5.Challenge against the Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan"

[23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011]

Questions Presented

Whether it is constitutional for the respondent to have failed to resolve, under Article 3 of the "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter "the Agreement")," the dispute over interpretation as to whether the complainants' rights to claim damages in the capacity of comfort women against Japan have been extinguished by Article 2 Section 1 of the Agreement (positive)

Summary of Decisions

According to the Preamble, Article 2 Section 2, and Article 10 of the Constitution and Article 3 of the Agreement, the respondent's duty to pursue dispute settlement procedures under Article 3 of the Agreement stems from the constitutional request to assist and safeguard the people who had their dignity and value seriously compromised by Japan's organized, continuous unlawful acts in their filing of claims against Japan. As the fundamental rights of the complainants may be significantly undermined if the respondent fails to fulfill its duty to proceed with dispute resolution, the respondent's obligation to act in this case originates from the Constitution and is stipulated in law.

In particular, although not in direct infringement of the fundamental rights of comfort women victims, the Korean government is nevertheless liable for causing disruption in settling the payment of claims by Japan and in restoring the victims' dignity and value in that it signed the Agreement without clarifying details of the claims and employing a comprehensive concept of "all claims." Taking note of such responsibility on the part of the Korean government, it is hard to deny that the government has the specific duty to pursue elimination of the disrupted state in settlement of claims.

Whether this omission to act by the respondent to initiate dispute settlement procedures infringes on the complainants' fundamental rights and is therefore unconstitutional will depend on whether such act stays within the scope of a government institution's legitimate leeway consistent with its duty to protect people's rights, which is determined through overall consideration of the significance of fundamental rights concerned, urgency of the risk of rights violation, effectiveness as a remedy of rights and whether undertaking the dispute settlement procedure runs counter to the genuine interest of the nation.

In fact, the claims of comfort women victims against far-reaching anti-humanitarian crimes committed by Japan are part of the property rights guaranteed by the Constitution. And the payment of claims would imply post-facto recovery of dignity, value and personal liberty of those whose rights had been ruthlessly and constantly violated. In this sense, preventing the settlement of claims would not just be confined to the issue of constitutional property rights but would also directly concern the violation of dignity and value as human beings. Hence the resulting infringement of fundamental rights would be of great implication. At the same time, the victims of comfort women are all aged, which means, if there is an additional delay in time, it may be permanently impossible to do justice to history and recover the victims' dignity and value as human beings through settlement of claims. Therefore, considering that the victims' claims serve as an urgent remedy for violation of fundamental rights and given the background and circumstances of signing the Agreement as well as domestic and foreign developments, it is not so unlikely that this case may result in an effective judicial remedy.

With all the aforementioned factors taken into account, pursuing dispute settlement under Article 3 of the Agreement would be the only rightful exercise of power consistent with the state's responsibility to protect

fundamental rights of citizens. As the failure of the respondent to intervene has resulted in serious violation of fundamental rights, the omission to act is in violation of the Constitution.

Supplementary Opinion of Justice Cho, Dae-Hyun

In addition to the court opinion, the Republic of Korea has to declare that it will fully compensate for the damages for which the complainants no longer have claims against Japan under the Agreement.

Dissenting Opinion of Justice Lee, Kang-Kook, Justice Min, Hyeong-Ki, Justice Lee, Dong-Heub

In order for a constitutional complaint challenging the omission of an administrative authority to be justiciable, the Constitution should serve as a source from which to derive the public power's duty to act. The duty to take action is derived from three sources, namely, the text of the Constitution, interpretation of the Constitution, and provisions of statutes.

Firstly, the state's duty to guarantee the fundamental rights of citizens as provided in Article 10 of the Constitution and the state's duty to protect citizens residing abroad as prescribed by Article 2 Section 2 of the Constitution, as well as the Preamble of the Constitution, proclaim nothing more than the general and abstract duty of the state toward the public or the basic order of national values, and therefore the provisions in themselves do not stipulate a duty of concrete action toward the citizens. And this is also an established precedent of the Court.

Second, the Agreement simply enforces the obligations between Japan and the Republic of Korea as parties to the pact, and so the "Korean government's duty to act on behalf of the complainants" cannot be derived from Article 3 of the Agreement, which does not stipulate any "mandatory" actions either. Furthermore, the Court has set a precedent in its prior case that the settlement through diplomatic channels and referral to arbitration provided in the Agreement falls within the scope of diplomatic discretion of the Korean government (98Hun-Ma206, Mar. 30, 2000), but the majority opinion of this case eventually leads to a decision contrary to the precedent.

The "settlement through diplomatic channels" as provided in Article 3 of the Agreement falls within the area of highly political actions where objective standards can rarely be applied to legal judgments on by whom, how, to what extent, and how far the diplomatic resolution is carried out. In this context, although such an area involving diplomatic resolution is subject to judicial review of the Court, it is to be admitted that judicial restraint is also required.

Indeed, it is all of our common and sincere hope that every possible state action is taken in light of the urgent need for remedy of fundamental rights of the complainants who had been mobilized as comfort women against their will by Japan and had their dignity and value completely stripped off. Yet, diplomatic settlement cannot be forced upon the respondent beyond the permissible boundary of the Constitution and laws and constitutional interpretation of jurisprudence thereof. This boundary is a constitutional limit that has to be observed by the Constitutional Court in accordance with the principle of separation of powers.

Parties

ComplainantLee, O-Soo et al.Legal representative: Attorney Cha, Ji-Hoon et al.

RespondentMinister of Foreign Affairs and TradeLegal representative: Yoon & Yang LLC's Attorney Kim, Eong-Sik et al.

Holding

It is unconstitutional that the respondent has failed to resolve, under Article 3 of the Agreement, the dispute over interpretation of whether the damage claims filed by the complainants, in the capacity of comfort women, against Japan have been extinguished by Article 2 Section 1 of the Agreement.

Reasoning

I. Overview of Case and Subject Matter of Review

A. Case Overview

1.The complainants are "victims known as comfort women" who were forced into sexual slavery by the Japanese military. The respondent is a government agency that carries out and supervises foreign and trade policies, engages in international relations, administers treaties and international agreements, protects and supports overseas Korean nationals, establishes policies for overseas Koreans, as well as studies and analyzes international affairs.

2.The Republic of Korea signed the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172, hereinafter "the Agreement") with Japan on June 22, 1965.

3.The complainants have stated that, as to whether the damage claims they hold against Japan as comfort women have been extinguished by Article 2 Section 1 of the Agreement, Japan refuses to provide them with compensation on grounds that the claims have expired by the aforementioned provision, while the Korean government does not believe that the claims issue has been settled by the Agreement, which represents a dispute between the Korean and Japanese governments over the interpretation of the Agreement. On July 5, 2006, the complainants filed this constitutional complaint challenging the constitutionality of the respondent's omission to act, arguing that the respondent is not fulfilling its duty to take action to resolve the interpretation dispute as stipulated by Article 3 of the Agreement.

B. Subject Matter of Review

In this case, the subject matter of review is whether the complainants' fundamental rights have been violated by the respondent, who failed to act under Article 3 of the Agreement in resolving the Korean-Japanese dispute over interpreting whether the complainants' damage claims as comfort women against Japan have been terminated by Article 2 Section 1 of the Agreement.

The text of the Agreement is as follows:

Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea (Treaty No. 172, signed on June 22, 1965, effective from Dec. 18, 1965)

Japan and the Republic of Korea,

Desiring to settle the problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and

Desiring to promote the economic cooperation between the two countries;

Have agreed as follows:

Article I

1. To the Republic of Korea Japan shall:

(a) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥108,000,000,000), in grants on a non-repayable basis within the period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year shall be limited to such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the said amount, the remainder shall be added to the amounts of the supplies for the

next and subsequent years. However, the ceiling on the amount of the supply for any one year can be raised by agreement between the Governments of the Contracting Parties.

