

# THE TERRITORIAL PROBLEMS OF THE PEACE TREATY WITH JAPAN

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## I. The Main Characteristics of the Peace Treaty with Japan

The Peace Treaty with Japan was concluded at the San-Francisco Conference on September 8, 1951. The main characteristics of this treaty are the following.

### (A) Perfect Victory of the Allied Powers

The so-called unconditional surrender of Japan brought forth the main features of the Peace Treaty. Of course it is not technically correct to say that Japan made an unconditional surrender. Japan only accepted the Potsdam Declaration unconditionally. But, by signing the Instrument of Surrender on September, 2, 1945, the Japanese Government became subject to the Supreme Commander for the Allied Powers who would take such steps as he deemed proper to effectuate the terms of surrender. Consequently, it is quite understandable that the Supreme Commander for the Allied Powers (SCAP) did everything that he could in Japan. The Peace Treaty with Japan is the final inventory of the occupation policy of six years.

In order to interpret the Peace Treaty with Japan, we should at first recall the Cairo Declaration, the Potsdam Declaration, and even the Yalta Agreement. The Cairo Declaration and the Potsdam Declaration are not only the conditions of armistice, but also the conditions of peace. In some respects, these two declarations are the combination of the capitulation of armistice and the treaty of peace, preliminary and final.

As for the Yalta Agreement, the United States dislike to say that it is still applicable to her. But the Yalta Agreement is an international convention between the United States, Great Britain and Soviet Russia. Internationally, it does not bind Japan, but it is binding to the United States.

Next, we must know the unilateral dispositions which the Allied Powers had done during the occupation period. By the order of the Supreme Commander for the Allied Powers, Japan had already executed some articles of the Potsdam Declaration.

Third, the Peace Treaty with Japan was written by the Allied Powers, especially by the United States. Mr. John Foster Dulles was the main scenario-writer. This treaty is not the treaty of negotiation. The peace with Japan is a dictated peace. Therefore the peace treaty with Japan does not belong to

the usual kind of international contracts, but rather resembles to a *contrat d'adhésion* of the French legal system. As a result, the intentions of the Allied Powers, above all the will of the scenario-writer, Mr. Dulles, will prevail when we want to understand the treaty. At the same time, when in ambiguity, this treaty must be interpreted favourably to Japan. *In dubio pro leo (mitius)*. Its reason is this: "Whatever the victors wanted to do for themselves, all could be drawn up in the peace treaty by them."

(B) Treaty of reconciliation and reliance

John Foster Dulles, the scenario-writer of the Peace Treaty with Japan, made a speech at the Whittier University on March 31, 1951, and said as follows: "In conclusion, this peace will be a peace of reconciliation...and of reliance." At the San-Francisco Conference, on September 5, 1951, Mr. Dulles said again as follows: "The nations will here make a peace of justice, not a peace of vengeance. ...The treaty remains, as first agreed, a non-punitive, non-discriminatory treaty, which will restore Japan to dignity, equality and opportunity in the family of nations."

The Peace Treaty with Japan inserted the following paragraph in Article I: "The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters". And it is lacking of the clauses of war responsibility and of human rights. It did not stipulate the limitation of armaments and the international inspection, which originally had been expected to appear. Further, it was not the peace treaty but the Japan-America Security treaty that had set up the international military servitudes in Japan.

(C) Separate Peace

The peace with Japan is not a total peace but a separate peace. Needless to say, the Peace Treaty with Japan was signed by the majority of the Allied Powers and of the United Nations. On the other hand China was not invited at the San-Francisco Conference. India, Burma and Yugoslavia were invited but did not send their delegates to the Conference. Soviet Russia took an active part in the preliminary peace negotiation and was represented at the Conference, but they did refuse to sign the treaty. In addition, Indonesia still has not ratified the peace treaty, while the Philippines postponed it until July, 1956.

