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Preemptive Strike on North Korea: Explaining the Sino–North Korean Mutual Aid and Cooperation Friendship Treaty*

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The ROK–China conflicts due to the THAAD deployment in South Korea and the Trump administration's preemptive strike doctrine toward the DPRK have put the security of the Korean Peninsula in a grave state. At the same time, positive expectations for ROK–DPRK–U.S. talks have been growing recently. However, since whether the United States will conduct a preemptive strike or not depends on the results of the U.S.–DPRK talks, the security of the Korean Peninsula is in a precarious state.

This paper, therefore, attempts to analyze the Sino–North Korean Mutual Aid and Cooperation Friendship Treaty (hereafter referred to as the Sino–North Korean Friendship Treaty) that will allow for the reconsideration of China's role in nullifying the uncertainty on the Korean Peninsula according to the treaty. The Automatic intervention, according to Article 2 of the Sino–North Korean Friendship Treaty, is an exercise of the right of self-defense that can be implemented when the requirements of necessity and proportionality of Customary International Law are met, and only until the UN Security council takes appropriate measures, according to Article 51 of the UN Charter. China's intervention in the case of contingency on the Korean Peninsula, according to the Sino–North Korean Friendship Treaty, has limitations with regards to compliance with Articles 48 and 103 of the UN Charter. It is a special treaty based on the historical background between North Korea and China. Also, since China recently adopted "non-alignment" as a foreign policy, it is unlikely that the Sino–North Korean Friendship Treaty will continue after the regime transition.

Keywords: Sino–North Korean Friendship Treaty, preemptive strike, Chinese intervention, collective self-defense, state succession

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Introduction

The atmosphere on the Korean Peninsula is disquieting. The U.S.–DPRK talks and denuclearization are definitely goals that are not easy to achieve, but thanks to active measures of the Moon Jae-in administration, high-level inter-Korean talks took place at Panmunjom on April 27, 2018. In recent days, during the anticipation of U.S.–DPRK and ROK–DPRK–U.S. summits, reunification and peace on the Korean Peninsula do not seem too far off. However, the security situation on the Korean Peninsula could change drastically if the failure of the U.S.–DPRK talks results in another war caused by a preemptive strike by the United States.

The political and economic ties between North Korea and China along with the proximity of the border to Beijing indicate that China will likely actively intervene under a crisis situation on the Korean peninsula to protect not only its borders but also its capital.[1] *The Global Times*, the official news agency of the Chinese government, referred to the former ROK president Park Geun-hye's words "collapse of the DPRK government" to warn that the Chinese government may intervene for its national interest if a crisis situation were to arise in North Korea.[2] One of the grounds justified by the international law on which China can intervene is the "Treaty of Friendship, Co-operation and Mutual Assistance between the People's Republic of China and the Democratic People's Republic of Korea" (hereafter referred to as the Sino–North Korean Friendship Treaty).

The South Korean government has been preparing for reunification based on peaceful and progressive methods or on the premise of war and rapid changes thus far. The only difference has been in its methodology. The following are studies on Chinese intervention in the case of contingency on the Korean peninsula: Kim Yeol-su (2012), Park Hwee-rak (2013), Shinjin (2014), and Hwang Seong-chil (2014). However, the former studies mostly analyzed the mutual assistance of the ROK–U.S. posed by Chinese military intervention, so they were utilizing a strategic approach to solve a security threat issue rather than to verify the effectiveness of the Sino–North Korean Friendship Treaty itself by analyzing the content or examining its feasibility based on the international law.

There have been many studies of legislative integration and succession of treaties of the unified Korean Peninsula in the field of law so far. The succession of treaties has mainly been discussed in accordance with the succession of territorial or debt issues; there is also an argument that, in accordance with practices, the succession of states with respect to treaties does not entail the succession of treaties dealing with serious political matters, such as the Sino–North Korean Friendship Treaty.

This research's aim is to analyze the legal basis for the Sino–North Korean Friendship Treaty that allows China to legitimately intervene in the case of contingency on the Korean Peninsula and enhance its role, and to renew the ROK's preparation for unification by clarifying the range and limitations of Chinese intervention.

This paper, with a brief historical and political background of the treaty, will categorize China's right of collective self-defense into the right of self-defense according

to Customary International Law (content-based) and the right of self-defense according to Article 51 of the UN Charter (procedure-based), and discuss the issue of state succession, concluding with a discussion of limitations.

Review of the Sino–North Korean Friendship Treaty and Military Alliance

Background of the Treaty[3]

The People's Liberation Army (PLA) expanded its influence in North Korea through participation in the Korean War and assistance in the post war recovery. The denouncement of Stalin and the peaceful coexistence doctrine by Khrushchev at the Twentieth Congress of the Communist Party in 1956 resulted in the aggravation of the Sino–Soviet conflict and the deterioration of the USSR–DPRK relationship. During competition with the USSR, China strengthened its military and economic assistance to the DPRK. Especially in 1958, massive military support was made to aid the DPRK military force which had been weakened by the withdrawal of Chinese forces from North Korea.[4]