(b) Extend long-term and low-interest loans up to such amount in yen as shall be equivalent to two hundred million United States dollars ($200,000,000) at present computed at seventy-two billion yen (¥72,000,000,000), which the Government of the Republic of Korea may request and which shall be used for the procurement by the Republic of Korea of the products of Japan and the services of the Japanese people necessary in implementing the projects to be determined in accordance with arrangements to be concluded under the provisions of paragraph 3 of the present Article, within the period of ten years from the date of the entry into force of the present Agreement. Such loans shall be extended by the Overseas Economic Cooperation Fund of Japan, and the Government of Japan shall take necessary measures in order that the said Fund will be able to secure the necessary funds for implementing the loans evenly each year.

The above-mentioned supply and loans should be such that will be conducive to the economic development of the Republic of Korea.

2.The Governments of the Contracting Parties shall establish, as an organ of consultation between the two Governments with powers to recommend on matters concerning the implementation of the provisions of the present Article, a Joint Committee composed of representatives of the two Governments.

3.The Governments of the Contracting Parties shall conclude necessary arrangements for the implementation of the provisions of the present Article.

Article II

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, is settled completely and finally.

2.The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):

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

(b)Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 19, 1945.

3.Subject to the provisions of paragraph 2, 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.

Article III

1.Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.

2.Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party

within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party.

3.If, within the period respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be designated by the government of a third country to be determined upon consultation between the governments so chosen.

4.The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.

Article IV

The present Agreement shall be ratified. The instruments of ratification shall be exchanged in Seoul as soon as possible. The present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

II. Arguments of the Parties

(Intentionally Omitted)

III. Background of the Case

The background and overall circumstances of this case will be reviewed first as a premise for judgment.

A.How the Agreement was Signed and the Process of Claim Settlement

1.The United States Army Military Government in Korea (USAMGIK), which was stationed in Korea after the nation's liberation from Japanese colonial rule, promulgated Edict No. 33 on December 6, 1945, which stipulates that former properties of Japan be reverted to the U.S. Military Government whether it be national or private, and subsequently the former properties of Japan were transferred to the Korean government by the "Initial Financial and Property Settlement between the Government of the United States of America and the Government of the Republic of Korea" that came into force immediately after the establishment of the government of the Republic of Korea on September 20, 1948.

2.Meanwhile, the San Francisco Peace Treaty signed between Japan and part of the Allied Powers on September 8, 1951 does not recognize Korea's claim of damages against Japan. Still, Article 4 (a) of the Treaty provides that the disposition of property and claims including debts between Japan and its nationals and the authorities presently administering the areas which no longer belong to Japan and the residents thereof shall be the subject of special arrangements between Japan and such authorities. At the same time, Article 4 (b) stipulates that Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the aforementioned areas.

3.In order to dispose of the property and claims including debts pursuant to Article 4 (a) of the aforementioned treaty, the talks for normalization between Korea and Japan began in full swing with the preliminary meeting of the 1st Korea-Japan Normalization Talks on October 21, 1951 and the main meeting on February 15, 1952. Following seven main meetings and subsequent meetings of preliminary talks, political talks and sub-committees, four side agreements - the Agreement, Agreement on Fisheries between the Republic of Korea and Japan, Agreement Between Japan and the Republic of Korea Concerning the Legal Status and Treatment of the People of the

Republic of Korea Residing in Japan, and Agreement concerning Cultural Assets and Cultural Cooperation between the Republic of Korea and Japan - were signed on June 22, 1965.

4.According to the "Annotated Translation on Claims" submitted by the respondent, the Korean government suggested eight provisions regarding its properties and claims (hereinafter the "eight provisions") at the 1st Korea-Japan Normalization Talks (Feb. 15-Apr. 25, 1952) as follows:

(1)Return the old books, art works, antiques, other national treasures, original copies of map, and 90 percent gold and silver transferred from Korea

(2)As of August 9, 1945, repay debts of the Japanese government against Chosun Government General

(3)Return the money transferred or wired since August 9, 1945

(4)As of August 9, 1945, return the properties in Japan of juridical persons which have headquarters or main offices stationed in Korea

(5)Repay the national bonds, public bonds, and banking notes of Korean juridical or natural persons purchased from the Japanese government and its people, receivable accounts of drafted Koreans, and other claims of Koreans

(6)Grant legal status to Korean juridical or natural persons' stocks or other types of securities issued by Japanese juridical persons

(7)Return the proceeds collected through the aforementioned properties and claims

(8)Begin the aforementioned return and settlement immediately upon conclusion of the Agreement within six months

5.However, the 1st Normalization Talks failed due to Japan's counter-argument of claiming its right against Korea, and no substantial talks on the claims issue took place until the 4th Korea-Japan Normalization Talks because of the difference in opinions over Dokdo and Peace Line issues, the controversial remarks of chief Japanese delegate in negotiations, Kubota Kanichiro, that "Japan's 35 year occupation of Korea was beneficial to the Korean people" plus the political situation of the two countries.

6.The practical talks on the eight provisions were finally held at the 5th Korea-Japan Normalization Talks (October 25, 1960-May 15, 1961), and Japan maintained that, regarding the first provision, the 90 percent gold and silver has been transferred through legal procedures and there are no legal grounds to be returned; on the second, third and fourth provisions, Korea has rights to claim only limited to those applicable after the promulgation of U.S. Military Government Edict **No. 33 on December 6, 1945; on the fifth provision, Japan was strongly** opposed to Korea's bringing up the issue of compensation for **individual damages, demanded thorough submission of evidence, namely,** the precise number of drafted men and the evidentiary materials thereof. As such, the Claims Committee of the 5th Korea-Japan Normalization Talks discussed from the first through fifth provisions out of the eight provisions before it was halted by the May 16 coup in 1961, but the two countries only confirmed their fundamental differences in perception and failed to bridge the gap.

7.As the 6th Korea-Japan Normalization Talks resumed on October 20, 1961, the two sides sought a political approach thinking that detailed talks over claims would only delay the settlement. At the Foreign Ministers' talks in March of 1962 following the talks between Korean President Park Chung Hee and then Japanese Prime Minister Hayato Ikeda on November 22, 1961, it was agreed that the two sides would submit informal proposals for Korea's demand in value and Japan's payable amount, respectively. As a result, the difference between the two sides was confirmed; Korea asked for 700 million U.S. dollars as repayment of claims, whereas Japan was willing to repay 74,000 U.S. dollars for claims and offer 200 million U.S. dollars in loans.

8.Against this background, Japan had initially proposed to raise the total amount of compensation considerably in the form of grants and loans for economic cooperation and, in exchange, to renounce the victims' claims, stating that repayment of claims requires strict establishment of matters of law and fact and should be limited to below south of the 38th parallel, which reduces the total value compensated and thus unacceptable by the Korean government. In response, Korea first proposed to carry out the compensation in two forms, pure repayment of claims and grants, in order to address the issue from a broader perspective instead of its initial position seeking all in claims repayment, but, retreating again from this position, proposed to address the issue just by specifying the total amount without labeling respective amounts for each category of the claims payment and non-payable grants in settling the claims.

9.Thereafter, then Central Intelligence Director Kim Jong Pil first met with then Japanese Prime Minister Hayato Ikeda and, subsequently, with Minister of Foreign Affairs Masayoshi Ohira, and at the 2nd talks with Foreign Minister Ohira on November 12, 1962, they reached a basic agreement on proposals to be submitted to both of the governments regarding the amount involved in the claims, terms and conditions of payment, etc. Following a more fine-tuning process, then Foreign Minister Lee Dong Won and then Japanese Foreign Minister Etsusaburo Shiina reached an understanding on the settlement of problem concerning property and claims and the economic cooperation between the two countries on the occasion of the 7th Korea-Japan talks on April 3, 1965 and, on June 22, 1965, signed the Agreement, which states that Japan shall provide a designated amount of grants and loans without any labels attached and that 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 is settled completely and finally.

