

The Protection of Immunity in Japan Law

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I. Introduction

This article provides an overview of how the rules of international law concerning diplomatic or consular immunity and inviolability have been implemented in the domestic law of Japan. Section II will outline how the Constitution of Japan deals with the authority to manage foreign affairs in Japan. Section III will present the status of international law in the Japanese legal system. This will be followed by a consideration of Japanese legislation and cases concerning diplomatic or consular immunity and inviolability. Based on these considerations, the article will conclude by summarizing how Japan observes and implements international law in its diplomatic or consular relations.

The discussion will be limited to the immunity and inviolability of foreign diplomatic missions or consular posts, and will not deal with those of foreign State officials, such as heads of State, heads of government, foreign ministers, armed forces, or international organizations.

II. International Relations in the Constitution of Japan

1. Power to Manage International Relations

The Constitution of Japan vests the power to manage international relations in the Cabinet. Article 73 of the Constitution stipulates that “[t]he Cabinet, in addition to other general administrative functions, shall perform the following functions” and enumerates the seven functions. The list includes to “[m]anage foreign affairs” (item 2) and to “[c]onclude treaties” (item 3).

The Ministry of Foreign Affairs (MOFA) has primary jurisdiction over managing international relations in Japan. A ministry is established “as an organ that takes charge of

administrative matters under the control and jurisdiction of the Cabinet, and a commission and an agency shall be established under a ministry as its external organs” (Article 3(3) of National Government Organization Act). The duties of ministries and “the scope of the affairs under jurisdiction that are necessary for accomplishing such duties” are prescribed separately by an Act (Article 4). The Act for Establishment of the Ministry of Foreign Affairs stipulates the duties of the MOFA and the scope of its jurisdiction. Article 4(1) of the Act enumerates the scope of the MOFA’s affairs, which include “[m]atters relating to foreign policy,” and “[m]atters relating to dealing with government affairs concerning foreign States such as negotiations and cooperation with foreign governments.”

Other ministries, commissions, or agencies also have some administrative responsibilities in matters related to “international cooperation pertaining to affairs under the jurisdiction.”¹ Some Acts establishing these responsibilities stipulate the concrete affairs specific to international relations. Article 14 of the Act for Establishment of the Ministry of Economy, Trade and Industry (METI) stipulates that it takes charge of administrative matters concerning “[i]nternational corporation on trade and economy including economic cooperation.” Article 4 of the Act for Establishment of the Ministry of the Environment points out that “[m]atters relating to the Antarctic environmental protection” are under its jurisdiction.

2. Power to Conclude Treaties

Article 73 vests the Cabinet with the power to conclude treaties, but it also stipulates that “it shall obtain prior or, depending on the circumstances, subsequent approval of the Diet.” The approval is required to ensure

¹ E. g. Article 4 (1) (92) of the Act for Establishment of the Ministry of Internal Affairs and Communications (MIC); Article 4 (1) (125) of the Act for Establishment

of Ministry of Land, Infrastructure, Transport and Tourism; Article 27-2 (5) of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade.

democratic control over diplomacy.²

However, the Cabinet of Japan does not always obtain Diet approval, and many treaties have not been deliberated in the Diet when they are concluded. In the background, the number of treaties has increased enormously since various issues have become global and require addressing internationally.³ Japan deals with the situation by dividing treaties into two categories: those which require Diet approval and those which do not (“executive agreements”). The legal ground for the Cabinet to conclude the former is Article 73, item 3 of the Constitution. On the other hand, the legal basis for concluding executive agreements is Article 73, item 2. Concluding an executive agreement is interpreted as part of the Cabinet’s function, namely, “[m]anaging foreign affairs.”

The key question is “Which treaties require Diet approval?” The Japanese government has adopted the view that the Cabinet shall obtain the approval when a treaty falls into one of three categories.⁴ The first category includes “international agreements that include matters that should be stipulated by law.” Article 41 of the Constitution stipulates that “[t]he Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.” The second category includes international agreements that involve more expenditure than previously approved by the Diet. Article 85 of the Constitution states, “[n]o money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.” The third and final category includes international agreements that are “politically important in that they govern the basic relations” between Japan and a foreign State or between States, “and therefore need to be ratified to be binding.”

² Fumio Anzai, Maki Misaki, and Joji Shishido, *Kenpo Gaku Dokuhon* [Japanese Constitutional Law: Principles and Policies], 3rd ed., Yuhikaku, 2018, p. 359.

³ Yasuo Nakauchi, “Joyaku no Kokkaisyohin ni kansuru Seido • Unyo to Kokkai ni okeru Giron: Joyaku Teiketsu ni taisuru Minsyuteki Tosei no Arikata toha” [System and Operation of Diet Approval of Treaties, and Consideration in the Diet: How the Diplomatic Control

Other treaties, including “international agreements that we can implement within the framework of the treaties or domestic law that is already approved or within the budget passed through the Diet” are categorized as executive agreements, which the Cabinet may conclude without Diet approval. However, as the Diet is the sole authority that can consider and decide on treaties, the Cabinet has introduced executive agreements to the Diet for reference if they complement treaties requiring Diet approval to further stipulate their implementation, operation, or other details. When similar executive agreements to a treaty concluded after the Diet’s approval of the treaty are important for the Diet to decide how the treaty should be implemented or used, the Cabinet also has presented the executive agreement to the Diet Foreign Affairs Committee as promptly as practically possible.

III. Status of International Law in the Legal System of Japan

In Japan, both customary international law and treaties take domestic effect owing to Article 98 (2) of the Constitution, which provides that “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed.”⁵ In other words, once treaties enter into forces or customary international law is established, they are automatically incorporated into Japanese law.

Treaties are ranked higher than statutory laws in Japan. Because Article 98 (2) of the Constitution provides, “[t]he treaties [...] shall be faithfully observed” and, unlike deliberations on a bill, the House of Representatives has greater power than the House of Councillors when considering

against Concluding Treaties should be], *Rippo to Chosa* [Legislation and Examination], No. 330, 2012, p. 3.

⁴ *Statement of Mr. Masayoshi Ohira, the Minister of the Foreign Affairs, the Standing Committee on Foreign Affairs, 72th Session of the House of Representatives, Record of Proceedings of the Standing Committee on Foreign Affairs, No. 5, 20 February 1974, p. 2.*

⁵ Anzai, Maki and Shishido, *supra* note 2, p. 359.

decisions referring to treaties under Article 61. On the contrary, treaties are ranked lower than the Constitution, as it is easier to conclude treaties than to amend the Constitution because of Article 96.⁶ The Constitution is also commonly interpreted to ensure customary international law remains superior to legislation and inferior to the Constitution.

Although the treaties in force and the customary international law automatically become Japanese domestic law, they are not necessarily applied directly in Japanese courts without legislation. Japanese courts have stated that, for treaties to be applied directly in courts, State parties must believe that a specific treaty's stipulation is applicable without legislation in municipal courts, and the provision must be "clear and precise."⁷ Customary international law is more essential for clarity and precision than treaties.⁸

IV. Diplomatic and Consular Immunity or Inviolability in the Japanese Legal Order

The following sections examine how Japan observes and concretely implements the rules of international law concerning diplomatic or consular immunity and inviolability. The first section outlines the treaties on diplomatic or consular relations concluded by Japan (1). The second section clarifies domestic laws and regulations on diplomatic or consular immunity and inviolability (2).

1. Treaties Concluded by Japan on Diplomatic and Consular Immunity

(1) Treaties on Diplomatic Relations

Japan signed the Vienna Convention on

⁶ Nobuyoshi Asibe, revised by Kazuyuki Takahashi, *Kenpo* [Constitutional Law], 7th ed., Iwanami Shoten, 2019, pp. 396-397.

⁷ Tokyo High Court, Judgment, 11 October 2011, *Japanese Annual of International Law*, Vol.37, 1994, p.129.

⁸ Tokyo High Court, Judgment, 5 March 1993, *Hanrei Jiho* [Law Cases Reports], No. 1466, p. 40.

Diplomatic Relations (VCDR) on 28 March 1962. After the Diet approved the conclusion on 8 May 1964, the government deposited the instruments of ratification on 8 June 1964. The VCDR entered into force for Japan on 8 July 1964 and was incorporated into Japanese Law.

Japanese courts have applied some provisions of the VCDR to some cases. In 1967, a member of the Taiwan Youth Independence Federation applied for permission from the Tokyo Metropolitan Public Safety Commission for a mass demonstration against an upcoming visit from Chiang Chingkuo, the Minister of National Defense of the Republic of China (ROC) at the time. The Commission permitted it on the condition that demonstrators did not march past the ROC Embassy. The member filed an action to revoke the disposition. The Tokyo District Court applied Article 22 (2) directly to the case and found that this demonstration was not likely to make "any disturbance of the peace of the mission or impairment of its dignity."⁹

(2) Treaties on Consular Relations

Japan deposited the instruments of accession of the Vienna Convention on Consular Relations (VCCR) on 2 October 1983, after the Diet approved conclusion of the VCCR on 17 May in the same year. The VCCR entered into force for Japan on 2nd of November in the same year, and then was incorporated into Japanese Law. It was considered as directly applicable in the Japanese courts.¹⁰

Japan concluded bilateral treaties on consular relations with the United States (US), the United Kingdom, the Union of Soviet Socialist Republics (USSR), and the People's Republic of China (PRC).¹¹ Some of these treaties were

⁹ Tokyo District Court, Order, 23 November 1967, *Hanrei Jiho* [Law Cases Reports], No. 501, p. 52.

