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Foreign Policy Practices and International Law Constraints in Korea

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1. Introduction

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Foreign Policy is a subject that mystifies even the most knowledgeable experts. The role of international law in foreign policy is even more puzzling. Korea’s foreign policy is no exception, and the relatively short history of its modern foreign policy in a political environment composed of neighboring superpowers raises the question of to what extent its foreign policy has been based on various aspects of international law.

Nonetheless, this discussion has particularly important implications for Korea observers because it can lead to a better understanding of Korea’s increasing role in the international legal community and forecast the country’s future foreign policy under the constraints of international law. Such a discussion should begin with the initial encounter between international law and Korean diplomacy.

2. The Initial Encounter Between International Law and Korean Diplomacy - The Concept of a “Common Law of All Nations”

Approximately 130 years ago, Korea opened its doors to the outside world for the first time in its long history and encountered the concept of international law, which is based on sovereign equality. Leaders in the nineteenth-century Joseon Dynasty, including pragmatic scholars and politicians called “Shilhak-pa,” realized that Joseon should be integrated into the international legal community if it wanted to establish equal relationships with Western

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2 In 1876, Korea concluded a friendship, commerce and navigation treaty with Japan under the Japanese military pressure, which officially opened its doors to Japanese traders. See e.g. Lee Yeehwa, “A Story of Korean History - Superpowers’ Knocking the Door of Korea” (Seoul: Hangil-Sa, December 2003).
countries. This was a condition more or less forced upon Joseon by the superpowers of the so-called civilized world. After having lived under an international system in East Asia substantially different from the modern system of sovereign states based on the Treaty of Westphalia, Korea decided to make the utmost effort to assimilate itself to this novel concept of international law—a common law of all nations—and faithfully observe international law as introduced to Korea at that time.

Japan’s invasion and occupation of Korea in the early twentieth century strengthened the Korean people’s belief that the international rule of law must be observed by nations in the pursuit of foreign policy goals because this logic was the only tool with which it could protest against Japan’s illegal invasion. The primary purpose of international law is to maintain order and legal stability in the international community, and observing established rules of law is an essential element in such efforts. From the perspective of most Koreans, Japan’s invasion policy involved policy instruments such as coercion, assassination, and bribery, and this policy was officially implemented between 1895 and 1910, during which a series of

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3 For the prevailing ideas and thoughts of Shilhak-pa scholars, see e.g. Lee Donghwan, “Thoughts and Literature in the Shilhak Period of Korea” (Seoul: Jisik-Sanup-Sa, May 2006); Park Ji-Won, “Yolha ilgee”, as translated by Kim Mun-Soo (Seoul: Doteul-Saegim, March 2008).

4 For the introduction of the concept of a “common law of all nations” into Korea and its implications, see Kim Saemin, “Korean Modern History and the Common Law of All Nations” (Seoul: Kyungin-Munhwasa, April 2002).

5 Japan fully colonized the Korean Peninsula in 1910 as a result of a series of strategic efforts including the conclusion of the Eulsa Protection Treaty in 1905 by means of coercion and bribery. Earlier, Japanese assassins assassinated the queen of Korea who had been strongly opposed to Japanese occupation policies toward Korea. See e.g. Kwon Oki, “Korea and Japan”, as translated by Lee Hyukjae (Seoul: Saemter-Sa, February 2005).
protection treaties including the 1905 Eulsa Protection Treaty took effect. The prevailing view in Korea was—and still is—that these treaties were pseudo treaties invalid under international law.

This experience led Korea to accept international law as something static and natural and as something given \textit{a priori}, like the concept in the Confucian philosophy of the Way of Heaven. In fact, this Confucian concept was used by many Koreans to understand international law in the nineteenth century and the early twentieth century. As a result, many Koreans came to understand international law as a static body of rules based on norms originating from reason, not from the practice of states. This approach had considerable influence on Korea's basic perception of international law during the country's modernization period.