At that time, political power in the DPRK was diverged into the "*Palchisan* Faction"; the "*Yan'an* Faction," former active communists in the Yan'an area; the "Soviet Faction," consisting of those who had returned from the USSR; and the "*Namro* Faction," domestic activists led by Park Heon-young. Kim Il Sung sought to decrease PLA influence in domestic affairs by eliminating pro–China personnel.[5] However, the excluded personnel of the *Yan'an* faction caused the August Faction Incident in 1956, and Kim Il Sung had to reinstate the *Yan'an* faction members to their posts under the pressure of the Chinese government.[6] The aforementioned criticism against Stalin's cult of personality at the Twentieth Congress of the Communist Party brought the Sino–Soviet conflict to the surface,[7] putting the DPRK, also working on the deification of Kim Il Sung, into an uncomfortable position. Nonetheless, North Korea could take advantage of the Sino–Soviet conflict by receiving technical and financial aid or loan exemptions.[8]

The DPRK could also obtain military benefits; on July 6, 1961, Khrushchev and Kim Il Sung signed the "Treaty of Friendship, Co-operation, and Mutual Assistance Between the Union of Soviet Socialist Republics and the Democratic People's Republic of Korea." To sum up, Kim Il Sung's discontent with Khrushchev's "peaceful coexistence doctrine" and the "criticism against cult of personality" and the completion of the mutual assistance system between the ROK, the United States, and Japan through the "Security Treaty Between Japan and the United States America" in 1951 and the "Mutual Defense Treaty between the United States of America and the Republic of Korea," led the DPRK to recognize the need for mutual assistance in response to security threats, and resulted in the conclusion of the Sino–North Korean Friendship Treaty on July 11, 1961.

Content of the Military Alliance Clause in the Sino–North Korean Friendship Treaty

(1) Legal Characteristics of the Sino–North Korean Friendship Treaty

The Sino–Chinese Friendship Treaty was signed by the Premier Kim Il Sung of the DPRK and the Premier Zhou Enlai in Beijing on July 11, 1961. Typically, a "treaty" is defined as an international agreement governed by international law.[9] According to Article 2 of the Vienna Convention on the Law of Treaties (VCLT, hereon, Law of Treaties) that was agreed upon in 1969 at the UN Conference on the Law of Treaties, a treaty is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[10]

To examine the effect of the Sino–North Korean Friendship Treaty, it is necessary to study whether it meets the basic requirements of a treaty. Given the name of the Sino–North Korean Friendship Treaty, it could be assumed to be a treaty.[11] However, a treaty refers to an agreement that binds the parties to international law regardless of its title such as an agreement, regulation or code.[12] Therefore, to determine whether the Sino–North Korean Friendship Agreement is a treaty, the following must be examined according to the 1969 Law of Treaties, if it is: 1) in written form, 2) concluded between States, and 3) governed by international law.

First of all, the PRC and the DPRK exchanged treaty documents by the title of the Sino–North Korean Friendship Treaty on July 11, 1961. Therefore, it satisfies the first qualification. Secondly, North Korea adopted the Socialist Constitution of the Democratic People's Republic of Korea on September 8, 1948, forming a cabinet with Kim Il Sung as the premier on September 9, and announcing the foundation of the DPRK on the same day.[13] The People's Republic of China was established after the Civil war, in October 1949, and recognized the DPRK as a state by establishing diplomatic relations with it. Based on both the constitutive and declaratory theories of state recognition, the two states were recognized by each another.[14] Hence, it is an agreement concluded between states. Lastly, this treaty is an agreement between the DPRK and PRC, which is not regulated by domestic laws of a single or third party, thus it qualifies as a treaty regulated by international law.

(2) Legal Analysis of the Structure of the Sino–North Korean Friendship Treaty[15]

1) Structure of the Sino–North Korean Friendship Treaty

The Sino–North Korean Friendship Treaty consists of seven articles and a preamble. The preamble stipulates the mutual respect for state sovereignty, mutual non-aggression, and non-intervention between the Standing Committee of the Supreme People's Assembly of the DPRK and the premier of the PRC.

This is interpreted as a promise to provide assistance and support to the other party-state in the case of an invasion by a third state.

2) Legal analysis of the Sino–North Korean Friendship Treaty

Articles 1 to 6 of the body lay out the limitations of the rights and responsibilities of both sides, and the final Article 7 specifies the effect of the treaty itself. Article 1 states that, "The Contracting Parties will continue to make every effort to safeguard the peace of Asia and the world and the security of all peoples." Article 2 states that, "The Contracting Parties undertake jointly to adopt all measures to prevent aggression against either of the Contracting Parties by any state. In the event of one of the Contracting Parties being subjected to the armed attack by any state or several states jointly and thus being involved in a state of war, the other Contracting Party shall immediately render military and other assistance by all means at its disposal," expressing that in the case of a contingency, the contracting states are mutually obliged to exercise the right of collective self-defense. The article regarding the military alliance will be dealt with in the details below.

Article 3 prohibits the conclusion of the alliance or actions against the other contracting party, and Article 4 stipulates that both states should consult with each other with regard to important international issues of common interest. Based on Article 4, China attempted to control DPRK's unilateral actions related to warfare after the Korean War in exchange for guaranteeing its national security. Such attitude is also evident in the "Mutual Defense Treaty between the Republic of Korea and the United States of America." After the Korean War, President Rhee Syngman rejected the ceasefire agreement and sought to unify by expanding northward, threatening the United States. In the midst of the ceasefire negotiations President Rhee released North Korean prisoners, which led to the ROK–U.S. Mutual Defense Agreement.[16] After its conclusion, the United States added the sentence "neither party is obligated… to come to the aid of the other except in the case of an external armed attack against such party" as a part of the "Understanding of the United States" section to restrain South Korea's sole actions such as preemptive strikes, and to prevent another war.