¹⁰ E. g. Tokyo District Court, Judgement, 23 February 2007, *Zeimu Sosyo Shiryo* [Tax Affairs Trial Documents] (No. 250-), No. 257, Loading No. 10639.

¹¹ Consular Convention between the United States and Japan, 22 March 1963, 518 U.N.T.S. 179 (entered into force 1 August 1964); Consular Convention between the

applied directly in Japanese courts. In addition, some commerce and navigation treaties between Japan and foreign States include provisions for the establishment of a consular post, consular functions, and consular immunity and inviolability.¹²

Some of these bilateral consular treaties require the State parties to give more immunity or inviolability than those required under the VCCR. For example, Article 18(1) of the Consular Convention between the USSR and Japan provides that “[a] consular officer or a consular employee who is a national of the sending State shall enjoy immunity from the jurisdiction of the receiving State in respect of acts performed in his official capacity.” The term “a consular employee” includes “drivers, servants, gardeners and similar staff employed in the domestic service of the consulate” (Article 1(4)). Article 6(2) of the Agreement on Consular Relations between Japan and the PRC prescribes that “[t]he authorities of the receiving State shall not enter the consular premises except with the consent of the head of the consular post or of his or her designee, or of the head of the diplomatic mission of the

sending State or of his or her designee.” The Japanese government has decided to recognize that a bilateral agreement, or the VCCR, whichever grants more immunity or inviolability, is applied between Japan and the State party of the bilateral agreement.¹³ In contrast, the Japanese government seems to apply whichever ensures more protection of both nationals’ and State parties’ rights when the sending States communicate with the nationals, except as otherwise provided by the agreement.¹⁴

2. Laws and Regulations of the Immunity and Inviolability of Diplomatic Missions and Consular Posts

The following sections describe Japanese statutory laws and regulations enacted or used to implement the rules of international law concerning diplomatic or consular immunity and inviolability. Specifically, it deals with the statutory laws and regulations on inviolability of the premises, freedom of communication, the personal inviolability of officers, immunity from jurisdiction, exemption from taxation, exemption from customs duties and inspection,

United Kingdom of Great Britain and Northern Ireland and Japan, 4 May 1964, 561 U.N.T.S. 25 (entered into force 10 October 1965); Consular Convention between the Union of Soviet Socialist Republics and Japan, 29 July 1966, 608 U.N.T.S. 93 (entered into force 23 August 1967); Agreement on Consular Relations between Japan and the People's Republic of China, 24 October 2008, 2915 U.N.T.S. I-50746 (entered into force 16 February 2010). The Consular Convention between the USSR and Japan currently applies to the bilateral relations between Russia, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan and Ukraine, and Japan. The Agreement between Japan and China was concluded, given the “Incident at the Japanese Consulate General in Shenyang,” for the purpose of preventing a recurrence of such incidents (*Statement of Seiko Hashimoto, Senior Vice-Minister for Foreign Affairs, 171th Session of the House of Representatives*, Record of Proceedings of the Standing Committee on Foreign Affairs, No.14 (10 June 2009), p.6). Cf. MOFA of Japan, “The Position of the Government of Japan regarding the Incident at the Japanese Consulate General in Shenyang, People's Republic of China,” at <https://www.mofa.go.jp/region/asia-paci/china/shenyang.html> (as of 15 March 2019).

¹² E. g. Article 5 (1) of Treaty of Commerce and Navigation (with Protocol), 28 February 1957, 280 U.N.T.S. 87 (entered into force 14 October 1957), provides that “[e]ither Party shall have the right to appoint consular officers within the territories of the other Party where any third country is permitted to have consular officers or in such other places as may be agreed upon by the appoint consular officers within the territories of the other Party where any third country is permitted to have consular officers or in such other places as may be agreed upon by the Parties.” Article 5 (2) stipulates that “Consular officers of either Party, on a basis of reciprocity, shall enjoy, within the territories of the other Party, treatment no less favourable than that accorded to consular officers of any third country with respect to the rights, competence, honours, privileges, immunities and exemptions of a consular officer performing functions in the territories of such other Party.”

¹³ *Statement of Takehiro Togo, Councillor for Foreign Affairs of Minister's Secretariat of the MOFA*, 98th Session of the House of Councilors, Record of Proceedings of the Standing Committee on Foreign Affairs, No.6, 12 April 1983, p.2.

¹⁴ Cf. *Saibansyo Jiho* [Court Reports], No. 875, 1984, pp. 1-4.

and other exemptions.

(1) Inviolability of the Premises

This section outlines how Japan observes and implements its obligations under Article 22 of the VCDR and Article 31 of the VCCR.

(a) Duty Not to Enter the Premises

The latter part of Article 22 (1) of the VCDR stipulates, “[t]he agents of the receiving State may not enter them [the premises of the mission], except with the consent of the head of the mission.” Responding to this obligation, Article 227 of the Criminal Investigation Code (hereinafter “CIC”) provides that a police officer “must not enter embassies; legations; and the residences or second residences and accommodations of ambassadors, ministers or members of the staff of the embassies and legations except when requested by them.” However, it follows that a police officer “may in cases when a person who has committed a serious crime to whom he/she is pursuit enters such a place, and the situation admits of no delay search it with the consent of ambassadors, ministers, members of the staff of the embassies and legations or a person who has authority to represent them.” It might seem that, pursuant to this provision, a Japanese police officer may enter the premises of diplomatic missions or diplomatic staff residences even when Article 22 (1) of the VCDR does not allow agents of the receiving State to enter them. However, treaties enjoy superior status to statutory laws in Japan; moreover, Article 224 of the CIC stipulates that when investigating “crimes related to embassies and legations or other crimes related to foreign States,” a police officer “shall comply with international law and international practices.” Thus, it could be interpreted that a police officer must not enter the “premises of a mission” under the VCDR, even if requested by a member of the staff of the embassy and the legation, or a person who has authority to represent the member of the staff.

Article 31(2) of the VCCR prescribes, “[t]he authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the heads of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.” Regarding this provision, Article 224(6) of the CIC specifies that a police officer “is not to enter consular posts headed by the career consular officers except when requested or given consent by the career head of consular post or a person who has authority to represent him/her.” Therefore, Japan guarantees the inviolability of consular posts that are headed by career consular officers to a greater extent than the VCCR.

(b) Duty to Take All Appropriate Steps

i) Protection against Any Intrusion or Damage

In Japan, there are no Penal Code provisions specific to intrusion or damage of the diplomatic mission or the consular post. Intruding into or damaging the diplomatic mission or the consular post constitutes the crime of breaking into a residence (Article 130) or the attempt of such a crime (Article 31). Damaging the diplomatic mission or the consular post constitutes the crime of damage to buildings.

On 1 April 1958, about 40 college students formed a scrum to petition for canceling hydrogen bomb testing around the Enewetak atoll. They ran to the front gate of the US Embassy, forced the almost closed gate open, and entered without consent. The Tokyo District Court ruled that “the principle of inviolability of the premises of the mission is not only a comity of nations but also a principle of international law, and therefore the receiving State shall comply with it. The intrusion in question against the principle in such a manner described above as not recognized as a petition

based on common sense constituted the crime prescribed under Article 130 of the Penal Code regardless of whether the purpose is legal and legitimate.”¹⁵

Japan’s MOFA have stated that basically, it does not intervene in disputes about premises leasing contracts between private individuals in the receiving States and the diplomatic or consular missions, or the sending States.¹⁶ However, Japanese government has become involved in such a dispute, whenever the dispute is likely to affect the inviolability of the premises.¹⁷ A landlord required a foreign embassy in Japan to vacate the building by the last day of March, 1991, because the embassy had not paid the rent in 12 months. The MOFA called on the landlord not to take forcible action against the mission and to continue negotiations, and asked the embassy and the sending States to pay the rent and settle the dispute properly and speedily.¹⁸

ii) Prevention of Disturbance of the Peace of the Mission or the Impairment of its Dignity

Mass demonstrations, processions, propaganda activities, or public assembly around foreign embassies or consular premises are likely to disturb the “the peace” of the missions. In Japan, such activities may be subject to the Act on Maintenance of Tranquility of Areas around National Diet Building, etc. and Foreign Diplomatic Establishments, etc. (Tranquility Maintenance Act), violent noise control ordinances, the Road Traffic Act, and public safety ordinances. Operating unmanned aircraft or drones over buildings used for diplomatic or consular missions and the surrounding areas are controlled by additional statutory laws and

regulations.

a) Tranquility Maintenance Act

The purpose of the Tranquility Maintenance Act is “to maintain tranquility around the National Diet Building, etc. and foreign diplomatic establishments, etc. by taking necessary measures with regard to using loud speakers in those areas, for contributing to ensuring the power of consideration and maintaining good international relations” (Article 1). Article 4(1) provides that the Minister for Foreign Affairs may designate an area around foreign diplomatic establishments that need to maintain tranquility and prohibit the use of loud speakers in a way that may harm tranquility in the area for a certain period. These designated areas are referred to as “areas around foreign diplomatic establishments, etc.” A police officer may inform a person using loud speakers in violation of the prohibition to take necessary measures to rectify the violation (Article 6). A person who has violated the orders of a police officer shall be punished by imprisonment, or imprisonment without work for not more than six months, or a fine of not more than 200,000 yen (Article 7).