3. Pragmatic Diplomacy and Bilateral Treaties

Since the end of the Second World War and the emancipation of the Korean Peninsula from the Japanese occupation, Korea had opportunities to formulate its foreign policy based on the normative perception of international law. Because national security and stability on the Korean Peninsula was an urgent task of supreme priority for the Republic of Korea (ROK), which was established in 1948, the Korean government needed to conjoin the realist and idealist elements in its foreign policy. To maintain peace in a concert of democracies,

\footnote{6}{See Ibid.}

\footnote{7}{See e.g. Lee Hanki, “Lecture for International Law” (Seoul: Pakyoung-Sa, March 2006); Kim Daesoon, “International Law”, 15th edition (Seoul: Samyoung-Sa, January 2010); Jeong Insup, “Lecture for International Law” (Seoul: Pakyoung-Sa, February 2010).}
Korea had to rely on the strong realism of foreign policy, and many bilateral treaties were its main tools. As a result, 88 bilateral treaties were concluded between 1948 and 1960, and this number increased to 580 between 2001 and 2009.

<Table 1: Number of Treaties Entered into by Korea Since the Establishment of the ROK>

<table>
<thead>
<tr>
<th>Year</th>
<th>48-60</th>
<th>61-70</th>
<th>71-80</th>
<th>81-90</th>
<th>91-00</th>
<th>01-09</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Treaties (Bilateral Treaties)</td>
<td>126 (88)</td>
<td>293 (231)</td>
<td>419 (329)</td>
<td>438 (326)</td>
<td>659 (523)</td>
<td>728 (580)</td>
<td>2,663 (2,077)</td>
</tr>
</tbody>
</table>

Indeed, through this foreign policy instrument of bilateral treaties, Korea strived to address a variety of difficult bilateral issues based on political realism. With respect to the question of security, it concluded the ROK-U.S. Mutual Defense Treaty in 1953\(^9\) and the ROK-U.S. Agreement on Status of Force in Korea in 1966.\(^{10}\) Because the priority aim of Korea’s diplomacy toward the U.S. after the Korean War was to secure military support and

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\(^9\) Mutual Defense Treaty between the Republic of Korea and the United States of America, signed on October 1, 1953 and entered into force in November 18, 1954 (Treaty No. 34).

economic aid from the U.S., the Korea-U.S. alliance based on bilateral legal commitments was instrumental in fostering other bilateral relationships.

The 3rd Republic of Korea, established through the May 16 Military Coup in 1961, considered this Korea-U.S. alliance to be central in its foreign and domestic policies because the foremost political promise of the Republic was “anti-communism.” Because the U.S. was then aggressively pursuing a foreign policy that sought to block the expansion of communist states, Korea had to demonstrate its willingness to cooperate. Upon the request of the U.S., Korea dispatched its soldiers to Vietnam in September 1964. It was of no consequence to the Republic’s realists whether the country’s involvement in the Vietnam War was justified under international law.

A series of treaties concluded in 1965 to normalize Korea’s relations with Japan also symbolized this pragmatic diplomacy. A dispute with Japan concerning fisheries and the continental shelf between the two countries was addressed by the conclusion of novel agreements concerning the joint management and development of fisheries and the continental shelf in 1965 and 1974, respectively.¹¹

Subsequent changes in American foreign policy by the introduction of President Nixon’s Guam Doctrine,¹² which created a new international atmosphere of détente between the East

¹¹Agreement on Fisheries between the Republic of Korea and Japan, signed on June 22, 1965 and entered into force on December 18, 1965 (Treaty No. 166); and Agreement between the Republic of Korea and Japan concerning the Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries, with Agreed Minutes and Exchanges of Notes, signed on January 30, 1974, and entered into force June 22, 1978 (Treaty No. 645).

¹²The Nixon Doctrine (also known as the Guam Doctrine) was put forth in a press conference in Guam on July 25, 1969 by President Richard Nixon. He stated that the U.S. expected its allies to take
and the West, heightened the instability in Northeast Asia, and President Carter’s election promise to withdraw U.S. military forces from the Korean Peninsula exacerbated it. To make the matter worse, Washington Democrats demanded the improvement of human rights in Korea, which resulted in frequent conflicts in the bilateral diplomatic relationship between the two long-time allies.\textsuperscript{13} Korea had no option but to address this changing policy environment by eventually accommodating many demands from Washington, including taking action on human rights abuses, which were substantially reduced since the 1990s, when Korea participated in many international human rights treaties.

care of their own military defense but that the U.S. would aid them as requested. The Doctrine argued for the pursuit of peace through a partnership with American allies.