In particular, Article 4 has come to the center of attention after the DPRK claimed success in its fifth nuclear test and launch of an ICBM (Intercontinental Ballistic Missiles) on July 28, 2017. Based on the background of the treaty, the "common interest" of Article 4 refers to the maintenance of peace and security. Hence, the factors interfering with the common interest of Article 4 include not only warmongering acts, but also North Korea's provocations and threats to the peace in Northeast Asia. Accordingly, China can warn North Korea about the violation of the treaty, for its devastating acts of aggression against the international society that harm their common interest of Article 4.

Article 5 mentions that the PRC and the DPRK will "consolidate and develop economic, cultural, and scientific and technical cooperation between the two countries" based on a mutual respect for state sovereignty and the principle of nonintervention. The principles of mutual respect for sovereignty, equality and reciprocity and nonintervention outlined in the preamble and Article 5 have roots in five diplomatic principles of Zhou Enlai: mutual respect for maintaining state sovereignty and territorial integrity, mutual non-aggression, nonintervention, equality and mutual benefit, and peaceful coexistence.

These are also stated in Article 2 of the North Korean Law of Treaties,[17] which proves that Kim Il Sung, the contractor of the treaty, put much effort and attention to assure autonomy of the DPRK from the PRC at that time.

Article 6 states that, "The Contracting Parties hold that the unification of Korea must be realized along peaceful and democratic lines and that such a solution accords exactly with the national interests of the Korean people and the aim of preserving peace in the Far East," specifying and limiting the methods of unification of the Korean Peninsula to a peaceful and democratic way. This can be interpreted as a desire of both states to prevent unification under the pressure of the United States and through absorption by the ROK that has achieved rapid post–war development.

Finally, Article 7 verifies the date of the contract and its effects. Many objections were raised regarding its validity, but on July 11, 2011, CCTV–4, one of the Chinese Central Television channels focusing on international affairs, announced that, "The Sino–North Korean Friendship Treaty was signed in Beijing between Premier Kim Il Sung and Premier Zhou Enlai on July 11, 1961 in Beijing and ratified on September 10 of the same year. The effective timeframe of this agreement is 20 years, and has been automatically extended twice, in 1981 and 2001." It also mentioned that, "This treaty is to remain in effect until the coming 2021," implying that the treaty is still legally effective.[18] Based on Article 7, the amendment and termination of the treaty requires the agreement of both state-parties, so a unilateral claim for recision is unlikely.

With regard to the expiration date of the treaty, the ROK–U.S. Mutual Defense Treaty states, "This treaty shall remain in force indefinitely. Either Party may terminate in one year if notice has been given to the other Party." President Rhee argued the treaty should be in effect for an "indefinite period of time," but the United States declined such a request[19] referring to Article 8 of the "Mutual Defense Treaty Between the United States of America and the Republic of the Philippines"[20] in 1951, where the expiration date was clearly indicated.

(3) Analysis of Article Regarding the Military Alliance in the Sino–North Korean Friendship Treaty[21]

The Sino–North Korean Friendship Treaty has been described by terms such as "blood alliance" or "buffer zone," due to Article 2 which deals with the military alliance. However, the Sino–ROK normalization in the post–Cold War era and continuous nuclear weapons development by North Korea despite China's persuasion, and the fact that CCTV–4 has recently announced the expiration date of the Sino–North Korean Friendship Treaty, made recent studies question not only the validity of the treaty, but also the stability of the "blood alliance."[22]

However, Kim Il Sung had already predicted the fragmentation of communism through the Sino–Soviet split.[23] He prioritized a "unanimity"[24] with China to resist the common threat of "American Imperialism," and the strategic values of the USSR–DPRK and Sino–DPRK alliances against the ROK–U.S.–Japan alliance led to the Sino–North Korean Friendship Treaty. Therefore, Article 2 of the Sino–North Korean

Friendship Treaty, with a historical and circumstantial background reflected in it, has similarities and differences with the "Treaty of Friendship, Cooperation, and Mutual Assistance between the Union of Soviet Socialist Republic and the Democratic People's Republic of Korea." First of all, Article 1 of the latter treaty states, "…Should either of the Contracting Parties suffer armed attack by any State or a coalition of States and thus find itself in a state of war, the other Contacting Party shall immediately extend military and other assistance with all means at its disposal." The Sino–North Korean Treaty, in opposition to this, stipulates the same context as "the other Contracting Party shall immediately render military and other assistance by all means at its disposal." The phrase "should" used in the USSR–DPRK Treaty has less legal compulsion than the word "shall" of the Sino–North Korean Treaty; according to the Sino–North Korean Treaty, both state-parties "shall" provide military support and all other possible aid to each other in the case of a war of aggression.

Furthermore, this Article regarding the military alliance in the Sino–North Korean Friendship Treaty contrasts with the "Mutual Defense Treaty between the Republic of Korea and the United States of America" (hereon referred to as the ROK–U.S. Mutual Defense Treaty). The clause of the "automatic intervention" in the case of aggression on the other state–party's territory is only mentioned in Article 2 of the Sino–North Korean Friendship Treaty. President Rhee demanded the inclusion of the "automatic intervention" clause in the ROK–U.S. Mutual Defense Treaty in 1953, but the United States convinced him that it is the Congress that has the right to declare war in the United States and that it would be difficult to get ratification from the Senate with the "automatic intervention" clause.[25] In the end, the ROK–U.S. Mutual Defense Treaty was concluded without the "automatic intervention" clause.