Then Minister of Foreign Affairs of the Soviet Union, Eduard Shevardnadze’s visit to Japan in 1988, pushed the enactment of the Act.¹⁹ Demonstrations and propaganda activities around the National Diet Building and foreign diplomatic establishments had been a problem until then. The governments of the Soviet Union and the PRC made a diplomatic protest to the Japanese government against propaganda activities around their embassies. The Diet had considered restricting such activities several

¹⁵ Tokyo District Court, Judgement, 27 March 1963, *Hanrei Times* [Law Times Reports], No. 145, p. 188.

¹⁶ *Statement of Yoshinao Ara, Deputy Chief of Protocol of Minister's Secretariat of the MOFA*, 91th Session of the House of Representative, Record of Proceedings of the Standing Committee on Foreign Affairs, No. 14, 9 April 1980, p. 13.

¹⁷ *Ibid.*

¹⁸ International Law Cases Study Group, *Gaiko Ryoji Kankei* [Study of International Law Cases of Japan (4):

Diplomatic and Consular Relations], Keio University Press, 1996, p. 68.

¹⁹ Akira Ueda, “Giin Rippo ni okeru Chian Kankei Rippo ni tsuite: Seion Hoji Ho wo Chushin ni shite” [The Public Peace and Order Laws in the Legislation by House Members: Focusing on the Law for Keeping Tranquility in the Areas of the Diet, Foreign Embassies, etc], *Hokurui Hogaku Ronsyu* [The Hokkaido Law Review], Vol. 41, 1990, pp. 249-250 and 256.

times since the 1970's. However, since there were different opinions on how to balance the right to freedom of expression, guaranteed by Article 21(1) of the Constitution, with the need to maintain tranquility, a bill to restrict these protests had not been brought before the Diet. Since Shevardnadze planned to visit Japan in December 1988, the MOFA demanded to enact a tranquility maintenance law by the day of the visit. Backed by strong MOFA demand, the Act was enacted on 5 December 1988, and took effect on 18 December. Shevardnadze visited Japan from December 18th to 21st. Based on the Act, the Minister for Foreign Affairs designated areas around the Embassy of the USSR and USSR Trade Representative as "areas around foreign diplomatic establishments, etc." on 26 December.²⁰ On 18 December, a member of a right-wing group repeatedly engaging in propaganda activities in these areas was arrested in violation of the Act.²¹

Later, when foreign VIPs came to Japan, the Minister sometimes prohibited demonstrations and propaganda activities in some areas on the basis of this Act. When the Japan-China-ROK Trilateral Summit was held in Fukuoka in December 2018, the Minister designated areas around the Consulate-General of the PRC in Fukuoka as the "areas around foreign diplomatic establishments, etc."²² Moreover, since 1989, areas around the Embassies of the U.S., Russia and the PRC have been designated as the "areas around foreign diplomatic establishments, etc." On 7 February 2009, three members of a right-wing group were arrested on suspicion of violating the Act for repeatedly

shouting out for the return of the northern territories outside the Russian Federation Embassy.²³

b) Violent Noise Control Ordinances

The so-called "violent noise control ordinances" enacted by prefectural assemblies restrict loud speaker noise. Since violent loud speaker noise jeopardizes peoples' daily lives, and seriously hinders the physical safety of a person and their smooth work performance, the ordinances aim to maintain community peace and ensure public welfare. The Okayama prefectural assembly introduced the first violent noise control ordinance in 1984.²⁴ Since the Tranquility Maintenance Act was enacted, other prefectural assemblies have also established the violent noise control ordinances. Over 40 prefectures have established such ordinances.²⁵

These ordinances may restrict propaganda activities in areas not subject to the Tranquility Maintenance Act. When Boris Yeltsin, the President of Russia, and his wife came to Japan in April 1998, Shizuoka Prefectural Police arrested three people who violated the Ordinance on the Control of Violent Noise from Loud Speakers.²⁶ The Shizuoka Summary Court issued a summary order to the accused to pay a fine.²⁷ However, since violent noise control ordinances are not enforced for the "peace of the mission," but to maintain community peace, the "peace of the mission" around diplomatic buildings is a result of the ordinances' maintenance of community peace.

²⁰ Public Notice of the MOFA, No.641, 16 December 1988.

²¹ "A 100,000 Yen Fine on a Member of a Right Wing Group: First Violation of the Tranquility Maintenance Act," *The Asahi Shinbun*, morning ed., 27 December 1988, p.26.

²² Public Notice of the MOFA, No. 646, 12 December 2008.

²³ "Three Members of Right Wing Suspected of Propaganda Activities on the 'Day of the Northern Territories'," *The Asahi Shinbun*, western Tokyo area, and morning ed., 8 February 2009, p.35.

²⁴ Violent Noise from Loudspeaker Control Ordinances,

²³ March 1984, Okayama prefecture Ordinances, No.14.

²⁵ Zenkoku Jorei Database [Japanese Ordinances Database], at <https://joreimaster-light.ls.kagoshima-u.ac.jp> (as of 31 March 2019).

²⁶ "Visit of the President of Russia: Allocating 4300 People Onshore, Offshore and in the Air on Alert against Writ Wing Groups and Others," *Nihon Keizai Shinbun*, evening ed., 18 April 1998, p. 11.

²⁷ "Order to Pay a Fine to a Member of a Political Group Conducting Propaganda Activities Loudly: Shizuoka Sub-District Public Prosecutor's Office," *Shizuoka Shinbun*, 29 April 1998, morning ed., p. 25.

c) Road Traffic Act

Demonstrations, processions, or public assemblies disturbing the “peace of the mission” are sometimes subject to the Road Traffic Act. The purpose of this Act is “to prevent road hazards and otherwise ensure the safety and fluidity of traffic, as well as to contribute in preventing blockages arising from road traffic” (Article 1). Article 77(1)(4) stipulates that a person “seeking to undertake an activity [...] that would involve persons using the road by passing down it in a configuration or manner that would have a serious effect on public traffic, or seeking to undertake an activity that would cause people to gather and thereby have a serious effect on public traffic, if the public safety commission prescribes that activity as one for which a person must obtain permission.” This permission must be obtained from the chief of the police station having jurisdiction over the location. A person who has not obtained the necessary permission from the chief of the police station, or who violates a condition attached by the police, “is subject to imprisonment for not more than three months or a fine of not more than 50,000 yen” (Article 119(1)(12) and (1)(13)). Each prefectural public safety commission has detailed regulations enforcing the Road Traffic Act, which specifies which activities require permission. Under most regulations, mass demonstrations and processions generally require permission.²⁸

d) Public Safety Ordinances

Demonstrations, processions, or public assemblies that are likely to disturb the “peace of the mission” may be subject to so-called the “public safety ordinances.” Public safety ordinances are established by prefectural assemblies and require advance permission from the prefectural public safety commission

to hold a public assembly, process, or demonstration on the road or in other public spaces. Over 50 prefectures and cities have enacted such ordinances. The ordinances aim to maintain the “peace and order of local public places,” not to prevent “disturbance to the peace of the mission or impairment of its dignity.”²⁹ As a result, when it is applied to maintain the “peace and order of local public places, the “peace of the mission” may also be protected from disturbance.³⁰

e) Flying Drone Control Act

In 2016, the Act on Prohibition of Flying Drones over the Areas around the National Diet Building, the Prime Minister’s Official Residence and Other Important Facilities of the State etc., Foreign Diplomatic Establishments etc., and Nuclear Sites was enacted. This Act aims at “preemptively preventing a danger to the National Diet Building, the Prime Minister’s Official Residence and other important facilities of the State, foreign diplomatic establishments etc., and nuclear site, by prohibiting drones flying over the areas around such facilities, with the aim of contribution to maintaining major operation of the national politics and good international relations and to assuring public safety” (Article 1). Based on this Act, the Minister of Foreign Affairs may designate the “premises of the mission,” the “consular premises,” the offices of foreign governments or international organizations described as inviolable under certain treaties, or places where “foreign VIPs are present,” as needing the preemptive prevention of danger posed by drones in light of the purpose stipulated by Article 1, as the ‘subject foreign premises etc.’ (Articles 5(1)). Drones may be prohibited from flying over areas around the designated facilities (Article 8(1)).

When Vladimir Putin, President of Russia,

²⁸ E.g. Article 18(1) of the Tokyo Road Traffic Rules.