## II. *The Main Characteristics of the Territory*

### *Clauses of the Peace Treaty with Japan*

The territory of New Japan was finally determined by Article 2 and 3 of the Peace Treaty, the main characteristics of which were the following three.

(A) No aggrandizement, territorial or other

The Atlantic Charter, August 14, 1941, proclaimed as follows: "First, their countries seek no aggrandizement, territorial or other; "Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; "Third, they respect the rights of all peoples to choose

the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."

This principle of no aggrandizement was confirmed by the Declaration of the United Nations, January 1, 1952.

Again this principle was affirmed by the Cairo Declaration as follows: "They covet no gain for themselves and have no thought of territorial expansion." And the Potsdam Declaration stipulated the execution of the terms of the Cairo Declaration.

It is of no doubt that the Potsdam Declaration established the territorial limits of new Japan in a concrete way as follows: "...Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." When the Allied Powers may determine the limits of minor outlying islands to be kept to Japan, they should be expected to respect the principle of no aggrandizement. Generally speaking, the territory clauses of the Peace Treaty were drawn in accordance with the Cairo Declaration and the Potsdam Declaration. But there were two exceptional cases, namely (1) the Okinawa and Ogasawara Islands, and (2) the Kurile Islands. These Islands originally belonged to Japan; they were not stolen or taken by violence and greed from other countries. These two cases, deviated from the principle of no aggrandizement, came from the Yalta Agreement and the strategic policy of the United States.

(B) Acquiescence of the *Fait accompli* done by the Allied Powers

The Potsdam Declaration is not only the surrender terms, but also the peace terms. By accepting the Instrument of Surrender, Japan has been in a position to acquiesce the territorial dispositions prior to the termination of war made by the Allied Powers. The Allied Powers had full power to make decisions in accordance with the Cairo Declaration and the Potsdam Declaration.

As for Korea, there are two established governments. In the southern part of Korea, the Republic of Korea (Dai Kan Min Koku) was set up on August 15, 1948. On the other hand, the People's Republic of Korea (Chosen Minshu Jinmin Kyowakoku) declared its independence on September 7, 1948.

Just after Japan's surrender, China began to recover Formosa and the Pescadores. On August 29, 1945, General Marshall Chiang Chieh-shih (Chiang Kai-shek) appointed the Governor of Formosa, on September 20, issued the Regulations of Organization to govern Formosa, and on October 25, the gala ceremony of restoring Formosa was held. Unilaterally China completed the national measures of the cession of Formosa in the fall of 1945.

The United States proposed the Pacific Islands, formerly under mandate to Japan, to the United Nations to place under its trusteeship system. The Security Council accepted the agreement of trusteeship concerning the said Pacific Islands on April 2, 1947, and this agreement became effective by the acceptance by the United States, on July 18, 1947.

Lastly, Soviet Russia had a good excuse to unilaterally annex Sakhalin and

the Kurile Island on the grounds of the Yalta Agreement. On February 3, 1946, U.S.S.R. declared formally the annexation of Sakhalin and the Kurile Islands.

I don't know whether the above-mentioned actions of the Allied Powers were all strictly in accordance with the Cairo Declaration and the Potsdam Declaration or not. But Japan was forced in every instance to acquiesce those actions and finally accepted the territory clauses of the Peace Treaty as a whole.

(C) Uncertainty of Territorial Dispositions

The Territory clauses of the Peace Treaty with Japan left some territories in an indeterminate status.

While those indeterminate territories were in fact transferred already to the hands of the Allied Powers and Korea, legally some uncertainties are still remaining. These uncertainties have come from the separate peace by the Allied Powers and the changes of international situations after Japan's surrender.

Japan had renounced all right, title and claim to Korea, including the Islands of Quelpart, Port Hamilton and Dagelet. But there are two governments in Korea now. Which government would be the true successor of the right renounced by Japan? This is the first question.

Japan had renounced all right, title and claim to Formosa and the Pescadores. But there are two governments in China now. Which government would be the true successor of the right renounced by Japan? This is the second question.