Limits of Intervention According to the Sino–North Korean Friendship Treaty[26]

(1) Limitation of the Right of Self-Defense according to Article 51 of the UN Charter

According to International Law, the right of self-defense can only be exercised when requested by the state receiving the attack, but assuming from cases such as the ROK–U.S. Mutual Defense Treaty in 1953, it is possible to oblige the usage of the right of collective self-defense in the case of a contingency. Likewise, in the Sino–North Korean Friendship Treaty, the right of collective self-defense and automatic intervention during contingency is approved regardless of the request of the victimized state. However, even though the DPRK and China has mutually agreed on collective self-defense, exercise of this right is only permitted until the UN Security Council takes "necessary measures" to maintain world peace and security as stated in Article 51 of the UN Charter: "If an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Based on the Armed Activities on the Territory of the Congo incident,[27] ICJ specifies that an "armed attack" must take precedence as the premise for the right of self-defense, and Article 51

of the UN Charter[28] requires the exercise of the right to be reported to the UN Security Council immediately.

China's intervention in the case of a sudden change in circumstances within the DPRK is limited in the following ways: an armed attack must take precedence, and the exercise of the right of self-defense according to Customary International Law must be immediately reported to the UN Security Council, the "necessity" and "proportionality" of the military action is required, and even if these conditions are met, exercise of the right of self-defense is not permitted if the UN Security Council is already taking effective measures for the state under attack.

(2) Determining Whether the Deployment of the ROK–U.S. Combined Forces is Armed Attack

Since the conclusion of the Mutual Defense Treaty, the ROK and the United States have set up a Contingency Plan in case of an emergency in response to North Korean threats. The core objective of such a Contingency Plan is "deterrence" and "crisis management."[29] The substance of the Contingency Plan is "*Choongmu* 3300," mentioned during the National Assembly's audit of state affairs in 2004, the evacuation plan of ROK nationals residing in the DPRK and a refugee acceptance plan in case of an emergency; recapture and integration plan "*Choongmu* 9000"; and "*Booheung*," an integrated contingency plan in the case of sudden changes in the DPRK.[30]

The effectiveness of the Sino–North Korean Friendship Treaty hinges on whether the intervention of ROK–U.S. forces in case of an emergency in the DPRK alone can be perceived as an armed attack, thus allowing China to exercise the right of self-defense. As for the definition and range of an "armed attack,"[31] Article 2 and Article 3 of the "Definition of Aggression"[32] in the 1979 UN General Assembly state that the occupation or integration by force or the use of force unless under special circumstances is considered an act of aggression.

Now the issue is whether such aggression is equivalent to the use of military force. In the case of the Military and Paramilitary Activities in and against Nicaragua,[33] ICJ has verified that the "use of force of considerable scale and effect" is military aggression. Hence, grounds on which "aggression" and the "use of force" are regarded as the same are obscure. Furthermore, even if the actions of the ROK–U.S. Combined Forces in the territory of the DPRK are considered "aggression" and the "use of military force," China's exercise of the right of self-defense does not meet the requirements of "necessity" and "proportionality" unless the ROK–U.S. Combined Forces coercively occupy the DPRK territory or "use force of considerable scale and effect."

Also, the ROK adheres to the International Peace Principle, as indicated in Article 5 (1) of the Constitution of the Republic of Korea: "The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars." Both the ROK and the ROK–U.S. Combined Forces avoid aggressive invasion of North Korea, thus China's intervention due to the right of self-defense is not justifiable. Furthermore, the ROK pursues peaceful unification according to Article 4 of the Constitution. Under

the peace–oriented spirit and principles of the Constitution, the ROK Forces constrain themselves and military operations to peaceful purposes, which again sets limits on China to exercise the right of self-defense.

(3) Duties according to Article 48 and Article 103 of the UN Charter

According to Article 48(1) of the UN Charter,[34] actions required to carry out the UN Security Council's decisions for maintaining international peace and security take place by all or some members of the UN. The DPRK has been pushing ahead the nuclear tests and missile launches repeatedly violating the decisions of the UN Security Council. If the UN Security Council decides to conduct military sanctions against the DPRK, the exercise of the right of collective self-defense of China along with the Sino–North Korean Friendship Treaty will be deferred, in accordance to Article 103 of the UN Charter[35] that prioritizes UN Charter obligations over duties of other international treaties if they collide.

Also, the exercise of China's right of self-defense is the use of force according to the treaty between China and North Korea, and since the UN Charter obligations take precedence over any treaties, it is necessary to adhere to Article 51 of the Charter and prevent collision. If the ROK–U.S. Combined Forces are deployed to the DPRK territory to use armed power, China can exercise the right of self-defense (especially collective) of the International Customary Law recognized in Article 51 of the UN Charter. However, the right of collective self-defense of China cannot be continued once the UN Security Council takes effective measures in the DPRK for peace and restoration of the international security.