10. On February 19, 1996, the Korean government enacted the "Act on Operation and Management of Claim Fund (repealed by Act No. 3613 on Dec. 31, 1982)" to provide legal grounds for civil compensation using the grants, but the beneficiaries were limited to the deceased among those who had been drafted against their will by Japan as well as those holding civil claims for private loans or bank deposits which had been discussed as such during the aforementioned talks. Thereafter, the "Act on Settlement of Civil Claims against Japan" was enacted on December 21, 1974 (repealed by Act No. 3614 on Dec. 31, 1982), and a total sum of 87.693 million won in compensation was provided from July 1, 1975 to June 30, 1977.

11.The comfort women issue was discussed neither at the Korea-Japan normalization talks aimed at signing the Agreement nor included in the eight provisions. It was not even specified in the list of beneficiaries of compensation through legislative measures after signing the Agreement.

B. Beginning and Development of the Comfort Women Issue

1. The issue of comfort women victims was raised in earnest by the launch of the Korean Council for the Women Drafted for Military Sexual Slavery by Japan in August 1991 and the press conference held by Kim, O-Soon (deceased on Dec. 1997).

2.The Japanese government totally denied responsibility and made a statement implying that it recognized the comfort women as "prostitutes" brought by a private trader who followed the military. But the Japanese government had no choice but to make a drastic change in their stance as then Professor Yoshimi Yoshiaki of Chuo University discovered six official evidentiary documents indicating the involvement of the Japanese military in the drafting of comfort women from the Japanese Defense Agency Library in January 1992.

3.Pushed by the emergence of victims, discovery of evidence, and public opinion, the Japanese government embarked on a fact-finding investigation and announced the results of the first investigation issued in July 1992

admitting its involvement in the comfort women issue but that there was no evidence of forced drafting. Then on August 4, 1993, Chief Cabinet Secretary Yohei Kono issued a statement, unveiling the second government investigation results as well as admitting to and apologizing for the involvement of the Japanese military and authorities in forced drafting and labor and thus committing a grave and critical violation of human rights.

4.The comfort stations were first installed as a preventive measure against frequent occurrence of rapes committed by Japanese soldiers

during the Shanghai Incident in 1932 that resulted in problems, such as local resistance and sexually transmitted diseases.

The Japanese military built a comfort station at an occupied area as it sent many troops to China for the Sino-Chinese War starting from July 1937, and the number of comfort stations grew after the Nanjing Massacre in December 1937. This act was taken partly to offer soldiers "mental solace" thus boosting their morale and alleviating discontent of soldiers prone to deserting a war that never seemed to end and also, in particular, to reduce the possibility of leaking military confidentiality by "employing" colonized women who cannot speak Japanese.

From 1941, the Japanese military created comfort stations in its occupied territories in Southeast Asian and the Pacific region as well during the Asia-Pacific War. The areas where comfort stations were located as confirmed by official documents are those invaded by Japan, including Josun, China, Hong Kong, Macao, and the Philippines. The number of comfort women is estimated at 80,000-100,000 or 200,000; 80 percent of them were Josun women, and the remainder were from the Philippines, China, Taiwan, and the Netherlands.

5.In response, the Korean government enacted the "Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule (Act No. 4565)" on June 11, 1993 and began providing support for living expenses to the comfort women victims, but the Japanese government maintained its position that compensation for comfort women victims had already been settled by the Agreement and no legal measures can be taken additionally. At the same time, the Japanese government revealed on August 31, 1994 that it may provide consolation money or settlement funds individually from a humanitarian perspective as a moral responsibility for damage of the comfort women's dignity and honor and seek ways such as the Fund for Women in Asia at a private, but not governmental level.

6.Judging that the Fund for Women in Asia is in essence the Japanese government's way of evading its responsibility, the comfort women victims and their support groups in Korea, Taiwan, etc. expressed their opposition early on to the idea of the fund as humanitarian charity instead of a justified compensation. The Korean government demanded the suspension of the Fund for Women in Asia from the Japanese government but was denied. Upon which the Korea government paid in lump sum a total of 43 million won, the amount originally intended by the fund, to the victims by appropriating the government budget and money raised in private, on the condition that no support would be received from the fund.

7.Meanwhile, the nine comfort women victims including Kim, O Soon filed a claim against Japan for compensation of the Pacific War victims on December 6, 1991, but the claim was finally dismissed at the Supreme Court on November 29, 2004. In the process, the appellate court Tokyo High Court ruled that the plaintiffs may have obtained the claims of damages occurring from the duty for safety consideration and unlawful acts but that all those claims correspond to the "property, rights and interests" of Article 2 Section 3 of the Agreement and thus have been extinguished. The victims partly won the lawsuit filed on December 25, 1992 seeking official apologies to comfort women who worked in Busan at the court of first instance, but the first instance decision was overturned

by the appellate court, and the Supreme Court also dismissed the appeal on March 25, 2003. Even the case filed on April 5, 1993 by Song, Shin-Do and other Koreans residing in Japan seeking apologies to comfort women from Japan was terminated by dismissal of the Supreme Court on March 28, 2003.

8.In response, once the relevant document was revealed by the judgment of February 13, 2004 ordering disclosure of documents of Korea-Japan talks related to the Agreement, the Korean government, following the decision of August 26, 2005 by the Joint Government- Private Committee co-chaired by the Prime Minister and to which the respondent is a member representing the government, announced its position that the Agreement was signed with the purpose of resolving the financial, civil debtor/creditor relationship between Korea and Japan based on Article 4 of the Treaty of San Francisco and that the

Japanese government has legal liability for "anti-humanitarian illegalities" involving state power such as the comfort women, which are not considered to have been resolved under the Agreement.

However, the Japanese government countered the resolution adopted by the U.S. House of Representatives and the 2008 working group report of a regular session of the U.N. Human Rights Council containing recommendations and queries of countries calling for the settlement of "comfort women" issue by arguing that the comfort women issue has been completely concluded through (1) the apology statement of then Chief Cabinet Secretary Kono Yohei, (2) settlement of legal issues under the Agreement, and (3) the Fund for Women in Asia.

9.The aforementioned actions and attitude of the Japanese government were accepted neither by the victims nor by the international community.

The U.N. Sub-Commission on Human Rights has steadily conducted research on the comfort women issue, and its first report titled "Coomaraswamy Report" on January 4, 1996 confirmed that human rights violation by the Japanese government of the comfort women who were forced into sexual slavery by the Japanese military during WWII was a clear violation of international law and proposed six-point recommendations for Japan including the compensation of damages at the national level, punishment of those responsible, disclosure of all materials under the custody of government, official written apology, and revision of textbooks, and decided to adopt the report at the 52nd session of the U.N. Human Rights Committee on April 15, 1996.

In addition, on August 12, 1998, the U.N. Sub-Committee on Prevention of Discrimination and Protection of Minorities announced and adopted a more detailed report submitted by Special Rapporteur Gay J. McDougall which supplements the Coomaraswamy Report and mainly asserts the Japanese government's legal liability for compensation and punishment of those responsible. The McDougall Report (1) clarified that the comfort women system was a form of sexual slavery and underscored its forceful nature characterizing it as a rape center or rape camp, (2) stressed the identification of war criminals while pursuing the punishment of those responsible, (3) called for active intervention from the U.N., such as the U.N. Secretary General being reported on the progress of the issue at least twice a year by the Japanese government and the U.N. High Commissioner for Refugees forming a panel in cooperation with the Japanese government for punishment of those accountable and appropriate compensation, and (4) emphasized the need for prompt and immediate compensation by the Japanese government considering the old age of the surviving victims.

10. As the "shift to the right" in Japan led by the Koizumi and Abe administrations triggered the movement toward removing the comfort women issue from textbooks and correcting the "Kono statement," countries around the world began responding firmly as stated below.

On July 30, 2007, the U.S. House of Representatives unanimously adopted a resolution on comfort women, the key points of which are that the government of Japan should: (1) formally acknowledge, apologize, and accept

historical responsibility for its Imperial Armed Force's coercion of young women into sexual slavery (comfort women) during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, (2) refute any claims that the sexual enslavement and trafficking of the comfort women never occurred, and (3) educate current and future generations about this crime while following the international community's recommendations with respect to the comfort women.