\textsuperscript{13} See e.g. Park Won-Gon, “Carter Administration’s Policy Toward South Korea: The Accomodation of Moral Diplomacy around the 10.26 Incident”, Korea Political Science Review 43-2 (Seoul: The Korea Political Science Association, June 2009).
### Table 2: Korea’s Accession to Major Human Rights Protection Treaties

<table>
<thead>
<tr>
<th>Human Rights Treaties</th>
<th>Date of Adoption</th>
<th>Number of Members</th>
<th>Date of Korea’s Accession (Date of Entry into Force)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment</td>
<td>December 10, 1984 (June 26, 1987)</td>
<td>145</td>
<td>January 9, 1995 (February 8, 1995)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Convention</th>
<th>Date</th>
<th>Ratification Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Int’l Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
<td>December 18, 1990 (July 1, 2003)</td>
<td>39</td>
</tr>
<tr>
<td>Int’l Convention for the Protection of All Persons from Enforced Disappearance</td>
<td>February 6, 2007</td>
<td>10</td>
</tr>
</tbody>
</table>

In the 1980s, the Reagan administration shifted the priorities of U.S. foreign policy back to power-oriented engagement strategies. Accordingly, the Korea-U.S. alliance returned to its original track of close cooperation and joint foreign engagement. Since then, strong bilateral ties on security matters have been strengthened. In particular, because North Korea denounced the Nuclear Non-Proliferation Treaty in March 1993 and created a nuclear crisis in the region, Korea’s pragmatic diplomacy based on bilateral cooperation with the member countries of the “Six-Party Talks” has gained increasing attention and become a top policy.


16The U.S., China, Russia, Japan, and two Koreas are members of the Six-Party Talks. These talks were a result of North Korea withdrawing from the Nuclear Non-Proliferation Treaty (NPT) in 2003. Apparent gains following the fourth and fifth rounds were reversed by outside events. Five rounds of talks from 2003 to 2007 produced little net progress until the third phase of the fifth round of talks,
priority.

It is clear that Korea’s bilateral foreign policy toward neighboring states is firmly founded on the basis of realism and pragmatism, not on the basis of any general rules of international law. Creating bilateral treaties on an as-needed basis has been instrumental in achieving these policy goals. Because the power diplomacy of the U.S. has always been the driving force behind Korea’s foreign military engagement, Korean administrations have focused on the country’s bilateral treaty obligations but paid no serious attention to the justifiability of its engagement policies under international law. In this sense, international law has not constrained Korea’s policymaking in matters of bilateral alliances. The element of central consideration has always been national security and the Korea-U.S. alliance.

4. UN and ICC Diplomacy and the Wilsonian Approach to International Law

It is natural that changes in the character of international society as a result of recent global crises have affected the substance of international law in the international community. Multilateral efforts to avoid another catastrophic crisis or war have necessitated changes in the quality of national behavior as well as in the mechanism for settling international disputes peacefully. The United Nations (UN) and the World Court, both enforcing the rule of law, became the key multilateral institutions through which the protectors of peace would function.

This “Wilsonian faith” in collective security has increasingly affected Korean diplomacy and its multilateral approach based on idealism. Because the ROK was established through a general election supervised by the UN Commission on Korea in May 1948 (combined with the subsequent approval by the UN General Assembly resolution17), Korea and the UN has maintained a close relationship.

The first multilateral approach taken by the newly established government was to send a delegation to the 3rd UN General Assembly meeting in Paris in December 1948 to request its membership to the UN. The Korean War, which broke in June 1950, fortified Korea’s UN diplomacy. Several UN Security Council Resolutions18 were issued to dispatch UN armed forces to counter the North Korean attack, and this active engagement by the UN continued

17 UN General Assembly Resolution A-RES-195 (III), December 12, 1948 (“…Declares that there has been established a lawful government(The Government of the Republic of Korea) having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe and consult and in which the great majority of the people of all Korea reside; that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and that this is the only such Government in Korea; …”).