To sum up, if China attempts to interfere with the ROK–U.S. Combined Forces' operations in North Korea, ROK should respond as follows: according to Article 51 of the UN Charter, the exercise of the right of self-defense of China is available only until the UN Security Council takes appropriate measures; and the exercise of the right of self-defense according to the Sino–North Korean Friendship Treaty will be considered as an act of ignorance and violation of Article 103 of the UN Charter. In addition, unless the ROK–U.S. Combined Forces deployed in North Korea use a considerable extent of force, there is no specific basis under which infiltration can be considered an armed aggression; the exertion of the right of self-defense of China does not fulfill the "proportionality" and "necessity" requirements, and becomes unjustifiable.

The Issue of Treaty Succession

Definition of State Succession

According to Article 6 of the Vienna Convention on the Law of Treaties, every state possesses the capacity to conclude treaties. The contracting parties, based on international law, are the states. The problem is whether the treaty is succeeded when the

contracting party-state changes.

Before examining treaty succession for the Sino–North Korean Friendship Treaty, it should be clarified whether that the Sino–North Korean Treaty is really a "treaty," and be followed by the definition of treaty succession. As studied previously in this paper the Sino–North Korean Friendship Treaty meets the three basic requirements of a treaty. This section will observe the definition of state succession. As stated in Article 2(1) (b) of the 1978 Vienna Convention on the Succession of States in Respect of Treaties, state succession is defined as the "replacement of one State by another in the responsibility for the international relations of territory." Therefore, state succession from the perspective of international law refers to the succession of sovereignty over a certain territory along with the predecessor–states' rights and obligations for state properties such as treaties, documents and debts.[36] To examine the Sino–North Korean Friendship Treaty succession after the sudden change in the DPRK, the following section will study whether the DPRK is a state, and whether the Sino–North Korean treaty is a treaty that can be succeeded.

State Succession of the Sino–North Korean Friendship Treaty

(1) Issues of State Succession of the DPRK according to the Domestic ROK Laws

State recognition is an act of individual state discretion,[37] meaning that each state makes independent decisions. According to Article 3 territory clause of its Constitution, the ROK government does not recognize the DPRK as a state, but as an anti–state organization.[38] Such a matter of state recognition is relevant to the DPRK's simultaneous accession to the UN, "Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation between South and North Korea" (hereon, Inter–Korean Basic Agreement), and the National Security Law of the ROK.

The first question is whether the simultaneous admission of South and North Korea to the UN violates Article 3 of the ROK Constitution. By joining the UN at the same time, it seems like state recognition has taken place,[39] but the domestic effect of state recognition is determined by domestic laws. The case of the Supreme Court[40] concluding that the DPRK national who has received an overseas citizenship at the Embassy of North Korea in China is a ROK national, or the Constitutional Court decision to define the DPRK as an anti–state organization[41] show that the ROK does not recognize the DPRK as a state but an anti–government organization in accordance with the "no recognition, no existence doctrine" of state recognition theory.

Given that the contracting parties of a treaty must be states, there is a debate whether the Inter–Korean Basic Agreement implies mutual state recognition if it were to be considered as a treaty. The ROK Supreme Court has clarified that the Inter–Korean Basic Agreement has the characteristics of a gentlemen's agreement,[42] and cannot be regarded as a treaty between states.[43] The Inter–Korean Basic Agreement also specifies[44] that, "their relationship, not being a relationship as between states, is a special one constituted temporarily in the process of unification."[45] Furthermore, the National Assembly has

the formal right to ratify outlined agreements according to Article 60 (1) of the ROK Constitution.[46] Yet, given that the Inter–Korean Basic Agreement has not been ratified by the General Assembly despite dealing with mutual aid and security assurance, the agreement cannot be regarded as having a domestic effect.

Finally, the normative basis of the National Security Law is recognized by Article 3 of the ROK Constitution and Article 37 (2) "restriction of freedom and rights of citizens for national security, the maintenance of law and order or for public welfare." A question on whether the National Security Law conflicts with Article 4 of the Constitution "peaceful unification clause" can be raised. As for this case, the Constitutional Court has ruled that the National Security Law is constitutional.[47] Also, Article 2 of the National Security Law defines anti–governmental organizations as "domestic or foreign organizations or groups with a command structure, whose intentions are to conduct or assist infiltration of the State or to cause national disturbances," and the Supreme court has ruled that the DPRK "has the traits of an anti-state organization, maintaining the position of unification under communism and attempting to overset our system of liberal democracy" (Supreme Court Decision 2007Do10121, December 9, 2010, etc.).[48] Based on the points of view mentioned above, the ROK does not recognize the DPRK as a state and regards it as an anti–state organization.

(2) State Succession according to International Law.

1) Statehood of the DPRK according to International Law

Domestic laws of the ROK do not recognize the DPRK as a state. Can this fact be the reason for the disapproval of the DPRK's treaty-concluding power, thus the ROK cannot be the successor–state of the Sino–North Korean Treaty after a regime transition in North Korea? Firstly, Article 1 of the Montevideo Convention on the Rights and Duties of States from 1933 indicates a State as an actor or personnel of international law that must have (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with other states.[49]

The DPRK has a population of 250 million to the north of the Military Demarcation Line with a government that has undergone political succession over three generations and has diplomatic ties with 160 countries around the world. With regard to the issue of state succession, the 1933 convention above clarifies, "The political existence of the state is independent of recognition by the other states," in Article 3. This article systemizes the declarative theory of the state, stating that the validity of a state is a fact and recognition is nothing more than a political act.[50] The agreement above is a codified version of the existing customary international law, applicable to all states.[51] It concludes that according to the international law the DPRK is a state regardless of the ROK's recognition.[52]