Japan had renounced all right, title and claim to the Kurile Islands and to the southern part of Sakhalin. But Soviet Russia did not sign the Peace Treaty. Who is the beneficiary of the right which Japan renounced? The Peace Treaty with Japan did not give the geographical limitation of the Kurile Islands. Are the islands of Habomae and Shikotan included in the Kurile Islands? Are the Japanese people able to restore the southern parts of the Kurile islands, Etroep and Kunashiri? These are the third questions.

Japan accepted in advance the coming proposal of the United States to the United Nations to place under its trusteeship the Okinawa Islands and the Ogasawara Islands. But the United States will not be able to get the acceptance of the Soviet Union at the Security Council for her proposal. The United States wants to hold the Okinawa Islands and the Ogasawara Islands as military bases. What is the legal nature of the temporary occupation of the Okinawa Islands and the Ogasawara Islands by the United States? This is the fourth question.

### III. *Four Territorial Problems of the Peace Treaty with Japan*

There are main territorial problems before Japan to-day. Let us explain them in detail.

(A) Korea

As you know, there are two governments in Korea to-day. One is the Republic of Korea (Dai Kan Min Koku) of the southern portion, and the other is

the People's Republic of Korea (Chosen Minshu Jinmin Kyowakoku) of the northern portion. Korea was not a co-belligerent of the United Nations, but a part of Japan, during the war. Therefore newly independent Korea was not invited at the San-Francisco Conference. But Korea shall be entitled to the benefits of Article 2 of the Peace Treaty, according to Article 21 of the Peace Treaty. Consequently, Korea acquired the territorial rights without negotiating with Japan. But the Peace Treaty did not stipulate "Which Government is the true successor of the right renounced by Japan?" or "Where is the boundary of Korea?"

According to my opinion, each Korean government should be entitled to the benefits of Article 2 of the Peace Treaty under the existing circumstances at the date of April 28, 1952, when the Peace Treaty with Japan became effective. And Japan renounced all territorial rights to Korea to the extent of which Japanese Governor of Korea had administered at the date of September 2, 1945, when Japan had accepted the Instrument of Surrender.

There is the problem of Takeshima between Japan and Korea which the latter has claimed and possessed since January 18, 1952. This is the boundary dispute concerning the interpretation of the Peace Treaty. But Korea is not a party to the Peace Treaty, so that the Article 22 of the Peace Treaty is technically not applicable.

On October 28, 1954, the Republic of Korea officially rejected a Japanese proposal to bring the dispute over Takeshima island for adjudication by The Hague International Court of Justice.

The Takeshima question first arose on January 18, 1952, when Republic of Korea President Syngman Rhee proclaimed the so-called "Rhee Line." In this proclamation, he claimed Korean rights over all islands, waters, the sea-bed and sub-soil inside the Rhee Line. Takeshima island was claimed to be within this unilaterally imposed zone. The Japanese Government on January 28, 1952 protested the Seoul proclamation of the Rhee Line and especially insisted that Takeshima island was sovereign Japanese territory.

Since then, both countries have exchanged several notes on the dispute without succeeding in breaking the deadlock. Seeing no prospect of a settlement in sight, the Japanese Government recently proposed to bring the dispute before the World Court. But this procedure the Republic of Korea also refused and appeared to be unwilling to negotiate a peaceful settlement. Whereas Japan proposed to resort to settlement by international law experts, the Republic of Korea tried to establish an accomplished fact by force.

Japan has historical evidence to prove that Takeshima is a part of Japanese territory. And according to international law, there is no question of the Japanese claim over the island.

Called the Liancourt Rocks on world atlases, Takeshima lies 86 nautical miles northwest of Oki island off Japan's Shimane prefecture. It is composed of two small islands and several rocky islands. It was known in Japan since several centuries ago that there were two islands, Matsushima and Takeshima, northwest of Oki island. In olden days, Takeshima was known by the Japanese as Matsu-

shima and was claimed as a part of Japanese territory. Takeshima was also used as a navigation and fishing point by the Japanese. In the days of the Shogun Iemitsu Tokugawa, administration over the island was given to the Lords of Yonago. Japanese boats going to the Dagelet islands always used Takeshima as a stopover point, and Japanese fishermen even went to Takeshima itself to fish.