18 S/1501, 1511, 1588.
through the Uniting for Peace Resolution\textsuperscript{19} by the General Assembly. It was during this war that Korea established its permanent UN Mission (at the embassy level) in New York in November 1951.\textsuperscript{20} After the war ended with an armistice in July 1953, annual reports of the UN Commission for the Unification and Rehabilitation of Korea (UNCURK) were tabled as an agenda for UN General Assembly meetings, which meant that the issue of Korean unification became a regular UN agenda. Through such multilateral efforts, Korea was able to conduct its diplomacy of "Unification through the UN process" and solidify its legitimacy as the sole government on the Korean Peninsula recognized by the international community.\textsuperscript{21}

Radical changes in the character of the UN affected the substance of Korea’s UN diplomacy. In 1970, the People’s Republic of China acquired its UN membership, replacing the Republic of China, and non-aligned nations now account for more than 40% of the entire UN membership. With such changes, Korea had to stop pushing for the automatic tabling of the Korean agenda to the General Assembly.\textsuperscript{22} Instead, its diplomatic efforts focused on improving economic, trade, and cultural relationships with non-aligned nations.

Moreover, Korea abandoned the Hallstein Doctrine,\textsuperscript{23} which had prevented Korea from

\textsuperscript{19} United Nations General Assembly Resolution A-RES-377(V), November 3, 1950.

\textsuperscript{20} Supra note 14, p. 172.

\textsuperscript{21} Ibid., p. 173.

\textsuperscript{22} The UNCURK was dissolved in November 1973 after 23 years in Korea.

\textsuperscript{23} The Hallstein Doctrine, named after Walter Hallstein, was a key doctrine that drove the foreign policy of the Federal Republic of Germany (West Germany) after 1955. It stated that the Federal Republic would not establish or maintain diplomatic relations with any state that recognized the German Democratic Republic (GDR, East Germany). Important aspects of the doctrine were abandoned after 1970 when it became difficult to maintain and the Federal government changed its
establishing or maintaining diplomatic relations with any state that recognized North Korea. The Diplomatic Policy Declaration for Peaceful Unification of Korea, announced on June 23, 1973, declared that Korea would not oppose North Korea’s membership to international organizations, signaling the idea of the two Koreas’ simultaneous accession to the UN.24

This shift in Korea’s foreign policy reflected the reality that the UN, as a collective security mechanism, could no longer support Korea’s foreign policy. In fact, an exemplary incident demonstrating the paralysis of the UN function occurred in 1975, when the 30th UN General Assembly adopted two mutually exclusive resolutions: one resolution requesting negotiations for peace on the Korean Peninsula25 and the other requesting the unconditional withdrawal of U.S. military forces from the peninsula as well as the replacement of the armistice with a peace treaty.26 In a realistic shift in foreign policy, Korea decided to abandon the Hallstein Doctrine and approached non-aligned nations without preconditions.

Korea’s efforts to join the UN took the form of aggressive ”Northern Diplomacy” in the 1990s. Diplomatic relations were established with Hungary and the Soviet Union in 1989 and 1990, respectively, and trade representative offices were exchanged with China in 1990. This created an amicable policy environment in which China was poised to persuade North Korea to join the UN simultaneously with the South. Finally, the two Koreas were simultaneously

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25 A-RES-3390A.

26 A-RES-3390B.
admitted to the UN in September 1991, which marked a key milestone in Korea’s four decades of diplomacy after the establishment of the ROK. Within five years, Korea became a Security Council member and recently produced a Chairman of the General Assembly and a Secretary General. In addition, Korea has been active in UN Peacekeeping Operations, including activities in Somalia, India, Pakistan, Georgia, Liberia, Afghanistan, Sudan, Timor-Leste, Nepal, and Lebanon.

< Table 3: Korea’s PKO Activities >

<table>
<thead>
<tr>
<th>Country (Region)</th>
<th>Assignment</th>
<th>Number of People</th>
<th>Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Somalia (UNOSOM II)</td>
<td>Facilitating reconstruction efforts, Assisting civilians</td>
<td>252</td>
<td>July 1993 - Feb 1995</td>
</tr>
</tbody>
</table>