2) Form of State–Succession and Course of Action

The "1978 Vienna Convention on Succession of States in Respect of Treaties" (hereon, 1978 Vienna Convention) classifies forms of state succession into four categories:

succession with respect to part of the territory (Article 15), newly independent states (Article 16–30), the uniting of states (Article 31–33), and the separating of a state (Article 34–37). The 1978 Vienna Convention Article 31 (1) defines the uniting of states as "when two or more States unite and so form one successor state," so the form of state succession is applicable to the Sino–North Korean Friendship Treaty would be that of the "uniting of states" from the 1978 Vienna Convention Article 31 (1).[53] The possible scope of the "uniting of states" includes all predictable forms of unification scenarios: not only mergers, but also annexation and absorption.[54]

However, the Sino–North Korean Friendship Treaty was a treaty concluded due to security threats such as the conclusion of the ROK–U.S. Mutual Defense Treaty after the Korean War, "tripwire" American troops near the ceasefire line, and the deployment of tactical nuclear weapons. Article 11 of the "Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity" *(Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands)*, which stipulated that treaties between East Germany and third states be concluded prior to unification would be regarded as treaties between third states and the unified Germany.[55] Likewise, the succession of treaties that the DPRK had concluded with third states will be determined considering their background, objective, and contents and will be verified in the treaty on the unification of the Korean Peninsula. China's policy makers seeking harmonious development, however, are rejecting the traditional "blood alliance," and clarify the relationship with the DPRK mentioned in the Sino–North Korean Friendship Treaty as an exclusive historical neighborship.[56] Along with the existence of the ROK–U.S. Mutual Defense Treaty and China's "non-alignment" foreign policy, it seems unlikely that the Sino–North Korean Friendship Treaty would be succeeded as a Sino–Korean Friendship Treaty, even if the ROK succeeds the position of the DPRK and undergoes negotiations with China.

Conclusion

With the support of Chinese economic reform policies, China has moved beyond socialist ideals and now pursues maximization of state interest alongside the United States as a global leader. China is maintaining influence on the Korean Peninsula due to its strategic values, and in times of contingency and crisis on the Peninsula, it will attempt to exert absolute influence in promotion of its pragmatism policy.

Based on the Sino–North Korean Friendship Treaty, China may consider the intervention of the ROK–U.S. Combined Forces as an aggressive measure and exercise the right of self-defense according to Article 51 of the UN Charter in the case of crisis in the DPRK. However, in the Armed Activities on the Territory of Congo Case, the ICJ has clarified that the use of the right of self-defense requires a preceding armed attack and an immediate report to the UN Security Council after its exercise.[57] Assuming from the ICJ's attitude and Article 51 of the UN Charter, China's intervention in the case of

contingency in the DPRK also requires an armed attack to precede, and the exercise of right of self-defense according to Customary International Law must be reported to the UN Security Council instantly; the armed intervention must adhere to principles of "necessity" and "proportionality." If the UN Security Council has already taken measures, exercise of the right of self-defense is not permitted.

In addition, if the ROK–U.S. Combined Forces infiltrate the DPRK's territory as a result of talks, China may regard that such action has fulfilled the requirement for exercising its right of collective self-defense as indicated in international law. According to the definition of an armed attack,[58] in the 1979 Definition of Aggression, Article 2 and 3 by the UN General Assembly Resolutions,[59] the use of military force or the occupation or annexation of another state's territory under no special circumstances is regarded as an aggression. This indicates that China can exercise its right of self-defense when the deployment of the ROK–U.S. Combined Forces into North Korean territory has already taken place. Automatic deployment of the ROK–U.S. forces will be avoided as it justifies China's intervention on an international legal basis. It is problematic that China may consider the dispatch of the ROK Forces even for peaceful purposes as an act of aggression and attempt to exercise its right of self-defense according to its national interests.

Even if the unification of the Korean Peninsula were to take place, there is a little likelihood of the Sino–North Korean Treaty being succeeded, as long as it was born within a special historical context and currently China is maintaining its "non-alignment" diplomatic stance. This study is meaningful for South Korea in the face of Trump's Preemptive Strike doctrine and unification, because despite arguments that the Sino–North Korean "blood alliance" is no longer practical or effective, the Sino–North Korean Friendship Treaty is still an effective legal method that can justify China's intervention on DPRK issues.

Notes

1. Such importance of Chinese intervention is seen in the statement made by Zhang Liangui (International Strategy Research Center): for the neighboring states of the DPRK, preparation for crises in North Korea is natural. The Chinese government must seek stabilization on the Korean Peninsula while simultaneously preparing for sudden changes in the situation. If the Chinese government fails to respond to crises situations, it lacks the justification as a government. Declassified documents also show that China will undoubtedly intervene for China's geopolitical interest and the issue of massive refugee influx. Moon Chung-in, *Asking the Future of China* (Seoul: Samsung Economic Research Institute, 2010), 285–87 [in Korean]; "军情观察, 朝鲜崩溃的后国，朝鲜估计崩溃时间," December 1, 2014, http://www.jqgc.com/jmda/47706.shtml (accessed March 28, 2017) [in Chinese]; "百科观察, 解密朝鲜金氏政权"即将崩溃"了吗？," October 10, 2014, http://toutiao.baike.com/article-1572347.html?prd=shouye_guancha (accessed April 1, 2017) [in Chinese]; and "铁血社区, 假设朝鲜政权崩溃...东北怎么办？," February 17, 2016, http://bbs.tiexue.net/post_11287857_1.html (accessed April 1, 2017). [in Chinese]
2. "中国需加强东北军事部署防半岛生乱," *Global Times*, February 17, 2016, http://opinion.huanqiu.com/editorial/2016-02/8550411.html (accessed March 25, 2017). [in Chinese]

