person cannot advance claims for reparation against another private person or a State directly on the basis of these treaties.

In addition, as for solatia, the appellants argue that a State violating a treaty is evidently obliged under international law, even in the absence of specific provision for reparation, to make good the damages caused. However, this argument cannot be accepted, because it is impossible to find any rule of customary international law according to which a private person, not a State, is qualified, even in the absence of a specific treaty provision, to seek reparation against a State violating a treaty.

(4) In consequence, the claims advanced by the appellants on the basis of international law are unfounded.'

[The Court holds that, as a matter of domestic substantive law, Japan and Y are liable to pay compensation to the appellants for tort and for tort and default, respectively.]

'8. Issue 9 (Settlement under Article 2 of the Agreement or Paragraph 1(1) of the Act)

The Court examines the allegation of the appellees that even if the appellants' claim against the appellees on tort or their claim against Y for default are accepted on the basis of substantive law, they are not legally obliged to respond to the appellants' demands based on the above claims.'

'(2) On the appellees' defense concerning the waiver of claims

A. Taking into account the terms of the aforementioned Article 2 of the Agreement[9]

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[8] Article 5(1)(a).

[9] Article 2 provides: "1. The Contracting Parties confirm that the problems concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and those concerning claims between the Contracting Parties and their nationals [...] are settled completely and finally.

2. The provisions of the present Article shall not affect the following [...]

(a) Property, rights and interests of those nationals of one Contracting Party who have ever resided in the other Contracting Party in the period between August 15, 1947 and the date of the signing of the present Agreement;

(b) Property, rights and interests of one Contracting Party and its nationals, which have

and Paragraph 1 of the Act [concerning the Measures on Property Rights of the Republic of Korea and Others Incidental to Implementation of Article 2 of the 'Agreement Between Japan and the Republic of Korea on the Settlement of Problems concerning Property and Claims and on Economic Co-operation'][10] (hereinafter, "the Act"), the aforementioned facts leading to the conclusion of the Agreement and the measures adopted by both States,[11] it is appropriate to understand that, among the claims of ROK citizens against Japan or Japanese nationals (including juridical persons), *(1)* all kinds of substantive rights of proprietary nature based on laws valid on June 22, 1965, were in principle extinguished on the same day pursuant to Paragraph 1(1) of the Act. Furthermore, *(2)* with respect to any claims arising from the causes which occurred on or before the said date, other than those indicated in *(1)*, Japan or its nationals against whom such claims are advanced by Korean nationals are in a position to affirm, as a defense based on Article 2 of the Agreement, that they are not legally obliged to respond to such claims, because no contention shall be made by ROK nationals against Japan or its nationals according to Article 2(3) of the Agreement.

B. All of the claims advanced by the appellants against the appellees fall under the claims *(2)* above (in the present case, since the appellants do not ask the appellees to pay them wages in accordance with employment contracts, the claims advanced by the appellants do not fall under *(1)* above). It is also obvious that these claims do not fall within the scope of Article 2(2) of the Agreement.

Accordingly, as long as the appellees affirm that Article 2 of the Agreement prevents the appellants from making any contention against the appellees, the appellants' ability to litigate such claims becomes extinct, and the appellant's claims shall be dismissed.

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been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 15, 1945.

3. Subject to the provisions of paragraph 2 above, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of the other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date."

[10] Act 144 of 1965. Paragraph 1 of the Act provides: "The following property rights of the Republic of Korea or its nationals [...] corresponding to the "property, rights and interests" stipulated in Article 2(3) of [the Agreement] shall become extinct as of June 22, 1965 [...]:

(1) claims against Japan or its nationals; [...]"

[11] For these facts and measures, omitted in the present translation, see, *e.g.*, Tokyo High Court, Judgment, December 14, 2005, *Japanese Annual of International Law*, No. 50 (1997), p. 213, pp. 214-216.

(3) On the appellants' allegations

A. The appellants argue that it is the Governments of Japan and the ROK that are prevented from making any contention under Article 2(3) of the Agreement, which only waives their rights of diplomatic protection.