²⁹ Supreme Court, Judgement, 10 September 1975, *Saikou Saibansho Keiji Hanreishu* [Supreme Court Reports (criminal cases)], Vol. 29, No. 8, p. 489.

³⁰ Tokyo District Court, Order, 23 November 1967, *Gyosei Jiken Saibanrei Syu* [Administrative Law Cases Reports], Vol. 18, No. 11, p. 1465.

came to Japan on 15 and 16 December 2016, flying drones were prohibited over areas around Yamaguchi Ube Airport, Otanisanso, and Kodokan.³¹ When President Trump visited Japan from 5th to the 7th November in 2017, drones were prohibited over areas around Yokota Air Base, Kasumigaseki Country Club, Akasaka Press Center, Imperial Hotel, and the State Guest House.³²

iii) Prevention of Impairment of Its Dignity

Destroying the national flag of a foreign State may constitute “impairment of its dignity” as referred to in Article 22(2) of the VCDR and of Article 31(2) of the VCCR. Article 92(1) of the Penal Code stipulates that “[a] person who, for the purpose of insulting a foreign state, damages, removes or defiles the national flag or other national emblem of the state shall be punished by imprisonment for not more than 2 years or a fine of not more than 200,000 yen.” The crime “shall not be prosecuted without the request of the government of such state” (Article 92(2)). The Article’s purpose is “to prohibit acts which damage the foreign States’ prestige and dignity signified by the national flag, with the aim of contribution to the smooth diplomatic relations.”³³ In light of this purpose, damaging a national flag referred to in Article 92(1) has been interpreted to mean “making the national flag lose or decrease its utility of signifying the foreign States’ prestige and dignity by destroying or impairing the national flag itself,” removing it as “not by damaging the national flag itself, but by relocating or covering it,” and defiling it as “by attaching or setting up something making people feel disgust on the flag and thereby making people feel disgust for the national flag itself.”³⁴

³¹ Public Notice of the MOFA, No. 472, 12 December 2016.

³² Public Notice of the MOFA, No. 370, 2 November 2017.

³³ Osaka High Court, Judgement, 27 November 1963, *Koutou Saibansho Keiji Hanreishu* [High Courts Reports (criminal cases)], Vo. 16, No. 8, p. 708.

³⁴ *Ibid.*

³⁵ Supreme Court, Order, 16 April 1965, *Saikou*

On 30 September 1961, two people put a signboard on the wall-hanging engraved with the national emblem displayed in a high position at the entrance of the ROC Consulate-General in Osaka. The wall-hanging was completely covered with the signboard. It was difficult to remove it. The Supreme Court ruled that the national emblem’s utility was lost by making it invisible in such a way, and therefore it constituted removing the emblem referred to by Article 92 of the Penal Code.³⁵

(c) Immunity from Jurisdiction Concerning the Premise of the Mission or Property

i) Premises of the Mission

In Japan, the premises of foreign missions, their furnishings, other property therein, and the means of transport of the mission have never been searched, requisitioned, attached or executed. The foreign consular premises, their furnishings, the property of the consular post and its means of transport have also never been requisitioned for purposes of national defense or public utility.

Neither the VCDR nor the VCCR stipulates that the sending States enjoy immunity from jurisdiction in terms of civil or administrative proceedings relating to diplomatic or consular premises. The law of state immunity applies to such proceedings. Japan has adopted a restrictive rule since 2006. However, prior to that, the Japanese courts exercised jurisdiction when the owner of a leased premises brought an action against the sending State for not paying the rent or/and compensation or vacating the building on the grounds of a breach of the lease contract.³⁶ The MOFA stated that disputes about the lease of buildings used for

Saibansho Keiji Hanreishu [Supreme Court Reports (criminal cases)], Vol. 19, No. 3, p. 143.

³⁶ “The Embassy of Algeria Sued, Getting into Trouble with Rent,” *The Mainichi Shinbun*, Tokyo, morning ed., 28 June 1982, p. 22; “Trouble Again in the New Address. The Embassy of Algeria under Construction Sued by a Neighbor for Cancel of the Construction,” *ibid.*, Musashino and Tokyo, and morning ed., 27 September 1983, p. 25.

missions comprised disputes under private law, and therefore the MOFA should not become involved.³⁷

Japan accepted the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS) on 11 May 2010. Approximately one year before, to implement the UNCIS, the Diet enacted the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.. The Act came into force on 1 April 2010. It applies to disputes pertaining to foreign States that have not signed or ratified the UNCIS. In 2009, Kei Kurayoshi, the Director-General of the Civil Affairs Bureau of the Ministry of Justice, stated that “if a foreign State does not pay the rent for the real property used for its embassy, since the judicial proceeding relating to this is equivalent to that regarding the rights or interests of real property prescribed in Article 11 of the Act, [...] the foreign State does not enjoy immunity from civil jurisdiction of Japan.”³⁸

Foreign States do not enjoy immunity from judicial proceedings concerning the revocation of the building certification of the diplomatic mission premises. In January 2004, Oman bought a site, intending to construct a building used for “the Embassy, the residence of the head of the mission, and the residence of the members of the staff of the diplomatic mission” in addition to the building that is currently used for the premises. In 2006, Oman sought a safety accreditation by the Mayor of Shibuya Ward pursuant to Article 4(3) of the Tokyo Building Safety Ordinance, and building certification by the District Construction Surveyor of Shibuya Ward pursuant to Article 6(1) of the Building Standards Act. Both applications were approved; however, owners of buildings on adjacent land filed an action against Shibuya Ward, requesting that their administrative dispositions be revoked. During the

proceedings, whether Oman enjoyed immunity from civil or administrative jurisdiction in this case was disputed. The Tokyo High Court denied Oman’s immunity, stating that following: “[t]he act of obtaining other buildings for the premises of the mission, in addition to the one that the foreign State obtained for the premise of the mission and are currently using, by itself, cannot be considered one of diplomatic activities. Only in case where there are special circumstances to consider it as one of the diplomatic activities, we can find that only the foreign State can take the required action. However, on closely examining all the evidences of this case, we failed to find the circumstances to consider the present building construction by Oman, by itself, as one of the diplomatic activities. Therefore, it is appropriate to conclude that the construction of the present building by Oman is not the act carried out by only a foreign State, but the same act was also carried out by a private person.”³⁹

In contrast, in 2007, the Tokyo District Court granted a foreign State immunity from judicial proceedings regarding violation of an intermediation contract to acquire real property used for a diplomatic mission.⁴⁰ In 1997, Saudi Arabia had contracts with a company to acquire a land and a building and to obtain a loan for the purchase. In 1998, Saudi Arabia obtained a land and a building in addition to a loan for the acquisition through the company’s intermediation. However, Saudi Arabia did not pay a prescribed reward to the company. The company filed an action against Saudi Arabia for not paying the prescribed rewards. The Tokyo District Court stated: that since the VCDR granted the embassy privilege and immunity, the embassy is the main facility used by the mission and can be considered essential in the diplomatic activities. “The act of aiming at the acquisition of such a building used for the embassy should be considered to be carried out

³⁷ *Statement of Yoshinao Ara*, supra note 16.

³⁸ *Statement of Kei Kurayoshi, the Director-General of the Civil Affairs Bureau of the Ministry of Justice*, 171th Session of the House of Representative, Record of Proceedings of the Standing Committee on Legal Affairs, No. 5, 7 April 2009, p. 2.

³⁹ Tokyo High Court, Judgment, 17 October 2007, at Court in Japan, at http://www.courts.go.jp/app/hanrei_jp/detail5?id=36488 (as of 24 March 2019).

⁴⁰ Tokyo District Court, Judgement, 27 December 2005, *Hanrei Jiho* [Law Cases Reports], No. 1928, p. 85.

as part of diplomatic activities. [...] The present intermediation contracts were concluded for the acquisition of lands and buildings used for the embassy by the State and the intermediation of the loan of funds for the purchase. To fulfill the contracts, the negotiations with high-level persons of the Japanese government, business community, political community, and the finance industry are needed. Thus, the present contracts were significantly different from usual real estate brokerages contract as a commercial transaction. It should rather be considered it as a sovereign activity for diplomatic purpose by the State. That content was incorporated into the terms of the contracts; therefore, it will be demonstrated that the plaintiff concluded the present contracts with the prior knowledge of the aforementioned. Accordingly, the conclusion of the present intermediation contracts is a sovereign activity of the State, and we shall say that the defendant is immune from the civil jurisdiction of Japan in this case.”

ii) Towing Away of Diplomatic or Consular Vehicles

The Japanese government does not define towing a vehicle as either the “attachment or execution” or exercise of “criminal jurisdiction.” Illegally parked diplomatic or consular vehicles are subject to the Road Traffic Act, as other cars are.⁴¹ If a diplomatic or consular vehicle is parked in violation of the Act, a police officer can order the driver of the vehicle or other responsible person to change how the vehicle is parked, or move the vehicle (Article 51(1)). If an illegally parked vehicle cannot be driven immediately because driver has left the vicinity, a police officer will attach

⁴¹ *E.g.* “Concerning the Complete Revision of Guidelines on Traffic Accident and Violation by Foreigners,” Circular Notice, 10 December 1985, from Director Traffic Division Metropolitan Police Department; “Concerning Establishment of Guidelines on Foreigner’s Traffic Violations,” 30 March 2018, from the Chief of Kanagawa Prefectural Police; “Guidelines on Investigation into Foreigner’s Traffic Violations,” 20 May 1992, from the Chief of Chiba Prefectural Police. *Cf.* “Strange International Argument: Whether Illegal Parking by the Ambassador of Mexico Receives

a notice to the abandoned vehicle, ordering the user to pay an abandonment penalty as a criminal penalty unless he/she pays an administrative penalty (Article 51-4(1)). If the driver or other responsible person cannot immediately comply with the order to move the vehicle, “the officer changes how the vehicle is parked or moves the vehicle, but only so far as is necessary to prevent road hazards and otherwise ensure the safety and fluidity of traffic” (Article 51(2)).