MOFAT, supra note 14, pp. 190-191.
<table>
<thead>
<tr>
<th>Country (UN)</th>
<th>Activity</th>
<th>Number</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>India/Pakistan (UNMOGIP)</td>
<td>Monitoring of a ceasefire</td>
<td>10</td>
<td>Nov. 1994 -</td>
</tr>
<tr>
<td>Georgia (UNOMIG)</td>
<td>Monitoring of a ceasefire</td>
<td>7</td>
<td>Oct. 1994 -</td>
</tr>
<tr>
<td>Liberia (UNMIL)</td>
<td>Monitoring of a ceasefire</td>
<td>2</td>
<td>Nov. 2003 -</td>
</tr>
<tr>
<td>Afghanistan (UNAMA)</td>
<td>Facilitating reconstruction efforts</td>
<td>1</td>
<td>Nov. 2003 -</td>
</tr>
<tr>
<td>Sudan (UNMIS)</td>
<td>Monitoring of a ceasefire</td>
<td>7</td>
<td>Dec. 2005 -</td>
</tr>
<tr>
<td>East Timor (UNMIT)</td>
<td>Policing</td>
<td>1</td>
<td>Dec. 2006 -</td>
</tr>
<tr>
<td>Nepal (UNMIN)</td>
<td>Policing</td>
<td>2</td>
<td>March 2007 -</td>
</tr>
<tr>
<td>Lebanon (UNIFIL)</td>
<td>Aiding a peaceful settlement, Facilitating reconstruction efforts</td>
<td>367</td>
<td>July 2007 -</td>
</tr>
</tbody>
</table>

Korea’s UN diplomacy is based on a Korean version of "Wilsonian" foreign policy. It began with an effort to collectively defend the Korean territory against a surprise attack by
North Korea, and after the Korean War, it developed into an effort to avoid another war through the principle of collective security in which all peace-loving nations would pledge themselves to joint action on behalf of peace.

In fact, this vision of collective security was the only viable option for Korea to protect its security in a region surrounded by superpowers. To support this policy, the principles and obligations under the UN Charter and UN resolutions were always recognized as absolute binding sources of international law by Korea, and such multilateral legal tools were actively sought to advance Korea’s foreign policy.

Korea's active participation in, and contribution to, the International Criminal Court (ICC) system is another example that demonstrates this Korean version of “Wilsonian Diplomacy.” Korea participated actively in establishing the ICC. In particular, a Korean proposal played a critical role in drafting Article 12 of the Statute of the ICC at the 1998 Rome Conference. The ICC is a permanent tribunal created to prosecute individuals for genocide, crimes against humanity, war crimes, and crimes of aggression.\(^{28}\) Under Article 12, the Court can exercise jurisdiction if the subject matter at issue satisfies either of the following two preconditions: (i) the accused was a national of the state party, or (ii) the alleged crime took place in the territory of the state party.\(^{29}\) In drafting this article, many European countries, led by Germany, took the position that the Court would need to exercise its jurisdiction without these preconditions, citing the notion of universal jurisdiction over serious crimes. By contrast, the U.S. insisted that these two preconditions be met cumulatively. Playing a mediating role between the two groups, Korea proposed that the two preconditions be made

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\(^{29}\) Article 12 of the ICC Statute.
selectively, which was successfully adopted as the current text of Article 12. Korea also contributed to the subsequent discussions related to the implementation of the ICC Statute, including those on defining crimes of aggression.

Korea, which has been constantly under the potential threat of war or aggression by neighboring superpowers and North Korea, expected that the ICC's establishment and its active operation would contribute to peace and collective security on the Korean Peninsula. This view has led Korea to embrace a Wilsonian type of international criminal law. In terms of Korea's position on international crimes, Korea has fully taken into account international criminal law, and this position is likely to continue for the foreseeable future.

5. Countering Terrorism and International Law

It is noteworthy that Korea’s response to terrorist attacks has always been constrained by its desire to be in full compliance with international law.

In September 1989, Korean Air 007 was shot down by a Russian fighter above the maritime area near the Sakhalin region. The strongest response by Korea was to request an UN Security Council meeting in cooperation with the U.S., Japan, and Canada. No resolutions were adopted by the Council because of the Soviet Union’s veto. In fact, Korea had taken the same approach for the KAL 858 bombing by North Korean terrorists in November 1987.

In October 1983, a Korean delegation including the President came under a bomb attack at the Aung San Martyr’s Mausoleum in Myanmar, which killed 17 high-ranking Korean

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officials. Although it was confirmed that North Korea was to blame, Korea merely took the issue to a committee meeting of the UN General Assembly, where representatives from 45 nations paid lip service criticizing the North.