The House of Representatives of the Netherlands (Nov. 8, 2007), the House of Commons of the Parliament of Canada (November 28, 2007), and the Council of Europe (Dec. 13, 2007) consecutively adopted a resolution calling on the Japanese government to, among others, make a formal apology, accept historical, legal responsibility for the brutality of forcing over 200,000 comfort women into sexual slavery, provide compensation for victims, and educate current and future generations about the sexual enslavement.

11. The U.N. Human Rights Council, following a regular session on the human rights situation of Japan on June 12, 2008, officially adopted a working group report containing recommendations and queries of countries on the comfort women issue, while the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights published a report in Geneva on October 30, 2008 on a review of human rights in Japan, advising the Japanese government to acknowledge its legal liability toward comfort women and apologize in a manner acceptable by the majority of victims.

12. In Korea as well, the plenary session of the National Assembly, with 260 concurring votes out of 261, passed a resolution urging Japan to formally apologize and pay damages to comfort women victims to restore their dignity, and, starting from the Daegu Metropolitan Council in July 2009, a total of 46 municipal and metropolitan councils nationwide, as of March 2011, adopted a resolution calling for the settlement of the comfort women issue. On December 11, 2010, the Korean and Japanese Bar Associations also issued a joint statement which acknowledged that (1) inconsistent interpretation and response of the Korean and Japanese governments regarding the substance and scope of the provision of the Agreement which settles the issue completely and finally has disrupted legitimate remedy of rights and increased distrust of victims and that (2) the government and the National Diet of Japan have to introduce legislation settling the comfort women issue including apology and financial compensation. The aforementioned resolutions and statement urge the Japanese government to settle the issue through legislation when there is still one more victim surviving and the Korean government to take a more aggressive diplomatic policy.

IV. Review on Justiciability

A. Constitutional Complaint against the Omission to Act

The executive's omission to act can be challenged only when the governmental power in question neglects its duty derived specifically from the Constitution and thus those who had their basic rights violated are entitled to request an administrative action or exercise of governmental power (12-1 KCCR 393, 98Hun-Ma206, March 30, 2000).

The "governmental power's duty derived specifically from the Constitution" stated above comprehensively includes the duty to take action by government power (1) stipulated in the Constitution, (2) derived from interpreting the Constitution, and (3) specifically written in the statutes (16-2(B) KCCR 212, 219, 2003Hun-Ma898, Oct. 28, 2004).

B. Duty to Take Action by the Respondent

Since the constitutional complaint becomes non-justiciable if the governmental power is not obligated to act as stated above, it shall be reviewed whether the respondent has the aforementioned duty to take action.

The Agreement is a treaty signed and promulgated under the Constitution, and holds the same effect as domestic law under Article 5 Section 1 of the Constitution. Yet, Article 3 Section 1 of the Agreement states that "Any dispute

between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels, and Section 2 of the same Article stipulates that "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party."

According to the aforementioned provisions, in the event of a dispute between Korea and Japan over the interpretation of the Agreement, the government shall settle it primarily through diplomatic channels and then resort to arbitration. In this context, it will be reviewed whether such act of dispute settlement by the government corresponds to the "duty to take action by governmental power specifically written in the statutes" as stated above.

The complainants, who are "comfort women victims" forced into sexual slavery by the Japanese military during Japan's colonial period, filed a claim for damages against Japan. However, the government of Japan refuses to pay for damages while arguing that the damage claims of the complainants have been extinguished by the Agreement, whereas the Korean government maintains that the Agreement does not settle the issue and therefore the claims are still valid. And eventually, this has resulted in a dispute over the interpretation of the Agreement between Korea and Japan.

Article 10 of the Constitution provides that "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." The "human dignity" herein is a supreme constitutional value as well as a goal set forth by the state that is binding on all government institutions, which therefore indicates that the state is entrusted with the duty and task to realize human dignity. For this reason, human dignity is not only a "boundary of state power" associated with individuals' right to protection from the state, but also an objective of state power to protect people from a third party when their dignity is at stake.

Moreover, Article 2 Section 2 of the Constitution provides that "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act," and the Constitutional Court has previously held that "The protection that citizens residing abroad enjoy during their stay in their country of residence under Article 2 Section 2 of the Constitution that specifies the state's duty to protect expatriates refers to diplomatic protection offered by the state in their relationship with residing countries for their fair treatment in all areas guaranteed by treaties, international laws and regulations as well as statutes of their country of residence and support in legal, cultural, educational and all other areas specifically designated by law based on political consideration for expatriates (5-2 KCCR 646, 89Hun-Ma189, Dec. 23, 1993). By this holding, the Constitutional Court has already acknowledged that the state's duty to protect citizens residing abroad is derived from the Constitution.

Meanwhile, the Preamble of the Constitution specifies that "the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Therefore, the duty to restore human dignity and worth of the victims who suffered tragic lives for a long period by being forced into sexual slavery during Japan's colonial rule in which the state failed to fulfill its most basic duty to protect safety and life of the people is, although this happened before enactment of the Constitution, the most

fundamental duty that the incumbent government upholding the cause of the Provisional Korean Government holds toward the people.

In light of the aforementioned provisions of the Constitution and Article 3 of the Agreement, the respondent's duty to initiate dispute settlement procedures in accordance with Article 3 of the Agreement stems from the Constitution that calls for the state to assist and protect its people whose dignity and worth has been seriously impaired by organized, continued unlawful acts of Japan in settling damage claims. As the complainants' fundamental rights are likely to be violated seriously if the state fails to fulfill its duty, it should be interpreted that the respondent's duty to act comes from the Constitution as one that is specifically stipulated in the statute.

Although the Korean government did not directly infringe on the basic rights of comfort women victims, it is liable for causing current disruption in settling their damage claims against Japan and restoring their worth and dignity as human beings by not specifying the substance of claims and employing a broad expression of "all claims" in signing the Agreement. In that sense, it is hard to deny that the respondent has the duty to take specific action to clear the disruption.

C. Non-Exercise of Governmental Power

The respondent first opted for "diplomatic channels" to settle the dispute, not holding the government of Japan financially accountable and having the Korean government undertake the financial support and compensation for comfort women victims while raising the issue continuously with the international community by focusing on a more important and fundamental issue: calling on the Japanese government for thorough fact-finding, formal apology and reflection, and proper history education. The respondent argues that such an action is a legitimate exercise of diplomatic discretion broadly vested in the Korean government and thus obviously qualifies as a dispute settlement measure through "diplomatic channels" provided in Article 3 Section 1 of the Agreement. For this reason, the respondent contends that this does not constitute as non-exercise of governmental power.

However, non-exercise of governmental power in question in this case refers to the government's failure to fulfill its duty to take dispute settlement procedures in Article 3 of the Agreement to settle the dispute over the interpretation of the Agreement as to whether the comfort women victims' damage claims have been terminated by the Agreement, so the diplomatic action that ignored the victims' damage claims does not qualify as a the duty to act relevant in this case. In addition, from the perspective of restoring human worth and dignity of the complainants, Japan as the offender admitting its fault and taking legal responsibility thereof and the Korean government's provision of financial support as part of social security benefits to the victims are completely different issues, so it is not to be considered that the duty for action has been accomplished just because the Korean government is offering some livelihood support.

According to the respondent's arguments as well, the Korean government had, early on from the 1990s, decided not to claim financial damages from the Japanese government, expressed its position by replying to relevant groups that it "would not take actions against the Japanese government as it is highly likely to elevate to a destructive legal dispute," and stated several times that it would not take any action regarding the dispute over interpretation of the Agreement.

Meanwhile, the Korean government has declared as aforementioned that the comfort women issue is not considered to have been settled through the decision of August 26, 2005 made by the Joint Government-Private Committee. However, this hardly constitutes a settlement through diplomatic channels under Article 3, and even if it does, the settlement efforts should continue and the procedure of arbitration referral provided in Article 3 must be taken should there be no further way for a diplomatic resolution. Yet, the respondent has neither mentioned the

comfort women issue directly since 2008 nor has specific plans for settlement. Therefore, the respondent has, by any account, failed to fulfill its duty to take action.