Article 51(15) of the Act stipulates that “[t]he expenses required for moving and storing a vehicle, issuing public notice [...] are borne by the driver or other responsible person or by either the user or the owner of the vehicle.” When a police officer moves an illegally parked diplomatic or consular vehicle, the chief of the police station charges the mission for the cost of moving and storage.⁴² If those who enjoy diplomatic or consular immunity refuse to pay, the chief of the police station neither issues a written demand that fixes the due date for payment, nor collects the fees based on the rules governing local tax arrears collection.⁴³

(2) Freedom of Communication

(a) A Wireless Transmitter

Article 27(1) of the VCDR and Article 35(1) of the VCCR provides that the diplomatic mission or the consular post “may install and use a wireless transmitter only with the consent of the receiving State.” Japan gives the diplomatic mission or the consular post a permission for the installation based on reciprocity with reference to the Radio Act. Article 5(1) of the

Diplomatic Privilege or Not,” *The Asahi Shinbun*, 11 June 1976, Tokyo, and evening ed., p. 11.

⁴² *E.g.* “Concerning Establishment of Guidelines on Foreigner’s Traffic Violations,” *ibid.*; “Concerning the Establishment of Operating Procedures on Order of Payment, Demand and Disposition of Delinquency of Abandonment with Respect to Penalty and Others on Diplomatic Privilege Holders, Members of the United States Armed Forces and Others,” 29 November 2007, from the Chief of Kanagawa Prefectural Police.

⁴³ *Ibid.*

Act provides that “[n]o radio station license is granted to [...] a foreign government or its representative.” However, pursuant to Article 5(2), he or she may be granted a license with respect to the “radio stations (exclusively used for radio communications services between specific fixed points) which are established for the purpose of official service, in an embassy, legation, or consulate and which are established by the government of a country or its representative that permits the Government of Japan or its representative to establish radio stations of a similar kind within the territory of that country.”

(b) Diplomatic or Consular Bag

Article 27(3) of the VCDR and Article 35(3) of the VCCR stipulate that a diplomatic or consular bag “shall be neither opened nor detained.” In accordance with these Articles, the Basic Notice of the Customs Law provides that “especially a diplomatic pouch shall not be subject to unpacking inspection” (67-4-8). Pursuant to the Basic Notice of the Customs Tariff Law, whether it is a diplomatic pouch shall be determined “by visible external marks of their character or document indicating the number of packages constituting the diplomatic pouch.”

(3) Personal Inviolability

Under international law, the diplomatic agents, the members of the administrative and technical staff, and the members of their family shall be inviolable (Articles 29 and 37 of the VCDR). In accordance with this, Article 226(1) of the CIC provides that, when investigating “crimes related to embassies and legations or other crimes related to foreign States,” due care shall be exercised “not to infringe the privileges of inviolability of the person, the reputation, the

papers, and others” which “ambassadors, ministers, members of the staff of the embassies, and their families” enjoy. However, the Japanese government takes the view that, when they are committing or beginning to commit a crime such as assault, a police officer may take forcible measures to stop them or prevent damage.⁴⁴

Article 37(4) of the VCDR states, “[p]rivate servants of members of the mission [...] may enjoy privileges and immunities only to the extent admitted by the receiving State.” Article 226(1) of the CIC stipulates that a police officer may arrest and interrogate private servants in the case where they are arrested out of the premises as the so-called “flagrant offender” who is committing or has just committed an offense, or in other cases of urgent necessity. However, it also states that in other cases, a police officer “shall be subject to the direction of the Chief of Prefectural Police Headquarters in advance.”

Article 41(1) of the VCCR provides that “[c]onsular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.” In accordance with this, Article 230(1) of the CIC prescribes that due care shall be exercised “not to infringe the privileges of inviolability of the person” which the career consular officers and the consular courier enjoy. A “grave crime” is not defined in the VCCR or in the Commentary on Draft Articles on Consular Relations.⁴⁵ Therefore, Takehiro Togo, Councillor for Foreign Affairs of Minister's Secretariat of the MOFA, stated that an offense punishable by imprisonment for a maximum period of three years or more would be considered a “grave crime” in Japan.⁴⁶

⁴⁴ *Statements of Kunihiro Matsuo, Director-General of the Criminal Affairs Bureau of the Ministry of Justice, and Kazuhiko Togo, Director-General, Treaties Bureau of the Ministry of Justice, 145th Session of the House of Representative, Record of Proceedings of the Standing Committee on Legal Affairs, No. 25,*

30 July 1999, p. 32.

⁴⁵ “Draft Articles on Consular Relations, with commentaries, 1961,” *Yearbook of the International Law Commission*, 1961, Vol. II, pp. 115-116.

⁴⁶ *Statement of Takehiro Togo*, supra note 13, p.21.

(4) Immunity from Jurisdiction

(a) Immunity from Court Proceedings

In Japan, when an action is filed against members of a foreign diplomatic mission or a foreign consular post, or their family member, the court files a request with the MOFA through the Supreme Court to confirm with the sending State whether it waives immunity.⁴⁷ In August 1969, the plaintiff filed an action to evict a diplomatic agent of the Embassy of United Arab Republic. The Tokyo District Court issued an order dismissing the complaint, stating that the defendant enjoyed the right of extritoriality, and therefore service on him was impossible. On the other hand, the Tokyo High Court revoked the ruling, stating as follows.⁴⁸ In Article 31(1) of the VCDR, a diplomatic agent is subject to the civil jurisdiction of the receiving State in listed instances. Even in cases other than those listed, the sending State can waive the immunity. Therefore, the judge in the prior instance should have confirmed whether the defendant was subject to the civil jurisdiction or not, and if this had been the case, should have served on him. If not, the judge should have confirmed whether the sending State had waived immunity. Since this confirmation was not completed, the prior ruling was illegal in this respect.

Additionally, when it becomes necessary to seek testimony from a member of a foreign diplomatic mission or a foreign consular post, or a family member, the court should use the same procedure to confirm with the sending State whether it waives immunity or not.⁴⁹ In 1980, the MOFA considered whether a member of a foreign diplomatic mission or a foreign consular post, or a family member could appear as a person of reference in the Diet, and stated

as follows: the Diet may request an embassy staff member to do so; his or her consent is needed to have his/her attend the Diet and submit the opinion; it is appropriate to obtain the sending State's consent in advance in the light of comity of nation.⁵⁰

Article 31(1) of the VCDR stipulates that the members of the diplomatic mission and their families do not enjoy immunity from the civil or administrative jurisdiction in some cases, such as a case "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Article 43 of the VCCR also prescribes that consular officers and consular employees are subject to the jurisdiction of the receiving State when not performing consular functions.

The Japanese court ruled that the foreign embassy counselor enjoyed immunity from jurisdiction regarding civil employment contract proceedings.⁵¹ X, the plaintiff, signed a fixed-term labor contract with JITEX Consulting Group (JITEX) and worked at the Japan Office of "Centre national d'études spatiales" (CNES) in "Service pour la Science et la Technologie" of the Embassy of France. X filed an action for compensation against Y, the counselor of the space development section of the Embassy of France, and JITEX, stipulating that the non-renewal of the fixed-term labor contract was illegal. The Tokyo District Court dismissed the action against Y, stating that since Y was belonged to the CNES, was a diplomatic agent, and was counselor of the Embassy's space development section, it was evident that the present litigation over the present labor contract for her work at the Office did not fall under any case listed in each item of Article 31(1) of the VCDR. It also pointed out that France had not explicitly waived Y's immunity

⁴⁷ "Concerning Inquiry on Waiver of Jurisdictional Immunity and Others of Diplomatic Privilege Holders and Others," Circular Notice, 15 December 1994, from Secretary General of Supreme Court.

⁴⁸ Tokyo High Court, Order, 8 April 1970, *Kakyo Saibansho Minji Hanreishu* [Lower Courts Reports (civil cases)], Vol. 21, No. 3/4, pp. 557-558.

⁴⁹ "Concerning Inquiry on Waiver of Jurisdictional Immunity and Others of Diplomatic Privilege Holders and Others," *supra* note 48.

⁵⁰ International Law Cases Study Group, *supra* note 18, p.127.

⁵¹ Tokyo District Court, Judgement, 28 February 2018.

from civil jurisdiction.