3. For more details on the background of the Sino–Korean Friendship agreement (a study on Sino–North Korean diplomatic relations), 权红, 中朝政治外交关系研究 (1949–2009) (Jilin: Yanbian University, 2010), 20–58. [in Chinese]
4. Choi Young-il, "Changes in Sino–DPRK Alliance and Military Cooperation" (master's thesis, Korea University, 2007), 38.
5. Choi Myung-hae, *China–North Korea Alliance* (Seoul: Oreum, 2009), 74–95. [in Korean]
6. James F. Person, "'We need Help from Outside': The North Korean Opposition Movement of 1956," Woodrow Wilson International Center for Scholars, Cold War International History Project, working paper 52, August 2006.
7. Lee Jong-seok, *Sino–North Korean Relationship: 1945–2000* (Seoul: Joongshim, 2000), 206–18. [in Korean]
8. Ibid., 221–22.
9. "A treaty is an agreement in written form and governed by international law to create rights and duties in between agents of international law such as States or international organizations." Constitutional Court Sentence 2008. 03. 27, 2006 Hun-ra4 Decision.
10. Article 2, (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
11. However, the Constitutional Court has ruled that the Agreement under Article 4 of the Mutual Defense Treaty between the Republic of Korea and the United States of America Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea (hereon, ROK–U.S. Status of Forces Agreement) was defined as being a "treaty". It follows that the legal quality is not determined by the name.
12. Malcolm N. Shaw, *International Law*, 5th ed. (London: Cambridge University Press, 2003), 88.
13. Kim Seong-bo and Lee Jong-seok, *History of North Korea, Founding and the Experience of People's Democracy* (1945–1960) (Seoul: Critical Review of History, 2014), 133–34. [in Korean]
14. In the case of the ROK, rulings of the Constitutional Court and the Supreme Court define the DPRK as an anti–State organization that has illegally captured the northern regions of the Korean Peninsula.
15. Jeon Sumi, "Legal Analysis of China's Intervention under Crisis within the DPRK," *Chinese Law Studies*, 29 (2017): 86–90. [in Korean]
16. Kwon Young-gen, "U.S. Perception and Behavior about the ROK Security and Autonomy – Focused on the US Operational Control over ROK Military," *Strategic Studies* 23, no. 3 (2016): 96. [in Korean]
17. Official title is "The Democratic People's Republic of Korea's Law of Treaties," the second Article of which supports the realization of the state's foreign policies. The DPRK adheres to the following principles: respect of sovereignty, equality and reciprocity, nonintervention.
18. For studies on the treaty's validity and possibility of exercising the collective self-defense, refer to the 李俊波. 中国依《中朝友好合作互助条约》享有的集体自卫权. 湘潭大学法学院 湖南湘潭, p. 20. For more information about the reasons of the conclusion of the Sino–Korean Treaty and its effectiveness after extension, check 王木克. 2011. 中朝互助条约的存与废. 世界知识. p. 64.
19. Kim Chang-soo, "ROK–U.S. Mutual Defense Treaty and the Status-of-Forces Agreement," *Critical Review of History* 54 (2001): 430 [in Korean]; and Han Pyo-ok, *Syngman Rhee and Korea–U.S. Diplomacy* (Seoul: Joongang Daily, 1996), 175. [in Korean]
20. Concluded in 1951, the Mutual Defense Treaty between the United States and the Republic of the Philippines also state in Article 8 that, "This Treaty shall remain in force indefinitely. Either Party may terminate in one year after notice has been given to the other Party." This is identical to Article 6 of the ROK–U.S. Mutual Defense Treaty.
21. Jeon, "Legal Analysis of China's Intervention under Crisis within the DPRK," 88–90.
22. Multiple scholars have asserted that the blood alliance between the DPRK and China has lost actual validity. Park Ju-jin and Kim Yong-ho, "Reconsideration of the Sino–North Korean Relationship," *Korean Political Science Review* 48, no. 1 (2014): 141–62; and Park Gyu-tae,

"China's Relations with the DPRK: Characteristics of Traditional Friendship," *Chinese Studies* 22 (2003): 53–70.