On March 26, 2010, a Korean corvette, the Cheonan, sank while on patrol in the West (Yellow) Sea. The Korean government carried out a thorough scientific investigation in cooperation with the U.S., the U.K., Australia, and Sweden and concluded that the Cheonan was sunk by a surprise North Korean torpedo attack. Again, the perpetrator was North Korea. Korea announced that it would bring the issue to the UN Security Council and is currently making efforts to pass a Council resolution condemning the attack. In addition, Korea announced that it would not comply with any contractual or humanitarian obligations owed to the North, except those pertaining to the Gaeseong Industrial Complex and North Korean infants and children.\(^{31}\)

Such responses show an extreme degree of self-restraint because since the end of the Korean War, Pyongyang has relentlessly pursued acts of armed provocation against Seoul without admitting any of the crimes they committed. Korea’s continued reluctance to counterattack in retaliation for these acts is based mainly on its view that such a counterattack could result in a vicious circle of hostile acts between the two Koreas, which may lead to another war on the Korean Peninsula.

Noteworthy is that this reluctance is also based on Korea’s consideration of international law constraints. Under the UN Charter, the unilateral use of force by a nation is permitted only in the course of self-defense, and the inherent right of self-defense may be exercised “if

\(^{31}\) Special Address to the Nation by President Lee Myung-bak on May 24, 2010, see e.g. Choson Daily report of May 24 2010.
an armed attack occurs."  

32 Any exercise of this right may be taken “until the Security Council has taken measures necessary to maintain international peace and security,” and it must be “immediately reported to the Security Council.”  

33 The Security Council is the organ that has the “primary responsibility for the maintenance of international peace and security.”  

34 From these provisions of the Charter, it is clear that once an armed attack is completed as an isolated incident, any use of force against the attacker would be difficult to justify as self-defense. Indeed, such a counterattack would constitute a reprisal prohibited by the international community in the modern era. It is also certain that any act against international peace and security must be promptly reported to the Security Council, and it is the Council that can take peaceful or forceful measures to maintain or restore international peace and security under Chapters VI and VII of the UN Charter.

It is noteworthy that Korea’s responses were in full compliance with this UN Charter mechanism. Its continued reluctance to use force to retaliate against North Korea has been rooted in the firm belief that Korea might lose its biggest weapon available against the North Korean regime: should Korea violate international law by exercising a reprisal, any claims Korea makes criticizing the North’s violation of international law would become less appealing to the international community. Although this weapon of international law is generally hortatory in other cases, it can be an effective tool for isolating the North, a frequent violator of international law; it may also work as a logical tool for inviting the North to return to the legitimate track of collective security for peace on the Peninsula.

32 Article 51 of the UN Charter.

33 Ibid.

34 Article 24 of the UN Charter.
6. International Dispute Settlement Procedures and International Law

In the postwar period, the international community decided that it would not allow the use of force as a means for settling international disputes. It is clear that Korea’s policy concerning the international dispute settlement is fully consistent with this principle of the pacific settlement of disputes under modern international law.

The International Court of Justice (ICJ) has supported this principle. Because all members of the UN are ipso facto parties to the ICJ Statute, Korea became a party to the Statute in September 1991 upon its accession to the UN. Therefore, the principle of the pacific settlement of disputes constitutes a central feature of Korea’s international dispute management policy.

However, Korea did not join those states that accepted the compulsory jurisdiction of the ICJ by submitting a declaration of acceptance in conformity with paragraph 2 of Article 36 of the Statute. This means that disputes involving Korea may be submitted to the Court only with the mutual consent of disputing parties on an ex ante or ex post basis. This absence of compulsory jurisdiction is one of the reasons why no case involving Korea has thus far been brought to the ICJ process. In this regard, it is noteworthy that Korea has been consistently opposed to Japan’s proposal to submit a territorial dispute concerning Dokdo Island, which lies between the two neighboring countries, to the world court.

Korea has also been reluctant to any ideas involving recourse to international arbitration or adjudication procedures, including the International Tribunal for the Law of the Sea procedure, in settling international maritime disputes, including the matter of the delimitation of the Exclusive Economic Zone (EEZ) with neighboring nations.