Extant historical documents which were written during the Tokugawa Shogunate to this day support the Japanese claim. There is also a map of the island made during the period 1716-1735 on orders of the Shogunate. This map, belonging to the Ikeda Family, rulers of Shimane, was made after an actual survey of the island.

The Republic of Korea, on the other hand, has no documents or maps to prove that Koreans had used or even known about this island hundreds of years ago as the Japanese did. The Republic of Korea has only documents referring to Dagelet island whereas she has no historical evidence of her claim over Takeshima which lies 49 miles from Dagelet. And even Dagelet island was more or less ignored by Korea since the days of the Rhee dynasty. Common sense will tell us, therefore, that Korea could not possibly have administered Takeshima.

It was in 1905 that Japan formally took over possession of Takeshima according to processes required by international law. Incorporation of Takeshima island as sovereign Japanese territory was decided by the Japanese cabinet on January 28, 1905, and on February 22 of the same year, Shimane prefecture publicly announced the incorporation of the island as an administrative part of Oki island. This incorporation fully conformed with modern international law.

It was not an illegal annexation. Japan had known of this small island for centuries, she has used it first and later has charted it. She obviously had the basis to claim sovereign rights over the island.

In order to obtain international recognition, Japan had to establish administrative rights. In August 1905 Governor Takekichi Matsunaga of Shimane prefecture personally surveyed the island.

Earlier, on May 17, 1905, Takeshima was entered in official books as Japanese government property. On April 14 of the same year, Shimane prefecture licensed fishing in Takeshima waters, and the first license was given to one Yosaburo Nakai and three others. Fishing rights by Japanese was continued until the outbreak of the Pacific war in 1941, and annual rental for use of land was paid by the licensed fishermen to the government.

The above facts support continuous Japanese control of the island. The Japanese claim is also justified by international law.

The Republic of Korea in a note on February 12, 1952 pointed out that Takeshima was withdrawn from Japanese administration by order of the Supreme Commander for the Allied Powers on January 29, 1946 and also that the island was located outside the so-called MacArthur Line. These actions, the Republic of Korea declared in the note, supported its claim over the right.

The SCAP action was taken during the Allied Occupation of Japan and was not a permanent decision. The SCAP order specifically said that "nothing in

this directive shall be construed as the policy of the Allied Powers concerning the final decision on the ownership" of Takeshima.

The MacArthur Line only restricted the operational zones of Japanese fishermen and did not delineate the area of Japanese administrative rule. It did not even constitute the final decision on Japanese fishing grounds.

From all these facts, we can only say that the Republic of Korea took advantage of the abnormal post-war circumstances to take over Takeshima island from Japan.

Korean fishermen in recent years appeared in increasing numbers in Takeshima waters. Japanese patrol boats have gone to the area to keep an eye on violations, and have protested several times to Seoul. The Republic of Korea refused to budge from its adamant stand on the island. And in July, 1954, the Republic of Korea sent armed guards to the island and constructed a lighthouse in August. A radio tower and artillery have since been set up on the island by the Koreans.

The dispute, thus, sees no prospect of settlement. Here, I should like to cite the dispute between Britain and France over small islands in the English Channel. Those two nations submitted their dispute to The Hague Court, which, November, 1953, handed down a fair decision and the dispute was settled. These islands were occupied by the Germans during World War II; but despite the complicated situation, the World Court gave the island to Britain on the basis of historical evidence. This decision disproved that policies and actions taken during the abnormal conditions of wartime constitute a final decision on territorial rights.

The Japanese Government will continue to press for a peaceful settlement of the Takeshima dispute despite the Republic of Korea rejection of Japan's World Court bid.