(b) Immunity and Criminal Investigation

Under international law, the members of the mission and their families enjoy immunity from the criminal jurisdiction of the receiving States (Articles 31(7) and 37(1) and (2) of the VCCR). The CIC does not prescribe their immunity from the criminal jurisdiction expressly. However, in the Japanese legal system, treaties are ranked superior to statutory laws. As noted above, Article 224 of the CIC stipulates that, when investigating “crimes related to embassies or legations, or other crimes related to foreign States,” a police officer “shall comply with international law and international practices.” In Japan, these provisions ensure that the criminal investigation against them is conducted without infringing upon their immunity.

On the contrary, Article 43(1) of the VCCR states that consular officers and consular employees are not “amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.” Thus, Article 230(2) of the CIC stipulates that “in conducting an investigation relating to the acts performed in the exercise of consular functions,” due care shall be exercised not to infringe upon the immunity that consular officers and consular employees enjoy from the criminal jurisdiction of Japan.

Article 71(1) of the VCCR provides that “consular officers who are nationals of or permanently resident in the receiving State” may enjoy more facilities, privileges, and immunities than recognized by the Article insofar as additional facilities, privileges, and immunities are granted by the receiving State. Japan does not grant consular officers with Japanese nationality or with a habitual residence in Japan more privileges and

immunities than stipulated by the VCCR (Article 230(2) of the CIC). Article 71(2) of the VCCR provides that “[o]ther members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers [...] enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State.” In Japan, only consular employees with Japanese nationality or with a habitual residence in Japan enjoy immunity from criminal jurisdiction with respect to the investigation “relating to the acts performed in the exercise of consular functions” (Article 230(2) of the CIC).

Furthermore, in a case where it is questionable whether the suspect enjoys immunity or inviolability, a police officer shall be “promptly subject to the direction of the Chief of Prefectural Police Headquarters” (Articles 226(3) and 230(4) of the CIC).

(c) Application of the Traffic Violation Notification System

The Traffic Violation Notification System permits those who commit minor Road Traffic Act violations to pay an administrative penalty within a specified period. Following payment of the fine, they are exempt from prosecution. The system applies to offenses such as illegal parking, speeding, and running red lights. The police deliver a “Traffic Violation Ticket” to violators, and the “Fine Payment Bill.” Those who pay a penalty by the specified deadline are not subject to prosecution, nor are they “subject to being brought before the family court for trial, in connection with a case involving the conduct” (Articles 128 and 130 of the Road Traffic Act).

The Traffic Violation Notification System also applies to those who enjoy diplomatic or consular immunity.⁵² When they commit a

⁵² E.g. “Concerning the Complete Revision of Guidelines on Traffic Accident and Violation by Foreigners,” supra note 42; “Concerning Establishment of Guidelines on

Foreigner’s Traffic Violations,” supra note 42; “Guidelines on Foreigner’s Traffic Violations,” Official Directives, 20 May 1992, Chiba Prefectural Police;

violation of the Road Traffic Act applied by the System, the police deliver a “Traffic Violation Ticket” and a “Fine Payment Bill.”⁵³ However, given that the members of the diplomatic mission or consular post enjoy immunity from jurisdiction, each prefectural police headquarters seems to order police officers to follow three directions when using the system, as follows.⁵⁴ First, a police officer shall not notify them to be appear. Second, a police officer does not request them to sign and seal the recorded statement column in the “Traffic Violation Card” used to report to the chief of the prefectural police. Third, a police officer delivers them the “Traffic Violation Ticket,” after erasing the sentence written on the Ticket, saying that paying a penalty is voluntary, but not paying it within the specified period may make them subject to prosecution or a juvenile court procedure.

(d) Members of the Staff Who Are Nationals of or Permanently Resident in the Receiving State

Members of the administrative and technical staff, or the service staff, and the private servants who are nationals of, or permanently resident in, the receiving State enjoy privileges and immunities “only to the extent admitted by the receiving State” (Article 38 (2) of the VCDR and Article 71(2) of the VCCR). No Japanese statutory laws and regulations stipulate this point. Japan does not admit any privileges and immunities more than provided by both Conventions except as provided by other agreements.

In December 2002, a member of the

“Application of Traffic Violation Notification System to Diplomatic Privilege Holders,” 18 April 1969, Aichi Prefectural Police.

⁵³ E.g. “Concerning the Complete Revision of Guidelines on Traffic Accident and Violation by Foreigners,” *ibid.*; “Application of Traffic Violation Notification System to Diplomatic Privilege Holders,” *ibid.*

⁵⁴ *Ibid.*

⁵⁵ Tokyo High Court, Judgement, 23 March 2005, *Koutou Saibansho Keiji Hanreishu* [High Courts Reports (criminal cases)], Vol.58, No.1, p.13.

⁵⁶ “Drug Smuggling by a Diplomatic Agent: Ex-

administrative staff of the Embassy of Sri Lanka in Japan caused a traffic accident on the way home from work. The staff member permanently resided in Japan. The Tokyo High Court denied the staff member immunity of jurisdiction, stating the following: “Considering the extent of the immunities admitted by Japan as the receiving State, the matters directly relating to the rights and obligations of the citizens such as immunity from criminal jurisdiction, in line with the spirit of the Constitution, basically shall be provided for by law. From this, and from the perspective of clarity of the scope of criminal jurisdiction and criminal procedural fairness, unless provided for by law in Japan with respect to the immunity, it is appropriate to consider that Japan adopt the national policy of not admitting any immunity under domestic law [...]. [...] Since a law or regulation that admits immunity from criminal jurisdiction is not found in Japan, the accused does not enjoy immunity from jurisdiction based on Article 38(2) of the present Convention.”⁵⁵

(e) Waiver of Privileges and Immunity

The sending States may also waive immunity from jurisdiction of members of the staff of the diplomatic mission or the consular post, and their families (Article 32(1) of the VCDR and Article 45(1) of the VCCR). In 1990, Nicaragua waived immunity of its diplomatic staff when the counselor of the Embassy of Nicaragua in Japan was facing prosecution for heroin trafficking into the US by a counselor of the District Court for the Eastern District of New York.⁵⁶ The US requested extradition from Japan based on the Treaty on Extradition

Counselor of the Embassy of Nicaragua in Japan Provisionally Detained by the Tokyo High Public Prosecutors Office,” *Nihon Keizai Shinbun*, morning ed., 18 July 1990, p. 35; Request from the U.S. to the Tokyo High Court for Extradition of the Ex-Member of the Diplomatic Staff,” *Nihon Keizai Shinbun*, morning ed., 29 August 1990, p. 35; “Mr. Kajiyama, the Minister of Justice Has Ordered the Extradition of the Ex-Member of the Diplomatic Staff of the Nicaragua Embassy in Japan to the U.S.,” *Nihon Keizai Shinbun*, evening ed., 18 October 1990, p. 19.

between Japan and the US. The Nicaraguan government agreed that the counselor's function came to an end as of 16 July 1990, and it waived immunity. It also stated that applying the Treaty on Extradition to the person was perfectly acceptable. On the next day, the 17th, the U. S. requested Japan's provisional detention of the offender. On 15 October, the Tokyo High Court ruled the extradition could proceed.

(5) Exemption from Taxation

(a) Tax Concerning the Premises

Article 23(1) of the VCDR and Article 32(1) of the VCCR stipulate that the sending State and the head of the mission are "exempt from all national, regional or municipal dues and taxes" in relation to the premises of the mission or the consular post and the residence of the career head of consular post "other than such as represent payment for specific services rendered." Japanese statutory laws, regulations, and directions stipulate the exemption from taxation in accordance with these articles.

As of 2019, those who acquire or own real property in Japan must pay registration, a license tax, and a stamp tax (which are national taxes), in addition to real estate acquisition tax, fixed asset tax, city planning tax, and business office tax (which are local taxes). Meanwhile, pursuant to Article 6 of the Registration and License Tax Act, based on reciprocity, no registration license taxes are imposed on foreign States' registration of sites and buildings of foreign embassies, legations, consulates, and other similar facilities. The stamp tax is not imposed on documents prepared by foreign embassies, legations, consulates (except consular posts headed by an honorary consular officer), or foreign representatives or their branch-office in the same manner (Article 54 of the Basic Notice of the Stamp Tax Act).

Pursuant to the Local Tax Act, the real estate acquisition tax, fixed asset tax, and city planning tax are not imposed on the "embassies, legations, or consulates" or the "facilities exclusively used for heads of embassies, legations, or consulates, or members of the staff of the embassies or legations" (Articles 73-4(2), 348(9) and 702-2(2)). In the same manner, the business office tax seems to be also not imposed, although this is not stipulated by statutory laws.⁵⁷

(b) Taxation on Diplomatic or Consular Staffs

i) Income Tax

Pursuant to Articles 34 and 37(1) and (2) of the VCDR and Articles 49(1) and 71 of the VCCR, the diplomatic agents, consular officers, or their families, and the administrative and technical staffs of the diplomatic mission or the consular post, or their families who are not nationals of, or permanently residing in, the receiving State are exempt from all taxes on the emoluments they receive from the sending State. Members of the service staff of the diplomatic mission or the consular post, "who are not nationals of or permanently resident in the receiving State," are exempt from taxes on the emoluments that they receive because of their employment (Article 37(3) of the VCDR and Article 49(2) of the VCCR).