D. Sub-Conclusion

Thus, the respondent did not take action although the duty to do so is derived from the Constitution and thereby has likely infringed on the fundamental rights of the complainants.

In this context, this case will be reviewed on the merits of whether the respondent's refusal or negligence to take action infringes on the complainants' fundamental rights and if it is therefore constitutional or not.

V. Review on Merits

A. Dispute over Interpretation of the Agreement

1.Article 2 Section 1 of the Agreement states that "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, is settled completely and finally." In this regard, Article 2 (g) of the Agreed Minutes states that the "completely and finally settled problem concerning property, rights and interests of the two Contracting Parties and their nationals and concerning claims between the Contracting Parties and their nationals in the aforementioned Article 2 Section 1 of the Agreement includes all claims within the scope of the eight provisions submitted by Korea at the 1st Korea-Japan Normalization Talks, and therefore it is confirmed that no claims can be made regarding the eight provisions."

2.In interpreting Article 2 Section 1 of the Agreement, the position of the Japanese executive and judiciary is, as reviewed above, that the damage claims of the Korean people including comfort women have all been comprehensively included in the Agreement and therefore renounced or the repayment thereof terminated. In contrast, the Korean government, through the decision of the Joint Government-Private Committee on August 26, 2005, has expressed its stance earlier that "unlawful acts against humanity" involving the Japanese government and other governmental powers such as the comfort women issue are not resolved by the Agreement and that the Japanese government is to be held legally responsible.

3.Even in the proceedings of this constitutional complaint, the respondent has repeatedly confirmed that there are differing views between the two countries since Japan believes that the comfort women victims' damage claims have been extinguished by the Agreement while the Korean government maintains that the comfort women's damage claims are different from those contained in the Agreement, and therefore these disparate views qualify as a "dispute" provided in Article 3 of the Agreement.

The respondent's argument of its supplementary documents submitted on June 19, 2009 following the oral argument of this case is also built up on the premise that there is a dispute over interpretation of the Agreement as it states that, "In deciding to opt for 'diplomatic channels' to settle the dispute, the Korean government's choice of ... out of several diplomatic options available amounts to a rightful exercise of discretion broadly granted to the government, which, as a matter of fact, is one of the dispute settlement measures through 'diplomatic channels' specified in Article 3 Section 1 of the Agreement."

4.In this sense, it is evident that the Korean and Japanese governments have dissenting views in interpretation as to whether the claims specified in Article 2 Section 1 of the Agreement involves the damage claim of comfort women, and that this conflicting interpretation constitutes a "dispute" defined in Article 3 of the Agreement.

B. Dispute Settlement Procedures

Article 3 Section 1 of the Agreement states that "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels," and that any dispute that fails to be settled under Article 2 Section 1 shall be referred for arbitration. In other words, these provisions foresaw the potential for interpretation disputes at the time of signing the agreement and therefore designated each contracting nation as the actor for settlement, stipulating the principles and procedures of dispute settlement.

Therefore, once the aforementioned dispute occurs, the respondent should, in principle, settle it firstly through diplomatic channels pursuant to relevant procedures under Article 3 of the Agreement and then, if this effort is exhausted, take the case to an arbitration board.

In this context, it will be reviewed below whether the respondent's failure to initiate the abovementioned dispute settle procedures has violated the complainants' fundamental rights and whether it is constitutional or not.

C.Whether Respondent's Omission to Act Violates Fundamental Rights

1. Distinguishing this Case from Precedent

In a previous case in which the government was accused of failing to refer to arbitration under Article 3 Section 2 of the Agreement (98Hun-Ma206, Mar. 30, 2000), the Constitutional Court held, "Whether it be viewed from the format or content of Article 3 of the Agreement or from the nature of diplomacy, the Korean government is considered to have a fair amount of leeway on whether to take a diplomatic channel or refer to arbitration. Therefore, it is hard to conclude that, just because the diplomatic talks between the two countries as the contracting parties have remained unsuccessful for a long period of time, the Korean government is absolutely obligated to refer to arbitration in its relationship with the complainants, who are Korean victims of forced drafting residing in Japan and their families; it is neither the case that the complainants have the right to call for arbitration referral from the government. Furthermore, even the state's duty to protect citizens residing abroad (Article 2 Section 2, Constitution) and the duty to confirm and guarantee the fundamental, inviolable rights of individuals (Article 10, Constitution) do not imply a concrete duty of the government to take concrete action to specifically refer to arbitration the dispute between Korea and Japan over the interpretation and implementation of the Agreement nor a right to claim such duty from the government."

The above decision concerns whether the respondent has the obligation to opt for "dispute settlement through referral to arbitration" specified in Article 3 Section 2 of the Agreement, and at issue was whether the respondent can set aside the primary option of diplomatic channels under Article 3 Section 2 of the Agreement and immediately invoke the duty to seek "dispute settlement through arbitration referral" in Article 3 Section 2 of the Agreement.

However, the issue in the instant case is whether the respondent is obligated to take the dispute settlement procedure under Article 3 Section 1 and 2 of the Agreement. In particular, given Article 3 Section 1 of the Agreement that stipulates settlement through a wide range of diplomatic channels instead of a specific method, the issue is whether, at the instance a Korean-Japanese dispute has occurred over interpretation of the Agreement, the respondent has the constitutional duty to settle it through diplomatic channels first and then proceed with referral to arbitration in case of failure of the former.

The point of this case is, therefore, not whether the respondent has the duty to adopt a specific measure among many ways to settle the dispute over interpretation of the Agreement, but whether it has the obligation to take diplomatic efforts, etc. under the aforementioned provision of the Agreement to do so. For this reason, this case differs from the abovementioned precedent.

2. Discretion of the Respondent

Diplomacy goes beyond the relationship between the state and its people in a nation that shares the same value and laws and includes the relationship between states in international environment composed of different values and laws. Therefore, it is undeniable that diplomacy is an area where broad discretion is vested in the government's policymaking that considers the situation and nature of the dispute, political landscape in and outside of the country, international laws, and common practice.

Yet, rights guaranteed under the Constitution are binding on all state powers, so administrative authority should also be exercised in a way that fundamental rights are guaranteed effectively in accordance with the duty to protect fundamental rights, and the domain of diplomacy cannot be completely excluded from those subject to judicial review, either. For diplomatic actions associated with people's fundamental rights, if a failure to fulfill the duty to take concrete action as reviewed earlier is decided as a clear violation of the constitutional duty to protect fundamental rights, it should be declared as an act of fundamental rights infringement and thus unconstitutional. Ultimately, the discretion of the respondent should inevitably be restricted to the reasonable scope consistent with the binding force of fundamental rights on government institutions, taking into account factors such as the gravity of the violated fundamental rights, urgency of the risk of fundamental rights violation, possibility of providing a legal remedy, and consistency with national interests.

3. Whether Omission to Act Infringes on Fundamental Rights

(A) Significance of the Infringed Fundamental Rights

The damage done to comfort women is unprecedented and unique, as it stems from forced mobilization and sexual slavery by the Japanese government and military.

The particularity of comfort women has been affirmed not only by the international community but also by the Japanese courts. The report of a non-governmental organization named International Commission of Jurists released on September 2, 1994 and the "Coomaraswamy Report" of the U.N. Sub-Commission on Human Rights published on February 6, 1996 defined it as "sexual slavery by the military." The report of August 12, 1998 submitted by Special Rapporteur Gay J. McDougall of the U.N. Sub-Committee on Prevention of Discrimination and Protection of Minorities concluded that the act of coercing sexual slavery amounts to a crime against humanity.