35 Article 93, paragraph 1 of the UN Charter.
By contrast, in settling trade disputes, Korea has taken an aggressive legalism\(^{36}\) approach by encouraging the settlement of trade disputes through WTO panel procedures. As of June 2010, Korea filed 14 complaints\(^ {37}\) and responded to 14 cases\(^ {38}\) through the WTO dispute settlement procedure (DSP). It also participated in 52 cases\(^ {39}\) as a third party. Obviously, Korea has been one of the most prolific users of the DSP.

This aggressive legalism is a direct result of Korea’s early experiences through its primarily defensive participation in the DSP. Immediately after the establishment of the WTO in 1995, there certainly existed on the Korean side an obsession for a bilateral settlement of

\(^{36}\) Several authors have used the term “aggressive legalism” to describe a WTO country’s use of the WTO’s substantive rules to counter what it considers to be unreasonable acts, requests, and practices of a major trading partner. See Saadia M Pekkanen, *Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy* (2001) 24 The World Economy 707–37. See also Henry S Gao, *Aggressive Legalism: The East Asian Experience and Lessons for China* in Henry Gao and Donald Lewis (eds), China’s Participation in the WTO (London: Cameron May Ltd., 2005) and Ichiro Araki, *Beyond Aggressive Legalism: Japan and the GATT* in Mitsuo Matsushita and others (eds), WTO and East Asia: New Perspectives (London: Cameron May Ltd., 2004) at 149–175.


\(^{38}\) WT/DS3, DS5, DS20, DS40, DS41, DS75, DS84, DS98, DS161, DS163, DS169, DS273, DS312, DS391.

disputes and some misunderstanding of the nature of the nascent DSP.\textsuperscript{40} This led to many trial-and-error situations. The mere threat of a WTO panel establishment by the U.S. (the complaining party in early cases such as \textit{Korea-Measures Concerning the Testing and Inspection of Agricultural Products}\textsuperscript{41}) worked effectively for the purpose of negotiations: the more the U.S. threatened, the more concessions the U.S. Trade Representative (USTR) obtained from the Korean Government.\textsuperscript{42} Virtually every head of the Korean delegation did not fail to mention in his or her opening statement that it was important to settle disputes “bilaterally.” As Korea increasingly stressed the necessity of a bilateral settlement, the USTR intensified its threat to establish a panel.\textsuperscript{43}

This type of vicious circle continued until Korea finally relented and expressed its willingness to move to a panel procedure. At that point, the U.S. accepted Korea’s last offer and settled the dispute because it knew that its threat would yield no additional concessions.\textsuperscript{44}

In addition, the U.S. even lodged a two-part complaint: the first complaint focused on a broad agricultural import regime of Korea with a few specific charges, whereas the second one was more specific. Through the first WTO consultation, the U.S. made efforts to determine the specific measures that were in violation of the WTO Agreement. In other words,

\begin{itemize}
  \item \textsuperscript{41} WT/DS3, 1995.
  \item \textsuperscript{42} Choi, supra note 40.
  \item \textsuperscript{43} Ibid.
  \item \textsuperscript{44} Ibid.
\end{itemize}
the U.S. used the WTO consultation process as a fact-finding procedure similar to the discovery procedure under Anglo-American judicial proceedings.\textsuperscript{45} Armed with the newfound facts, the USTR lodged another complaint that was much more focused.\textsuperscript{46} By imposing these "double" WTO procedures, Washington was able to double the concessions from Seoul.

Through this rather painful trial-and-error process, Korea finally learned the ways in which the WTO DSP could be used. It realized that it does not need to insist on a bilateral settlement of disputes because of concerns about their possible effects on the special relationship between Korea and the U.S., particularly on the security relationship.\textsuperscript{47} Indeed, the benefits of the depoliticization of international commercial disputes tend to be greater for those states in such relationships because they have a greater need for an authoritative decision by a neutral and credible umpire.\textsuperscript{48}