23. Choi, *China–North Korea Alliance*, 150.
24. Ibid.
25. Ohn Chang-il, "Korean War and the ROK–U.S. Mutual Defense Treaty," *Military History* 40 (2000): 131. [in Korean]
26. Jeon, "Legal Analysis of China's Intervention under Crisis within the DPRK," 98–101.
27. The Case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) Decision, International Court of Justice Reports 2005. para. 147.
28. Article 51, Nothing in the present Charter shall impair the inherent right of the individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
29. Kim Dong-wook, *Security on the Korean Peninsula and International Law* (Seoul: Korean Studies Information, 2010), 241. [in Korean]
30. "Code Name: 'Booheung,' Support Plan in Case of North Korean Crisis," *Moonhwa Daily*, January 13, 2010. [in Korean]
31. UN General Assembly Resolution 3314 (XXIX) adopted the "Definition of Aggression" as the understanding of an "armed attack," which is the premise for the exercise of the right of self-defense.
32. Article 2, The First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. Article 3, Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.
33. International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986, para. 191.
34. Article 48(1), The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
35. Article 103, In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
36. Lord McNair, *The Law of Treaties*, 2nd ed. (London: Oxford, 1961), 589–90; Robert Jenning and Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (London: LongMan, 1992), 208–09; and Wilfried Fiedler, "State Succession," in *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt (Amsterdam: North-Holland, 1986), 446–47.
37. Shabtai Rosenne, *The Perplexities of Modern International Law* (Leiden/Boston: Brill & Martinus Nijhoff, 2004), 246.
38. On the uniqueness of the inter-Korean relationship, the Constitutional Court has ruled, "Based on the reality that the DPRK is a partner in the dialogue and cooperation for the peaceful reunification of Korea, while also having the character of an anti-state organization as it maintains the unification of the South under communism doctrine in an attempt to overthrow our liberal democratic system…" (Constitutional Court Decision 92Hun-Ba48, July 29, 1993).
39. Joining of the UN simply means both states have become parties to the UN Charter. For

example, the United States and East Germany were both parties to the Partial Test Ban Theory (PTBT) concluded in 1963, but the United States did not recognize East Germany as a state until 1973; joining of the UN and state recognition between states are being regarded as separate matters.

40. Supreme Court Decision 96Nu1221 decided November 12, 1996 [Affirmation to Nullify Compulsory Expulsion Order].
41. On the Constitutionality of the Inter-Korea Exchange and Cooperation Act Article 3 (Constitutional Court Decision 92Hun-Ba48, July 29, 1993), On the Constitutionality of the National Security Law Article (Constitutional Court Decision 89Hun-Ba113, April 2, 1990).
42. "Inter–Korean Basic Agreement has the quality of a mere joint statement or a gentlemen's agreement not in the relationship between states but in a special relationship temporarily formed in the process of unification." (Constitutional Court Decision 92Hun-Ba6 26, 93Hun-Ba34, 35, 36 delivered on July 29, 1997).
43. "Inter–Korean Basic Agreement… is not legally binding, and cannot be considered as a treaty between states or document conforming to it…" (Supreme Court Decision 98Du14525 Decided July 23, 1999).
44. The judicial precedents toward the special inter–Korean relationship seems to be a reflection of the special relations doctrine of Willy Brandt, the Prime Minister of West Germany, stating that East Germany cannot be recognized according to international law and the relations between East and West Germany would inevitably be a special one.
45. This perspective on the special inter-Korean relationship can also be observed in Article 3(1) of the Development of Inter–Korean Relations Act, which was established on December 29, 2005 and enacted on June 30, 2006.
46. The Constitution of the Republic of Korea, Article 60(1), "The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters."
47. On the Constitutionality of the National Security Law (Constitutional Court Decision 92Hun-Ba6, 26, 93Hun-Ba34, 35, 36 delivered on July 29, 1997), Supreme Court Decision 90Do1451 Decided September 25, 1990 [Violation of the National Security Law, Violation of Establishment of Riot Police Units Act, Forgery of Public Documents, Exercise of Forged Public Documents].
48. It has been established by the Supreme Court that, "North Korea is a partner in dialogue and cooperation for the peaceful unification of the country, but it also maintains the quality of an anti-state organization as it attempts to overthrow our liberal democratic system under the doctrine of unification of the South under communism. Hence, the power of the National Security Law remains valid." (Supreme Court Decision 2007Do10121 Decided December 9, 2010 [Violation of the National Security Act - Praise Incitement Etc]).
49. Article 1, The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.
50. Hersch Lauterpacht, *Recognition in International Law* (London: Cambridge University Press, 2012), 419.
51. David J. Harris, *Cases and Materials on International Law*, 6th ed. (London: Sweet & Maxwell, 2004), 99; and Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post–Colonial National Identity* (Leiden: Martinus Nijhoff Publishers, 2000), 77.
52. In determining the statehood of Croatia, Macedonia, and Slovenia that had applied for membership in the EU, the Badlinter Arbitration Committee of the EU has confirmed the definition of the state according to the Montevideo Convention, and ruled that a State is a state itself, and recognition by other states is not a crucial factor in determining a state.

53. The ROK government does not recognize North Korea as a state, but the DPRK has its people, effectively rules the northern region of the Korean Peninsula, and has established diplomatic relations with 160 of 195 states around the world, therefore being recognizable as a state.
54. Arthur Watts, *The International Law Commission 1949–1998*, vol. 2, The Treaties (London: Oxford University Press, 2000), 1154.
55. Jochen A. Frowein, "The Reunification of Germany," *The American Journal of International Law* 86, no. 1 (1992): 157–59.
56. Wang Li, "'Non-Alliance Partner' Doctrine of Chinese Diplomacy," *Sungkyun China Brief* 3, no. 2 (2015): 142.
57. Article 51, Nothing in the present Charter shall impair the inherent right of the individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
58. The Resolution of 1974 US Assembly 3314(XXIX) adopted the "Definition of Aggression" to clarify the term "armed attack" as a precondition of the right of self-defense.
59. Article 2, The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant Circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. Article 3, Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any Annexation by the use of force of the territory of another State or part thereof.

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