The resolution adopted by the U.S. House of Representatives in July 2007 also described Japanese military's sexual slavery as "forced military prostitution by the government of Japan, considered unprecedented in its cruelty and magnitude" and "one of the largest cases of human trafficking in the 20th century." Furthermore, in its ruling on April 27, 1998, the Shimonoseki Branch of the Yamaguchi District Court admitted to the liability of legislative inaction in the comfort women issue and ordered to pay compensation, stating that it is a "clear case of sexual and ethnic discrimination, fundamental violation of the dignity of women, and undermining of national pride."

The comfort women victims' right to claim damages from the government of Japan for its extensive anti-humanitarian crime is not just part of the property rights enshrined under the Constitution, but also implies the post-facto restoration of dignity and value and personal liberty that has been ruthlessly and continuously violated. Therefore, blocking the repayment of damage claims is not just confined to a constitutional property issue but is also directly associated with the infringement of fundamental dignity and value of human beings (20-2(A) KCCR 91, 100-101, 2004Hun-Ba81, July 31, 2008).

(B)Urgency of a Legal Remedy for Violation of Rights

In the three lawsuits filed with the Japanese courts since 1991, the comfort women victims lost their case, one of the reasons being that the damage claims of comfort women victims have been extinguished by the Agreement.

It has now become virtually impossible to resort to judicial remedies from Japan's courts or expect voluntary apology and remedies from the Japanese government. It is already over 60 years since the end of WWII when comfort women were forced into sexual slavery for the Japanese Military, and more than 20 years since the victims brought lawsuits against Japan.

As of March 13, 2006, 125 comfort women remained alive out of 225 subjected to the Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule, but the number of death increased even during the hearings of the complaint in this case, just leaving 75 survivors of comfort women victims registered with the government as of March 2011. This case originally started with 109 complainants, but 45 died while the case was pending, which left only 64 complainants. Since even those alive are aged, further delay in the court proceedings may make it permanently impossible to bring justice to history and restore their dignity and value through repayment of damage claims.

(C) Possibility of a Legal Remedy

The respondent argues that, given the uncertainty of the outcome after referring the issue to arbitration, the Korean government decided not to claim financial damages from Japan and instead to provide, by itself, the victims with financial assistance and compensation.

Even if the infringed rights are significant and there is an urgent risk of violation, it is difficult to impose the duty to take action on the respondent if there is absolutely no chance of providing a legal remedy. However, the duty of action is required not only when a legal remedy is definitely warranted, but also when the possibility of obtaining one exists. In this case, if the victims are willing to take the chance of finally having their claim for damages against the Japanese government denied, the respondent should fully consider the intent of the victims.

Article 19 of the Draft Articles on Diplomatic Protection adopted by the UN International Law Commission and submitted to the General Assembly in 2006 sets forth as a recommendation that a state entitled to exercise diplomatic protection should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred and take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought.

In this case, as the complainants are filing a complaint to seek the respondent's exercise of duty to take action, their intent as victims is clear. Moreover, taking into account the background of signing the Agreement and the domestic, foreign views appalled by the unprecedented violation of women's rights calling for Japan's admission of fact, apology, and compensation, the possibility of obtaining compensation from the Japanese government in case the respondent takes a dispute settlement procedure under Article 3 of the Agreement should not be foreclosed.

(D) Consistency with Critical National Interests

The respondent argues that it is difficult to undertake the duty to take concrete action demanded by the complainants, stating that taking steps for dispute settlement under Article 3 of the Agreement and claiming financial compensation from the Japanese government may cause a destructive legal dispute or strained diplomatic relations. However, even if the nature of diplomatic actions that require strategic choices based on understanding of international affairs is taken into account, it is nevertheless hard to conclude that an extremely unclear and abstract reason such as the possibility of a "destructive dispute" or "strained diplomatic relations" qualify as pertinent reasons for

disregarding legal remedies for the complainants facing serious risks of basic rights violation. It is neither a national interest to be considered seriously.

Instead, it would be more constructive to the future of a sincere Korean-Japanese relationship and consistent with truly major national interest to call on the Japanese government to take on its legal responsibility toward the victims by making efforts to share recognition of historical facts, thereby deepening mutual understanding and trust between the two countries and their peoples, and to prevent similar tragedies by taking this as a lesson learned.

(E) Sub-Conclusion

The respondent's failure to take action in this case violates the significant fundamental rights of the complainants enshrined in the Constitution.

D. Sub-Conclusion

According to Article 10, Article 2 Section 2, and Preamble of the Constitution and Article 3 of the Agreement, the respondent's duty to take steps for dispute settlement under Article 3 of the Agreement is derived from the Constitution and specifically stipulated in the statutes. Also, widely considering the possibility of serious violation of fundamental rights such as dignity and value as human beings and property rights, as well as the urgency and possibility of remedy, the respondent does not have the discretion to not take action and cannot be deemed to have fulfilled its duty of action to take dispute settlement procedures under Article 3 of the Agreement.

In conclusion, such inaction of the respondent violates the Constitution and thus the fundamental rights of the complainants.

VI. Conclusion

Therefore, the instant constitutional complaint has merits and is thus upheld. All Justices joined this opinion except for the concurring opinion of Justice Cho, Dae-Hyun (Part VII) and dissenting opinions of Justices Lee, Kang-Kook, Min, Hyeong-Ki, and Lee, Dong-Heub (Part VIII).

VII. Concurring Opinion of Justice Cho, Dae-Hyun

The complainants are victims known as comfort women who were forced into sexual slavery by the Japanese military and are entitled to damage claims, and they argue that exercising their damage claims has become difficult due to the Agreement. In this case, the Constitutional Court cannot deny a constitutional complaint filed by the complainants arguing that their claims have been infringed upon with the rationale that the viability and scope of damage claims has not been determined in procedures of ordinary courts.

It is the duty of the state to confirm and guarantee the comfort women's right to a damage claim against Japan as fundamental human rights of individuals (latter part of Article 10, Constitution). Nevertheless, the Korean government agreed in the Agreement to receive the total value equivalent to three hundred million U.S. dollars in grants on a non-repayable basis and to confirm that the problem concerning claims between the two countries and their nationals has been settled completely and finally and that no contention shall be made with respect to any such claims.

And the Japanese courts state that the complainants are not entitled to claim damages against the government of Japan because of the said Agreement.

People are divided as to whether the complainants' damage claims

against Japan have been extinguished by the Agreement. If the Agreement does terminate the damage claims, it happens that the state, which is obligated to guarantee the property rights of the complainants, has signed an agreement which strips the complainants of their property rights. Even if the Agreement does not nullify the right to damages, the complainants are deterred from exercising their right to claim damages because of the Agreement.

Therefore, it is duly considered that the Korean government has the duty to initiate diplomatic talks or arbitration procedures with Japan in accordance with Article 3 of the Agreement with the purpose of addressing the unconstitutional interference of the Agreement with the complainants' exercise of right to claim damages against Japan.

Furthermore, it may be viewed that the Agreement is in violation of the fundamental rights of the complainants as it hinders the exercise of the complainants' right to claim damages, but it is hard to conclude that the Agreement violates Article 37 Section 2 of the Constitution if we interpret it so that the Korean government received three hundred million U.S. dollars from the Japanese government to repay altogether the Korean people's claims against Japan during the Japanese colonial rule. Yet, despite the possibility of this understanding, the Korean government is still not free from its duty to compensate for the damages of its people who have lost their right to claim damages owing to the Agreement ordering Japan to supply three hundred million U.S. dollars in non-payable grants.

The Korean government enacted the "Act on Operation and Management of Claim Fund" on February 19, 1966 following its receipt of three hundred million U.S. dollars from Japan in non-payable grants, but the beneficiaries excluded comfort women such as the complainants and were limited to the deceased victims who had been drafted against their will by Japan. The government enacted the "Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule," based on which it provided comfort women with support for living expenses in lump sum and on a monthly basis, as well as priority rental of housing, living allowance, medical aid, and nursing aid, but this hardly qualifies as a fully satisfactory compensation for the damage claims of the complainants.