Recently, Korea and the U.S. have been proceeding to WTO DSP without any hesitation. The U.S. requested the establishment of WTO panels for cases such as \textit{Korean Liquor Tax},\textsuperscript{49} \textit{Korean Beef},\textsuperscript{50} and \textit{Korean Government procurement of Airport equipment}.\textsuperscript{51} On the other hand, Korea responded by bringing to the DSP cases such as \textit{DRAM Anti-dumping},\textsuperscript{52} \textit{Stainless Steel Anti-dumping},\textsuperscript{53} \textit{Linepipe Safeguard},\textsuperscript{54} \textit{Bird Amendment},\textsuperscript{55} and \textit{DRAM

\begin{footnotesize}
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\item \textsuperscript{45} Ibid.
\item \textsuperscript{46} Korea - Measures Concerning Inspection of Agricultural Products, WT/DS41, 1996.
\item \textsuperscript{47} Choi, supra note 40.
\item \textsuperscript{48} Ibid.
\item \textsuperscript{49} WT/DS84.
\item \textsuperscript{50} WT/DS161.
\item \textsuperscript{51} WT/DS163.
\item \textsuperscript{52} WT/DS99 (1997).
\item \textsuperscript{53} WT/DS179 (1999).
\end{itemize}
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Countervailing against Washington. This shows that Korea-U.S. trade relations have been upgraded to a mature stage in which trade disputes have been “depoliticized” for the mutual benefit of the two trade partners.

In Northeast Asia, pending territorial and maritime disputes between Korea and neighboring states have functioned as serious impediments to various endeavors aimed at improving bilateral relationships among adjacent nations. An enigmatic question is how many years a permanent settlement of such disputes would take. These territorial disputes are likely to develop into peace-threatening disputes in future. At that point, the key task for Korea would be forming a social consensus and finding a policy path that can address such challenges through pacific procedures offered by international tribunals. Lessons should be learned from the depoliticization process of trade disputes. In this regard, an aggressive approach based on legalism seems to be the only viable path in settling international (trade and non-trade) disputes for the sake of peace and legal order in the region.

7. Conclusions

It is always the case that governments respect international law only when it suits their national interests. Korea’s bilateral foreign policy toward its neighboring states is firmly founded on the basis of this pragmatic realism. It has followed the path of American diplomacy, which shifted from a policy of isolation to that of engagement. Further, Korea has always prioritized national security and its alliance with the U.S. over any general rules of

54 WT/DS251 (2002).
56 WT/DS296 (2003).
57 Choi, supra note 40.
international law. Thus, creating bilateral treaties as needed has been instrumental in executing this policy based on realism.

On the other hand, Korea’s multilateral diplomacy has differed. In the process of implementing its multilateral foreign policy, the norms of international law have been given serious consideration. Korea’s UN and ICC diplomacy demonstrates that its policy makers have adopted a strong Wilsonian perspective. Rules and principles under the UN Charter and the ICC Statute have always been strictly observed, and such legal tools have been actively sought in enforcing Korea’s multilateral foreign policy. This firm belief in the collective security system by Korea has also been reflected in countering terrorism. Although this strict legalism may seem dogmatic, it is actually based on the realistic consideration that this vision of collective security is the only viable option for Korea to protect its security in a region surrounded by superpowers. It also reflects the reality that if Korea were to depart from the path of legalism, the country would only lose an effective tool for fighting foreign rule-breakers, including North Korea.

This approach based on legalism is highlighted by Korea’s foreign trade policy in settling WTO disputes. This aggressive legalism is a result of lessons learned from a series of disputes with major trading partners through WTO DSP. If Korea were to take this approach to settle other disputes, it would contribute greatly to peace and legal order in Northeast Asia. In this sense, the international community, not to mention the Northeast Asian community, has long been waiting for the institutionalization of depoliticization practices in settling territorial disputes in Asia.
Korea’s bilateral foreign policy toward its neighboring states is firmly founded on the basis of the pragmatic realism. Korea has always prioritized national security and its alliance with the U.S. over any general rules of international law.

By contrast, in the process of implementing Korea’s multilateral foreign policy, the norms of international law have been given serious consideration as Korea’s UN and ICC diplomacy and WTO dispute settlement policy demonstrates. Korea’s firm belief in the collective security system has also been reflected in countering terrorism. This reflects the reality that if Korea were to depart from the path of multilateral legalism, the country would only lose an effective tool for fighting foreign rule-breakers, including North Korea.

If Korea were to take this aggressive legalism approach to settle territorial disputes, it would contribute greatly to peace and legal order in Northeast Asia. In this sense, the international community has long been waiting for the institutionalization of depoliticization practices in settling territorial disputes in Asia.