In Japan, pursuant to the Income Tax Act, on the basis of reciprocity, income taxes are not imposed on the "salary, compensation, wages, annual allowances, bonuses, and any other pay of a similar nature" (hereinafter "salary or other wage" in this section) that the heads or the members of the staffs of the diplomatic missions or consular posts who do not have Japanese nationality receive for work (Article 9(1)(8) of the Act and Article 24 of the Order for Enforcement of the Income Tax Act). The Basic Notice of the Income Tax Act provides that income tax is also not imposed on salary or other wages that the spouses of the foreign

⁵⁷ International Law Cases Study Group, *supra* note 18,

ambassador, ministers and diplomatic agents receive for work (9-11). In contrast, pursuant to this, their “retirement income” is subject to income tax (9-12(2)). It also stipulates that the salary or wage that “a person receives for the work such as providing a performance art, which a national or local government of Japan does not carry out, or for the work with a profit objective” are subject to income tax (9-12(3)).

The Reconstruction Special Income Tax, established to raise funds for reconstruction following the Great East Japan Earthquake, is also not imposed on the salary or other wages that non-Japanese members of the staffs of the diplomatic missions or consular posts and others receive for work. This is because the special income tax is imposed only on the salary or other wage subject to income tax (Article 9 of the Act on Special Measures on Securing Financial Resources Necessary to Implement Measures for the Reconstruction in Response to the Great East Japan Earthquake).

ii) Withholding Obligation

The Income Tax Act obliges a company or a person that employs a resident of Japan and pays him or her salary or other wage in Japan to “withhold income taxes from that domestic source income at the time of payment and pay them over to the national government” (Articles 183 and 204). Whether a sending State shall withhold income taxes at the time of paying a salary or other wage that is not exempt is not stipulated in the VCDR, or the VCCR, or in domestic statutory laws and regulations.

When considering whether the US shall withhold income taxes from the salary or other wage paid to a Japanese person working at the US Embassy in Japan, the Tokyo High Court denied the US had an obligation, stating as follows⁵⁸: “the principle of international law is that in relationships between sovereign States, a State is subject to other States’ rights of taxation only when there is a treaty or other

agreement, and therefore a State basically may not exercise the right of taxation against other States unilaterally. [...] Looking at this case, the activity of the embassy is diplomatic activity, which is sovereign act. A State pays local employees salary or wages to perform the diplomatic activity. The US should be said not to assume the withholding obligation unless there is an agreement between the States or international custom to that effect. And there is no sufficient evidence to find that there is such agreement with the US or international custom.” In this case, the Court justified exemption from the withholding obligation on the principle of international law. However, the relationship between the US and Japan is now subject to more specific international rules governing diplomatic relations, such as the VCDR. The specific international law rules apply to the relationship rather than the principle. The Court should have considered applying such rules, not the principle, in this case.

(c) Consumption Tax

Article 34(a) of the VCDR and Article 49(1)(a) of the VCCR mentions “[i]ndirect taxes of a kind which are normally incorporated in the price of goods or services” as one of the taxes which a diplomatic agent and others are not exempt from. These “[i]ndirect taxes” include not only the consumption tax, but also the golf course utilization and bathing taxes. Under the VCDR and the VCCR, the State parties have a duty to exempt the diplomatic agent and others from these indirect taxes. However, Japan exempts consumption tax from the foreign diplomatic mission and others based on reciprocity.

i) General Consumption Tax

In Japan, pursuant to Article 86(1) of the Act on Special Measures Concerning Taxation (hereinafter referred to “the Act” in this section), transferring a taxable asset from

⁵⁸ Tokyo High Court, Judgement, 8 June 2004, at Courts in Japan,

http://www.courts.go.jp/app/hanrei_jp/detail5?id=38458 (as of 31 March 2019).

enterprises needed to perform diplomatic or consular functions at embassies, legations, consulates, and other similar organs, and ambassadors, ministers, consuls, and persons equivalent thereto of foreign States (hereinafter “foreign embassies or others”) are exempt from consumption tax based on reciprocity. Foreign embassies or others are obliged to use the asset in question to perform such functions for two years from the date of the transfer or lease of the asset “except under unavoidable circumstances” (Article 86(3) of the Act).

Only enterprises designated by the Commissioner of the National Tax Agency can transfer an asset to foreign embassies or others which is exempt from consumption tax (Article 45-4(1) of the Order for Enforcement of the Act). A company seeking this designation must submit a “written application for designation of the shop applying consumption tax exemption to the transfer to foreign diplomatic establishments” to the MOF.

Foreign embassies or others planning to receive consumption tax exemption must present such enterprises with the certification prescribed by the MOF and submit documents in the prescribed form, which contains a list of the articles or services, the quantities and prices in question, and their use (Article 45-5(1) of the Order). Foreign embassies or others can apply for certification to the Principal Deputy Chief of Protocol of Minister's Secretariat of the MOFA (Article 36-2(1) of the Regulation for Enforcement of the Act). The certifications include one for gasoline, vehicles, provision or

supply of electricity, gas, tap water, and telecommunication services, and other taxable assets.⁵⁹ The certifications of other taxable assets are classified as only goods or as both goods and services. They are also divided into two groups: those requiring a purchase of more than 5,000 yen to receive exemption, and those requiring a purchase of more than 40,000 yen.

ii) Specific Consumption Tax

Pursuant to the Local Tax Act, a local government may establish a new tax item by the prefectural ordinance other than that established by the Act (Articles of 259, 669 and 731). As of 2019, Tokyo, Osaka prefecture, Kyoto city, and Kanazawa city established an accommodation tax. These local governments do not impose the tax on the accommodations of ambassadors and others performing diplomatic or consular functions “in the light of reciprocity based on the VCDR and the VCCR.”⁶⁰

iii) Consumption Taxes and Others Relating to Vehicles

As of 2019, those who acquire or own a vehicle in Japan must pay an automobile acquisition tax, an automobile tax, a light automobile tax (which are local taxes), and an automobile weight tax (which is a national tax). Pursuant to the Circular Notices of the MIC, the automobile tax is not imposed on the automobiles whose vehicle inspection certificates are delivered by not Ministry of Land, Infrastructure, Transport and Tourism (MLIT) but the MOFA.⁶¹ The

⁵⁹ National Tax Agency, “Concerning Treatment of Exemption of Consumption Tax on Transfer of Taxable Asset for Foreign Establishments and Others,” at <https://www.nta.go.jp/law/tsutatsu/kobetsu/kansetsu/soc/hiho/060401/01.htm> (as of 24 March 2019).

⁶⁰ The Tokyo Metropolitan Government Bureau of Taxation, “Accommodation Tax: Application Forms,” at <http://www.tax.metro.tokyo.jp/shomei/index-z8.html>; Osaka Prefecture, “Accommodation Tax: Taxable Minimum, and Tax Exemption for Foreign Ambassadors and Others,” at <http://www.pref.osaka.lg.jp/zei/alacarte/shukuhaku.html#kazeimenjo>; Kyoto City Government, “Companion to Accommodation Tax Special Collection,” 1st ed., the

Taxation Division, the Tax Affairs Department, the Administrative and Budget Bureau of the Kyoto City, 19 April 2019, p.11, at <https://www.city.kyoto.lg.jp/gyozai/cmsfiles/contents/0000236/236946/tebiki.pdf>; Kanazawa City, “Guidelines of Administrative Processing for Kanazawa City Accommodation Tax,” the Tax Affairs Division, the General Affairs Bureau, 31 August 2018, pp.13-14, at <https://www4.city.kanazawa.lg.jp/data/open/cnt/3/25368/6/youryou.pdf> (as of 24 March 2019).

⁶¹ “Concerning Treatment of Diplomatic Agents and Consular Staffs in Japan in Imposition of Local Taxes,” Circular Notice of the Home Affairs Agency, 2 February 1953.

Notice does not stipulate automobile acquisition tax and light automobile tax because both were established after the Notice was issued. The light automobile tax has been interpreted not to be imposed on the automobiles whose vehicle inspection certificates is delivered by the MOFA pursuant to the application *mutatis mutandis* of the item of the bicycle tax and cart tax of the Notice. This is because bicycle tax and cart tax were predecessor of light automobile tax. The automobile acquisition tax seems also not to be imposed on them. The exemption appears to be based directly on international law. The automobile acquisition tax is scheduled to be abolished when the consumption tax rate is increased from 8% to 10% in 2020. The automobile weight tax is also not imposed on such automobiles, since its taxation objects are the automobiles whose vehicle inspection certificates are delivered by the MOFA.

Automobile fuel in Japan is subject to a local gasoline tax, and a liquefied petroleum gas tax (which are national taxes). Pursuant to Article 90-3(1) and (2) of the Act on Special Measures Concerning Taxation, gasoline tax and local gasoline tax are not imposed on the gasoline “provided for a fuel for automobiles for public purpose of “foreign embassies, legations, consulates and other similar organs,” or on fuel for the private automobiles of “foreign ambassadors, ministers, consuls and persons equivalent thereto” on a reciprocal basis.