Therefore, the Korean government not only has the duty to resolve the unconstitutionality of the Agreement by taking diplomatic or arbitration procedures against Japan pursuant to Article 3 of the Agreement, but also has to declare its responsibility to fully repay the damages caused by the Agreement by preventing the complainants from exercising their right to claim damages.

Moreover, it is barely possible that the complainants' disrupted exercise of right to claim damages against Japan will be resolved through diplomatic talks or arbitration measures, which are rather likely to result in vain hope and frustration, so it should be further emphasized that the Korean government is obligated to fully compensate for the complainants' claims against Japan. Since the complainants are all aged, it is all the more necessary that the state's compensation measures take place in a prompt manner.

VIII. Dissenting Opinion of Justices Lee, Kang-Kook, Min, Hyeong-Ki, and Lee, Dong-Heub

Unlike the majority opinion, we believe that the respondent does not necessarily have the duty toward the complainants to proceed with dispute settlement measures in Article 3 of the Agreement even by our written provisions of the Constitution or any constitutional jurisprudence, and therefore this constitutional complaint filed by the complainants is non-justiciable for the reasoning below.

A. Pursuant to Article 68 Section 1 of the Constitutional Court Act, non-exercise as well as exercise of governmental power can be subjected to constitutional complaints, but only those whose rights have been violated by such inaction by the government are entitled to file a constitutional complaint. For this reason, constitutional complaints against the omission to act by administrative power shall be limited to cases where the government neglects its duty specifically stipulated in the Constitution and therefore those entitled to the rights can call for administrative action or exercise of government power (3 KCCR 505, 513, 89Hun-Ma163, September 16, 1991; 12-1 KCCR 393, 401 KCCR 98Hun-Ma206, March 30, 2000).

Additionally, it is also the Court's established precedent that the "duty specifically stipulated in the Constitution" implies all three types of cases, namely, when the duty to take action is written in the Constitution, or derived from the Constitution through interpretation, or specifically stipulated in statutes (16-2(B) KCCR 212, 219).

However, it is to be noted that the governmental power's duty to take concrete action stipulated in the Constitution, or derived from interpretation of the Constitution, or prescribed by statutes should be directed "toward the people entitled to basic rights." Only the "individual whose constitutional right has been violated by the governmental power's neglect of duty despite the individual's right to call for administrative action or exercise of governmental power" will be able to file a constitutional complaint against the omission to act by the administrative power in question.

The majority opinion reasons that, in consideration of Article 10, Article 2 Section 2 of the Constitution, the portion that states "the people of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919" in the Preamble of the Constitution, and Article 3 of the Agreement, the duty of the respondent to take action in this case is "derived from the Constitution and specifically stipulated in the statute" and that the duty to take concrete action borne by the respondent is to "take dispute settlement procedures pursuant to Article 3 of the Constitution." It will be reviewed hereafter whether this interpretation is appropriate.

B.First, the texts and interpretation of Article 10, Article 2 Section 2, and Preamble of the Constitution do not elicit the "duty to take concrete action derived from the Constitution."

Some provisions of the Constitution stipulating the legal relationship of the state and the people set forth fundamental rights and other rights in concrete and clear terms, but there are others stated in open, abstract, and declaratory language, so that the binding force of rights and duties between the state and the people takes effect only via constitutional interpretation or specific statutes. However, the state's duty to guarantee the fundamental rights of citizens as provided in Article 10 of the Constitution and the state's duty to protect citizens residing abroad as prescribed by Article 2 Section 2 of the Constitution fall under the latter category, which means that they merely stipulate the general and abstract duty of the state to guarantee the basic rights of the people and to protect them, and that the provision alone does not derive from itself the state's duty to take any specific action for the people. The same applies to the portion of the Preamble of the Constitution that states "the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Although the Preamble of the Constitution sets forth national tasks and guiding ideas and principles to establish state order, as well as embodying the national consensus on the nation's basic order of values, thus acting as the supreme norm that sets the standard for statutory interpretation and legislation, the state's duty to take concrete action for the people cannot be derived from the text of the Preamble itself.

It is also the Constitutional Court's precedent that the duty of the state to take concrete action and the people's right to call for such action from the state is not derived from Article 10, Article 2 Section 2, and Preamble of the Constitution (On Article 10, Article 2 Section 2 of the Constitution: 12-1 KCCR 393, 402-403, 98Hun-Ma206, March 30, 2000; 10-1 KCCR 705, 710, 97Hun-Ma282, May 28, 1998, and on Preamble of the Constitution: 17-1 KCCR 1016, 1020-1021, 2004Hun-Ma859, June 30, 2005).

Therefore, however significant and urgent the state of the complainants' fundamental rights violation may be, it is impossible to derive from Article 10, Article 2 Section 2, and Preamble of the Constitution alone what the state should do. Ultimately, there should be a "statute that lays down a duty of concrete action" as a medium in order to recognize the state's duty to take concrete action for the complainants.

C.Next, it will be reviewed whether the provision on dispute settlement procedures prescribed by Article 3 of the Agreement qualifies as a case in which a "statute lays down a duty of concrete action" and thus "the duty of action can be derived from the Constitution."

1.First, "the concrete action laid down in statutes" should be interpreted as a case where the statute stipulates that "the state is obliged to take a specific action for the people." This is because, filing of a constitutional complaint against an administrative power's omission to act is limited to cases where the public power concerned neglects its duty even if an individual entitled to fundamental rights can request for the exercise of administrative action or governmental power under the statute stipulating the duty of concrete action (12-1 KCCR 393, 98Hun-Ma206, March, 30, 2000), and the statute stipulating this duty to take concrete action should "grant the entitled people the right to demand the state to exercise a duty of concrete action." This is a premise also required, as a matter of course, to verify the possibility of basic rights violation or cause and effect relations in a constitutional complaint filed by those who had their fundamental rights infringed on by the state's failure to take concrete action as mentioned above.

Basically, if laws enacted by the National Assembly or administrative rules and regulations binding on the people contain portions granting specific rights, this is a case where "the duty to take action is specifically stipulated in statutes." Almost all of the constitutional complaints against the omission to act by the administrative power concerned issues of whether the state's specific duty of action toward the complainant is stipulated in the statute and whether there is an omission to take action, and it was held that the state had the duty of action when, the relevant statute spells out the duty of action as either a statutory obligation binding on administrative powers or a discretionary action where non-exercise of governmental power has resulted in such a serious violation of the complainant's fundamental rights, that the duty of action should be interpreted as a statutory obligation (10-2 KCCR 283, 96Hun-Ma246, July 16, 1998 and 16-1 KCCR 699, 2003Hun-Ma851, May 27, 2004 for the former, 7-2 KCCR 169, 94Hun-Ma136, July 21, 1995 for the latter). On the other hand, if the duty of action was prescribed in the statute as a pure discretionary act by the administrative power, it was ruled that the state did not have the duty to take specific action for the complainant (17-1 KCCR, 2004Hun-Ma859, June 30, 2005).

However, even if treaties or other types of diplomatic documents like the Agreement stipulate the contents and procedures as to how to settle disputes between the contracting parties, this is basically premised on their mutual accountability between the two parties, so a certain specification of a duty merely allows a contracting party to demand the duty from the other party. For this reason, in order for an individual to be able to call on the state to "fulfill the rights and duties a nation may hold against the other country," it should be specifically stated in the treaty concerned that the people have the right to call on the country to take such actions. As long as there is no such explicit phrase in the treaty, the fact that the treaty deals with the legal relationship of the people alone does not give rise to the right to call on the government to take procedural measures provided in the treaty.

The Agreement concerns "property, rights and interests of the two Contracting Parties and their nationals as well as claims between the Contracting Parties and their nationals (Article 2 Section 1 of the Agreement), which is spelt out in general, abstract terms and therefore whether or not Japan's compensation for comfort women victims such as the complainants in this case falls under the claims mentioned in the Agreement is not clear. Consequently, it is likely that the difference in positions between the two countries has led to a "dispute" over interpretation and implementation of the Agreement on the legal relationship of the complainants. Nevertheless, unless the Agreement gives the nationals concerned the right to call for dispute settlement procedures pursuant to Article 3 of the Agreement, the fact that the complainants' fundamental rights are involved alone does not necessarily provide

them with a concrete right to call on their government to implement the dispute settlement procedures set forth in the Agreement.