The so-called right of diplomatic protection is a right of a State itself, and the State does not act on behalf of a private person when it exercises its right of diplomatic protection. Article 2(3) of the Agreement, for its part, explicitly provides that no contention shall be made with respect to claims of "either Contracting Party" as well as claims of "its nationals." Such claims of States shall be understood to include the aforementioned so-called right of diplomatic protection, as well as claims directly owned by the States concerning damages incurred upon State organs or State properties. On the other hand, taking into account that private persons do not, in principle, have claims under international law, the claims of nationals shall be understood to mean claims of nationals under domestic law (ordinarily, claims under the domestic law of the offending State). Therefore, this provision explicitly referring to the claims of nationals shall be understood to prevent nationals from making any contention with respect to their claims under domestic law. In addition, considering that Article 2(1) of the Agreement stipulates that Japan and the ROK confirm the problem concerning claims between the two States and their nationals is settled completely and finally, Article 2 was not intended to leave unsolved the problem of the claims of nationals under domestic law.

B. The appellants argue that, since the Agreement is nothing but an agreement between Japan and the ROK and regulates only inter-State relations between the two, they are unable to waive claims of individuals by the Agreement.

Nevertheless, it is generally accepted that a State may, by way of treaties, bring about certain effects onto its nationals' private rights, for example, by disposing of their properties or waiving their claims. Thus, the Treaty of Peace with Italy (February 10, 1947) provides that Italy waives all claims on behalf of Italian nationals against Germany and German nationals.[12]

Accordingly, the Court does not consider that the Agreement, as an agreement between Japan and the ROK, cannot waive or bring about certain other effects upon claims of nationals (Note that Article 2(3) of the Agreement stipulating that no contention shall be made with respect to any "claims" (falling under category *(2)* mentioned in (2)A above) shall not be understood to extinguish such claims, themselves, as substantive claims).'

'D. The appellants argue that their individual claims, based on the Convention concerning Forced or Compulsory Labour and other important human rights

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[12] Article 77(4), *United Nations Treaty Series*, Vol. 49, p. 3.

treaties, cannot be incorporated or merged into claims of the ROK, even if it exercises its right of diplomatic protection and negotiates with the defendant State.

However, the Convention concerning Forced or Compulsory Labour and other treaties provide only for compensation between States and not for individual claims against a State. Therefore, this allegation advanced by the appellants is unfounded.

In addition, the appellants contend that breach of these treaties by the defendant State entails its international responsibility to make full reparation for the injury caused. However, if the responsibility of the wrongful State may be pursued by the victim State as a result of an internationally wrongful act, an individual victim is not entitled under international law to advance claims directly against the wrongful State. Accordingly, this contention advanced by the appellants is not founded.

(4) On the appellants' allegations at this instance

A. Interpretation based on internal documents of the Ministry of Foreign Affairs (hereinafter, "MOFA")

The appellants argue, based on MOFA's internal documents made publicly available in 2008, that the Government of Japan understood that the States parties waived only their right of diplomatic protection under Article 2(3) of the Agreement. The documents pointed out by the appellants seem to be MOFA's internal documents written just before the conclusion of the Agreement or its entry into force. Such documents are not decisive, though they may be taken into account in interpreting relevant provisions of the Agreement. Nevertheless, the Court examines these documents.

The title of the document dated April 6, 1965, "Legal Meanings of the Waiver of Nationals' Property and Claims in the Peace Treaty" (an internal document probably prepared by a counselor of the Legal Division, Treaties Bureau, MOFA), gives an impression that it analyzes a general interpretation with respect to the waiver of property and claims of nationals in the Peace Treaty. In its text, however, paragraphs 1 and 2 do no more than give basic explanations on diplomatic protection, as ordinary textbooks do. Paragraph 3, which says that "in the case of waiver of a claim for compensation for seized fishing vessels, such a claim is also considered to be that of a State as mentioned above," merely indicates that the claim of a State to seek compensation for seized fishing vessels, which may debatably be included in the claims waived by a treaty, is based on the so-called right of diplomatic protection. It does not speak of claims in general which may be waived by treaties or of the question whether the claims that individuals of a State party have under the domestic law of another State party can be waived or be made unable to be litigated.