(d) Fee

Under the VCDR and the VCCR, the receiving States may impose “[c]harges levied for specific services rendered” on foreign diplomatic agents or other members of the staff of the diplomatic mission or the consular post

(Article 34(e) of the VCDR and Article 49(1)(e) of the VCCR). In Japan, however, diplomatic agents and consular officers are exempt from some fees.

Pursuant to Article 39(1) of the Wildlife Protection, Control, and Hunting Management Act, those who intend to hunt shall be licensed by the prefectural governor, and have to pay a hunting license fee for receiving the license (the Cabinet Order on Standard Fees of Local Governments). Foreign diplomatic agents and others appear to be exempt from the fee on the basis of reciprocity, based on the Circular Notice of the Ministry of Home Affairs.⁶² Article 24 of the Explosives Control Act stipulates that a person who intends to import explosives must obtain the permission of the prefectural governor, and “a person who has imported explosives shall notify the prefectural governor to that effect, without delay.” He or she has to pay the explosives import permit fee for receiving the permission. The foreign diplomatic agent and others are exempt from the fee, based on the Circular Notice of the MIC.⁶³

Foreign diplomatic agents and consular staffs are also exempt from a driver's license test and the fee and a license issuance fee. Pursuant to the Notice of the National Police Agency,⁶⁴ if a diplomatic agent or consular officer with a sending State nationality holds a license to drive a motor vehicle or motorized bicycle from an administrative agency or authorized organization in a country or region outside Japan, they are exempt from taking the academic and practical skill tests that are part of the driver's license test, but not from taking the fitness screening. If they do not possess a foreign driving license, they must take all the aforementioned tests. Additionally, when

⁶² “Concerning Exemption of Diplomatic Agents and Others from Hunting License Fees,” dated 12 November 1963, from the Director-General of Finance Bureau of the Ministry of Home Affairs, to the Prefectural Governors. The Ministry of Home Affairs is the predecessor of the MIC.

⁶³ “Concerning Exemption from Fees Relating to Explosives Imported by Diplomatic Agents, Consular

Staffs and Others,” 16 March 1963, from the Director-General of Light Industry of the Ministry of International Trade and Industry, to the Prefectural Governors. The Ministry of International Trade and Industry is the predecessor of the METI.

⁶⁴ “Concerning Revise of Handling Principles of Woks Concerning Foreign Drivers’ Licenses,” Circular Notice of the National Police Agency, 28 September 2016.

renewing or reissuing the license, they are not exempt from these procedures. In any case, neither foreign diplomatic agents nor consular officers are exempt from fees. In contrast, other members of the staffs of the diplomatic missions or the consular posts who are nationals of the sending State and have diplomatic or consular identification card must pay these fees.

(6) Exemption from Customs Duties and Inspection

(a) Custom Duties

In Japan, pursuant to Article 16(1) of the Customs Tariff Act (hereinafter referred to “the Act” in this section), “based on mutual conditions,” articles for the official use of a “foreign embassy, legation or other organs with equivalent thereto” (hereinafter “embassy and others” in this section) and “foreign consulate or other organs with equivalent thereto” in Japan, and articles for the personal use of a “foreign ambassador, minister or other envoy of equivalent thereto” (hereinafter “ambassador and others” in this section) and members of their family, and “the officials of foreign embassy, legation, consulate or other organs with equivalent thereto [...] designated by Cabinet Order” and their family are exempt from customs duties. These “mutual conditions” are certified in accordance with simple custom clearance request papers issued by the Deputy Chief of Protocol of Minister’s Secretariat of the MOFA and others (16-4 of the Basic Notice of the Act).

What falls into the definition of “other organs with equivalent thereto” other than an embassy or legation is determined by the exchange of a memorandum, official documents, or note verbal between Japan and sending States ((16-1(1)) of the Basic Notice). The “other establishment with equivalent thereto,” rather than a consulate, includes consular posts headed by honorary consular officers (16-1(5) of the Basic Notice). The “officials [...] designated by Cabinet Order” are as follows:

counsellors, first secretaries, second secretaries, third secretaries, and attachés of embassies or legations; consuls-general, consuls, and vice-consuls of consulates-general or consulates; and attachés, assistant attachés, diplomatic secretaries of embassies, legations, consulates-general or consulates (Article 27 of the Order for Enforcement of the Act). The “[a]rticles for official use” by embassy and others means articles that are necessary for the embassy and others “to perform diplomatic activities,” which include “construction materials of offices or staff accommodations of embassy and others, and cinematographic films (including fiction movies) screened only in embassy and others” (16-1(2) of the Basic Notice). Moreover, if automobiles, alcoholic beverages, and tobacco imported based on the preceding paragraph are used for purposes other than those prescribed in the preceding paragraph for two years from the date of permission to import, the importer must pay previously exempted customs duties immediately (Article 16(2) of the Act and Article 28 of the Order for Enforcement of the Customs Tariff Act).

The articles exempted from customs duties are also exempt from the national consumption tax (Article 13(1)(3) and 13(3)(3) of the Act on Collection, etc. of National Consumption Tax Imposed on Imported Goods). In addition, when importing these articles, approval from the Minister of Economy, Trade and Industry is not required (2-12(5) of the Basic Notice of the Treaty, etc.).

(b) Inspection

In accordance with Articles 36(2) and 37(1) of the VCDR and Article 50(3) of the VCCR, the Basic Notice of the Customs Act provides that the unpacking inspection of the articles for public use of embassy and others, or the articles for the private use of an ambassador and others are omitted, “in consideration of international custom and except when found particularly necessary” (67-4-8). It also provides that omitting documents such as invoices shall not be prevented. The Basic Notice of the Treaty,

etc. also prescribes that “the unpacking inspection of the personal effects of a diplomatic agent or a member of the family belonging to the said person's household is basically not conducted,” and an official, when conducting the unpacking inspection, shall do so cautiously to avoid a dispute at a later date (2-12(8)). Moreover, pursuant to the Basic Notice of the Customs Act, the unpacking and inspection of “import mails sent to foreign diplomatic agents and others” are omitted “except when found particularly necessary” (76-4-6). In contrast, the license fee for inspection outside of the designated place is treated as equivalent to “charges for storage, cartage and similar services” of Article 36(1) of the VCDR” (2-12(7) of the Basic Notice of the Customs Act), and is therefore collected when inspecting articles of ambassadors and others as well.

(7) Non-Application of Other Procedures

Although not stipulated in the VCDR and the VCCR, some licenses are not requested from diplomatic agents, consular officers, and others under Japanese national statutory laws. Article 48(1) of the Foreign Exchange and Foreign Trade Act stipulates that “[a]ny person who intends to carry out the export of specific kinds of goods to specified regions, which are specified by Cabinet Order as recognized to undermine the maintenance of international peace and security, shall obtain [...] permission” from the Minister of Economy, Trade and Industry. However, when exporting “goods for the personal use of a foreign ambassador, minister or other envoy of equivalent thereto sent to Japan and the officials of foreign premises [...] in Japan, and goods sent by foreign premises,” the Minister’s approval is not needed (Article 4(2)(2) of the Export Trade Control Order). Article 36 of the Act on Stabilization of Supply, Demand and Prices of Staple Food provides that “any person who intends to carry out the export of rice [...] pursuant to the provisions of the Ordinance of the Ministry of Agriculture Forestry and

Fisheries, shall notify the quantity exported to the Agriculture, Forestry and Fisheries Minister in advance.” However, pursuant to Article 10(6) of the Order for Enforcement of the Act, “since rice for the personal use of a foreign ambassador, minister or other envoy of equivalent thereto sent to Japan and the officials of foreign premises [...] in Japan, and rice sent by foreign premises is unlikely to adversely affect the domestic supply and demand and the stabilization of the prices,” this notification is not required.

(8) Respect for the Laws and Regulations of the Receiving State

Japanese statutory laws and regulations apply to the foreign diplomatic missions or consular posts, except as otherwise provided. However, since diplomatic missions or consular posts enjoy immunity and inviolability, even if members of the foreign missions violate Japanese statutory laws and regulations, Japan cannot take forcible measures against them. As noted above, the Japanese government notes that a police officer, in extremely exceptional circumstances, may temporarily forcibly restrain diplomatic or consular staff members when they are likely to commit or are committing a crime.⁶⁵

V. Conclusion

In the Japanese legal system, international treaties and customary international law have domestic effect and are ranked as inferior to the Constitution, but superior to the statutory laws. Japan is a State party to both the VCDR and the VCCR, which have some provisions that can be directly applied in Japanese courts. However, in most cases, Japan has established statutory laws, regulations, and guidelines on implementing its duties under international law. By applying these domestic rules, Japan implements the rules of international law concerning diplomatic or consular immunity and inviolability.

⁶⁵ *Statements of Kunihiro Matsuo, and Kazuhiko Togo,*

supra note 45, p.32.