(B) Formosa

There are two governments in China now. While the United States supports the Nationalist Government of China (Chiang Kai-Shek Regime), Great Britain and the Soviet Union recognize the People's Republic of China. Both governments of China were not invited at the San-Francisco Conference. According to the Cairo Declaration, it is understood that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. But China is not a party to the Peace Treaty with Japan and shall not be entitled *ipso jure* to the benefits of Article 2 of the Treaty which Japan renounced.

But Formosa and the Pescadores are not interpreted to have become "res nullius". These islands are expected to be restored to the Republic of China. China, as a state, is in a position to claim Formosa and the Pescadores. Under the present circumstances, we can find no suitable government to represent China. It is quite clear that Formosa and the Pescadores belong to China according to the Cairo Declaration. The territorial problem concerning Formosa and the Pescadores is the question of a government to represent China.

As for Japan, she recognized the Nationalist Government of China and concluded with her the Treaty of Peace on April 28, 1952. The exchange of instruments of ratifications of this Treaty of Peace took place at Taipei on August 5, 1952. According to Article 2 of the Treaty, it is recognized that Japan renounced all right, title and claim to Formosa and the Pescadores in favour of China. Japan is permitted to conclude such a bilateral Treaty of Peace according to Article 26 of the Peace Treaty with Japan.

(C) Sakhalin and the Kurile Islands

Sakhalin and the Kurile Islands originally belonged to Japan. Since the beginning of 18th century, the Japanese people had set up their economic establishments of fishing and wood-cutting at Sakhalin and the Kurile Islands and the Tycoon of the Tokugawa Government had ordered Lord Matsumae to administrate these islands. It was only at the end of 18th century that the Russian Empire began to expand eastward and tried to extend their colonial interests over these islands. Thus the territorial disputes were occurred between Japan and this new-comer.

On February, 7, 1855, a treaty between Japan and Russia (Poutiatine's treaty) was concluded at Shimoda of Japan. It settled the boundary between Japan and Russia in regard to the Kuriles, giving to Japan the island of Etroep and to Russia the Kuriles north of the island. But the treaty made no division of Sakhalin, but treated it as a condominium. The status of Sakhalin as a condominium continued until 1875.

However, in a treaty signed May 7, 1875, between Japan and Russia, Japan secured to herself, in exchange for her rights in Sakhalin, the whole group of islands including Choumcheu at the northern tip of the insular chain. These historical facts here referred to are extremely important in interpreting the territory clauses of the Peace Treaty with Japan concerning the Kurile Islands.

During the Russo-Japanese war, the Japanese army occupied the whole parts of Sakhalin. But, according to the Portsmouth Treaty, 1905, Russia restored the northern part of Sakhalin without compensation and Japan gained the title to the southern part of her old island, Sakhalin. The new boundary was settled between Russia and Japan at N. 50'.

According to the war-time agreement of Yalta, the Soviet Union acquired the title to Sakhalin and the Kurile Islands. It stipulated as follows: "The Southern part of Sakhalin as well as the islands adjacent to it shall be returned to the Soviet Union...The Kurile Islands shall be handed over to the Soviet Union." On the other hand, the United States is insisting that, in order to be entitled to the territorial interests of the Peace Treaty, the Soviet Union must become a party to the Peace Treaty with Japan. But if the things are left long enough as they are, the *fait accompli* done by the Russian occupation is probable to become a prescriptive right.

Here I want to mention something about Habomae and Shikotan. It is of no doubt that the Islands of Habomae and Shikotan, geographically and legally, do not belong to the Kurile Islands. These are the essential parts



of Hokkaido. Accidentally, the Japanese defense forces surrendered to the Russian commander at the end of War II. But at the London Peace Conference between Japan and Russia, 1955, the Russian Delegate expressed their intention to return the Islands of Habomae and Shikotan to Japan.