The document, dated May 28, 1965, entitled "Draft Article 2 of the Agreement and the Problem of Seized Fishing Vessels" (likely to be an internal document of

the Treaties Bureau, MOFA) is partly illegible and partly difficult to clearly understand. However, the gist of the document, as a whole, is that the claim of a State with regard to seized fishing vessels is based on the so-called right of diplomatic protection and that the State's right of diplomatic protection concerning seized fishing vessels will be waived by the conclusion of the Agreement. It, thus, cannot be firmly found that the document refers to claims in general, including those other than the aforementioned one, which may be waived by treaties. Although the document says that the problem of the claims of Japanese nationals against the ROK Government for compensation under the ROK law (though not clear, it seems, looking at the document as a whole, to mean the ROK's responsibility under administrative law or for tort) is a separate issue from the interpretation of the Agreement, it cannot be found that the document does say anything about whether claims held by individuals under the ROK law can be waived or made unable to be litigated by the Agreement.

The document, dated September 1, 1965, entitled "(The Provisions of the Agreement and Issues of Compensation in Japan for Private Property in the ROK)" (probably an internal document of the MOFA) says that Article 2(3) of the Agreement will prevent Japan from exercising its so-called right of diplomatic protection and that rights of individuals themselves may be extinguished by acts (measures) of the ROK Government, and not by the Agreement. The content of this document is quite close to the view expressed by the Japanese Government in the Diet, and seems at first glance to be in favor of the arguments advanced by the appellants. Upon closer examination, however, it can also be understood to mean that the document merely indicates that an international legal effect of the Agreement will be the waiver of the right of diplomatic protection, and that it does not extinguish substantive claims of individuals under domestic law. Therefore, the document should be understood to leave open the question of whether the Agreement will extinguish, though not substantive claims themselves, the ability to litigate such substantive claims as a matter of domestic law.

Accordingly, while it is true that the content of the documents examined in this section and the view expressed and maintained by the Japanese Government emphasized the international legal effects of the Agreement to waive the right of diplomatic protection, it cannot be concluded that it is in clear contradiction with the views to consider that the Agreement extinguishes, as a matter of domestic law, the ability to litigate in the sense explained in (2) above.

B. Backgrounds to the conclusion of the Agreement

The appellants argue that damages caused to Labor Volunteers were not taken into consideration during the negotiation between Japan and the ROK for the Agreement.

It is true that no sufficient evidence indicates that issues relating to Labor

Volunteers were discussed during the negotiation for the Agreement. Moreover, as found above, it was difficult for the ROK to establish claims concerning Labor Volunteers. However, as is confirmed above, the Agreement was concluded as a result of a political compromise following the failure of the so-called accumulation approach. Moreover, no record shows that, during the negotiation, it was examined whether claims unknown before the conclusion of the Agreement should be excluded from the scope of the claims mentioned in Article 2(3) of the Agreement with respect to which "no contention shall be made." Considering, in addition to these backgrounds, that Article 2(1) of the Agreement provides that the problem concerning claims between the Contracting Parties and their nationals is settled completely and finally, the Court finds that the Parties agreed to settle claims, including those unknown at the time of the conclusion of the Agreement. It, thus, cannot be denied that the claims advanced by the appellants in the present case are included in the claims with respect to which "no contention shall be made," in spite of the absence of discussion on Labor Volunteers during the negotiation.

C. Direct applicability

The appellants seem to argue that Article 2(3) of the Agreement dealing with claims cannot be directly applicable, without further measures. However, the provision, which stipulates that "no contention shall be made," can be understood to mean that holders of the claims are deprived of their ability to litigate their substantive claims. It follows that, when ROK nationals raise contentions with respect to individual claims against Japan or Japanese nationals arising from facts occurring on or before June 22, 1965, and the defendant presents a defense based on Article 2(3) of the Agreement, it suffices for the court to sustain the defense and decide to dismiss the claims. Article 2(3) is thus applicable without adaptation by specific law, and nothing prevents the direct application of the provision. It also goes without saying that the kinds of measures taken with respect to "property, rights, and interests," being clearly distinguished from "claims" in Article 2(3), need not be taken with respect to "claims."