Therefore, the Agreement cannot derive from itself the state's duty to take concrete action as stated in the majority opinion because nowhere in the Agreement is it provided that the nationals concerned have the right to demand their government to take the dispute settlement procedure of Article 3 nor do Article 10, Article 2 Section 2, and Preamble of the Constitution provide grounds for such duty of action, so, eventually, not even all of the Agreement and the aforementioned constitutional provisions combined can infer from them the state's duty to take concrete action toward the complainants of this case.

2.Furthermore, given the textual content of Article 3 of the Agreement, the duty to take diplomatic actions pursuant to Article 3 to settle the dispute over interpretation of the Agreement is neither considered a "duty" to take "concrete" action.

(A)Article 3 of the Agreement provides that, "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels (Section 1)," and "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of ... within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute (Section 2)." Yet, nowhere in the provision is it stated that a dispute "must" be settled through diplomatic channels or a deadlock in diplomatic settlement "must" be resolved through referral for arbitration. The phrase "shall be settled through diplomatic channels" is interpreted as no more than a diplomatic pledge between the two contracting parties to settle disputes diplomatically. The portion "shall be referred for decision to an arbitration board" becomes effective "upon receipt of a note requesting arbitration of the dispute," and nowhere can we find here the grounds to interpret that referral for

arbitration is "compulsory." In conclusion, it cannot be derived from anywhere in Article 3 Section 1 and 2 that it is "compulsory" to take a diplomatic procedure for settlement or refer the decision to an arbitration board.

However, the majority opinion states, without any mentioning of the aforementioned doubts on interpretation, that "it is impossible to perceive that the respondent has the discretion not to fulfill such duty of action" solely based on the significance of the complainants' fundamental rights and urgency of remedies for violation of their rights. For this reason, it is indeed a huge logical jump to have interpreted a non-compulsory phrase of an international treaty as a "compulsory" provision that can enforce the respondent, a government body of one contracting party, to implement an act provided in the treaty only on grounds that the affected people are in a desperate situation.

Instead, it would be more reasonable to define the act of taking dispute settlement procedures provided in Article 3 of the Agreement as a "discretionary act" of the two contracting parties given the format and content of the provision. In a constitutional complaint case where the Korean victims of forced drafting residing in Japan argued that the state has the duty to take concrete action of referring to arbitration the dispute over damage claims, the Constitutional Court has also interpreted that the duty of action falls under the discretion of the government with the reasoning below.

"Article 3 of the Agreement stipulates that disputes between the two countries over the interpretation and implementation of the Agreement shall be, first of all, settled through diplomatic channels and those failed to be settled through this procedure shall be referred for decision to an arbitration board, and "whether viewed in terms of the format and content of the provision or nature of diplomatic issues, it is inferred that the government is given a great deal of discretion on whether to take diplomatic channels or arbitration referral to settle the aforementioned

disputes." Therefore, it is difficult to conclude that the government is, no matter what, obligated to refer for arbitration in its relationship with the complainants who are Korean victims of forcible
drafting residing in Japan just because the diplomatic talks between the two countries have been stalemated for a long period; by the same token, it is hard to decide that the complainants are given the right to urge the government to refer for arbitration (12-1 KCCR 393, 402, 98Hun-Ma206, March 30, 2000)."

The majority opinion states that the above precedent differs from this case in that, because the constitutional complaint of the precedent was filed on grounds that the government had put aside the duty of diplomatic settlement in Article 3 Section 1 of the Agreement and failed to refer the dispute for arbitration as provided in Article 3 Section 2 of the Agreement, this case may arrive at a different conclusion as its key issue is the dispute settlement procedure in Article 3 of the Agreement. Yet, this view comes from a misunderstanding of the precedent. It would be more pertinent to perceive that the main basis for not recognizing the duty to take concrete action lies in the reasoning, as reviewed earlier, that both the "diplomatic settlement" or "referral for arbitration" in Article 3 of the Agreement are not "compulsory" but a matter of diplomatic "discretion" of the Korean government.

(B)Moreover, the "diplomatic channels" and "referral for arbitration" specified in Article 3 of the Agreement may be somewhat binding in nature, but this does not necessarily imply a "concrete" action, either.

The "duty to settle through diplomatic channels" is nothing more than general, abstract obligations of the state such as the duties to guarantee fundamental rights, protect nationals residing abroad, pursue the inheritance and development of traditional and national culture, promote welfare of the physically disabled, etc., and protect public health. A general, abstract duty is not a "concrete" duty of action in itself and, although specified in the Constitution, it is not automatically translated into a "concrete" duty of action sought by the people from the state. When the Constitution, which governs the normative relationship between the state and its people as a founding norm, cannot serve as the basis to call on the state to exercise its duty, it cannot be interpreted that a mere stipulation in the lower norm of "treaty" is translated into a duty of "concrete" action that can be requested to the state by the people, who are not even direct parties to the treaty.

Furthermore, it is difficult to secure an objective review standard to decide on the responsible party or method, progress, and conclusion of exercising the "duty of diplomatic settlement," which belongs to an area of highly political actions, non-exercise of which is difficult to confirm. Therefore, although the duty of diplomatic settlement is subjected to judicial review by the Constitutional Court, judicial restraint under the principle of separation of powers is required. In this case alone, when seriousness of the comfort women issue and the subtle diplomatic relations between Korea and Japan that need to be continued nonetheless are taken into account, there is no clear standard to decide whether such duty of diplomatic settlement has been fulfilled or not, such as on how much diplomatic effort should suffice, whether the diplomatic efforts that started in the beginning but has stopped now or efforts unsatisfactory to the complainants over the past 40 years since signing of the Agreement do not suffice, and when the duty of arbitration referral in Article 2 takes effect. It is at issue whether the "diplomatic duty" that involves all these elements could be considered as a "concrete" duty of action that can people can demand from the state. It is all the more problematic in that if the Constitutional Court imposes the "duty of diplomatic effort" using vague terms on the government merely based on grounds that it is specified in the Agreement without questioning the specifics of duty fulfillment, this runs the risk of violating the principle of separation of powers vested by the Constitution in the executive that holds jurisdiction in policy judgment and formulation on political, diplomatic actions and its execution.

D. Sub-Conclusion

Because the duty to take concrete action is not derived from Article 10, Article 2 Section 2 of the Constitution, a portion of the Preamble of the Constitution, and Article 3 of the Agreement, the instant constitutional complaint, in which the complainants argue that their fundamental rights have been violated by the respondent's failure to proceed to dispute settlement specified in Article 3 of the Agreement, should be dismissed for non-justiciability.

Given the desperateness of the complainants who, after being mobilized for sexual slavery by the Japanese military, were deprived of their life as decent human beings but were not even given apologies from Japan, any Korean national cannot but relate to them, and it is our desperate hope that the government does its utmost to resolve this at the state level. However, the Constitutional Court has to basically judge by the Constitution and laws, so it cannot go beyond the borders of the Constitution and laws as well as constitutional jurisprudence however significant or desperate the situation of direct parties. If legal remedies to address the significance of basic rights protection and urgency of the complainants in this case are not found from statutes or other constitutional jurisprudence, the issue of the complainants' legal status will eventually have to be entrusted to political power, and the Constitutional Court cannot force the respondent to push the bounds of the Constitution, law, and constitutional interpretation either. This is the constitutional boundary that the Constitutional Court has to adhere to under the principle of separation of powers.

Justice Lee, Kang-Kook (Presiding Justice), Cho, Dae-Hyun, Kim, Jong-Dae, Min, Hyeong-Ki, Lee, Dong-Heub, Mok, Young-Joon, Song, Doo-Hwan, Park, Han-Chul, Lee, Jung-Mi