Upon conclusion of the negotiations for normalization of Japanese-Soviet relations in Moscow on October 19, 1956, a Joint Declaration and a Protocol on trade were published. According to the 9th Article of the Joint Declaration, Japan and the Union of Soviet Socialist Republics agreed to continue their negotiations for the conclusion of a peace treaty after normal diplomatic relations had been reestablished between the two countries. The Union of Soviet Socialist Republics, in response to the desire of Japan and in consideration of her interests, agreed to transfer the Habomae Islands and the island of Shikotan to Japan, provided, however, that the actual transfer of these islands should be effected after the peace treaty between Japan and the Soviet Union was concluded.

At present the international status of the Kurile islands is not yet settled in a definite word. The Japanese people are eager to have the return of the southern part of the Kurile islands. The islands of Etroep and Kunashiri are supported to be originally the parts of Hokkaido (Yezo) by Poutiatine's treaty concluded at Shimoda, 1855. The United States Government also seconded the view of the Japanese Government concerning Etroep and Kunashiri.

(D) Okinawa and Ogasawara

Okinawa and Ogasawara originally belong to Japan. Japanese residual sovereignty to Okinawa and Ogasawara is recognized by the United States Government. At first Mr. Dulles proposed to place Okinawa and Ogasawara under the United Nations trusteeship system, with the United States as the sole administering authority. Dulles' proposal was strongly opposed by the Soviet Union and India. Russian memorandum to the United States dated November 23, 1950, stated as follows: "The Cairo Declaration and the Potsdam Declaration did not stipulate to take away Okinawa and Ogasawara from Japan's sovereignty, but declared no thought of territorial expansion." Indian message to the United States dated August 23, 1951, said as follows: "Okinawa and Ogasawara, which are not the territories acquired by aggression and whose inhabitants have their historical relations, are not suitable to place under the trusteeship and not to recognize the full sovereignty of Japan." Great Britain was supposed to have supported the Indian attitude in this respect. Then the conception of residual sovereignty to Okinawa and Ogasawara appeared in the conference. Thus the Peace Treaty came a little bit closer to the treaty of reconciliation and reliance.

The conception of residual sovereignty is borrowed from the conception of property of the Roman civil law, which recognizes the divisibility of property and the separation between proprietorship and beneficial enjoyment. The best example of residual sovereignty is the case of a leased territory. The sovereignty of the lessor state over the territory is more nominal than real. The actual possession belongs to the lessee state only. The residual sovereignty is not a right of possession to-day, but a right to possess to-morrow. It may tell a his-

torical title of yesterday's ownership, and means some possibilities of eventual recovery in the future. But, as long as the lease has not expired, it is the leaseholder who exercises sovereignty over the territory concerned.

As Japan technically is permitted to hold the residual sovereignty to Okinawa and Ogasawara, the inhabitants are still keeping their nationalities of Japan. But the residual sovereignty is quite a formal one and any Japanese law is not directly applicable. Only by the order of the American Occupation Authorities, the local laws, including the law of nationality, which prevailed at the time of Japan's surrender, were adopted to be effective there. Therefore the American Military law is solely predominant for all practical purposes. The United States has the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands. This is the peacetime military occupation by the United States, as a temporary measure.

The purpose of the United States to hold the islands of Okinawa and Ogasawara is surely for her military considerations. But the inhabitants of Okinawa are heavily suffering from the sacrifices and burdens of strategic necessities. The Tea-house of the August Moon is a humorous scene of Okinawa, but the actual conditions of Okinawa are much more miserable. Fortunately, the Amami Islands, the northern group of the Okinawa Islands, were returned to Japan on December 25, 1953. This fact of restoration will teach us that the residual sovereignty sometimes changes into the actual sovereignty. On the other hand, the return of the divided Okinawa would mean that the American Military Authorities do not want to give up the main group of the Okinawa Islands in the near future. The fate of Okinawa and Ogasawara essentially depends upon the wisdom and conscience of the people of the United States. No country could expect the goodwill and co-operation of its neighbours by the dictated peace and prolonged occupation.