D. On the allegations with respect to breach of good faith and abuse of right

The appellants argue that Japan presents the defense based on Article 2 in contravention of good faith and that both appellees' defense based on the said Article constitutes an abuse of rights.

However, while the view expressed by Japan in the Diet with respect to Article 2(3) of the Agreement emphasizes the waiver of the right of diplomatic protection concerning individual claims, as well as the non-extinction of individual substantive claims, it is difficult to find that the view is incompatible with the position that such individual substantive claims cannot be litigated under the domestic law of the other State party to the Agreement. Therefore, the defense ad-

vanced by Japan based on this Article does not constitute a breach of good faith. Furthermore, Article 2(3) of the Agreement explicitly stipulates that no contention shall be made with respect to "all" the other claims not provided for in Article 2(2) arising from facts occurring on or before June 22, 1965. It is also difficult to find, as mentioned above, that the negotiations leading to the conclusion of the Agreement does not indicate that it was intended to exclude such claims as alleged by the applicants. Therefore, it does not constitute an abuse of rights for the appellees to present defenses based on Article 2(3) as it does not deviate from what is envisaged in that Article. In the final analysis, when the appellants advance their arguments on the abuse of rights, their intention is not to affirm the illegitimacy of the appellees' defense based on Article 2(3) of the Agreement, but to allege that the claims advanced by the appellants are not those mentioned in the said paragraph. However, as already held, this is an unfounded allegation.

Accordingly, the allegations advanced by the appellants concerning the contravention of good faith and the abuse of rights are unfounded.'

Judge Nobuaki Watanabe (presiding)
Judge Tsuyoshi Momosaki
Judge Chikako Asaoka

II. Private International Law*

Validity and Recognition of Foreign Judgments — Divorce — Child Custody — *Habeas Corpus* Act

Supreme Court, Decision, August 4, 2010; Case (ku) No. 376 (2010);**
Osaka High Court, Decision, February 18, 2010; Case (jin na) No. 9 (2009)***

Osaka High Court, Decision

This case concerned a dispute between an American/Nicaraguan father (the "Plaintiff") and a Japanese mother (the "First Defendant") about the custody of their child. Since their marriage and the birth of their child in 2002 the Plaintiff and the First Defendant had lived together in Milwaukee, Wisconsin in the United States. The First Defendant and the Plaintiff separated after an incident on February 14, 2008 when the Plaintiff used violence against the First Defendant. After this incident, the Plaintiff continued to harass the First Defendant, and on the advice of a counsellor in the Wisconsin State Court's Domestic Violence Division, the First Defendant returned to her parents' home in Japan with the child on February 27, 2008. On February 21, 2008 the Plaintiff brought divorce proceedings against the First Defendant in the Milwaukee County Circuit Court in Wisconsin ("State Court"). As the First Defendant had taken the child to Japan, the State Court made an interim ruling on February 28, 2008 that the child was to be placed under the sole legal custody of the Plaintiff and ordered the First Defendant to return to Wisconsin and hand the child over to the Plaintiff. The First Defendant did not return to America or hand the child over to the Plaintiff and did not appear at the final trial of the divorce proceedings on June 10, 2009. Accordingly, the State Court granted the divorce and awarded the Plaintiff sole legal custody of the child. The Plaintiff brought a case in Japan pursuant to the Habeas Corpus Act[1] against the First Defendant and her father (the "Second Defendant") and mother (the "Third Defendant") seeking an order that the child be released and handed over to the Plaintiff.

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* Edited by Naoshi Takasugi, John Ribeiro and Yoshiaki Nomura.

** For the Supreme Court Decision, please see p. 528.

*** Translated by Melissa Ahlefeldt.

[1] For a complete translation of the Japanese Habeas Corpus Act (Jinshinhogoho, Act No. 199, July 30, 1948), see *EHS Law Bulletin Series*, Vol. 1, Catalogue No. 1030 (2008).