

RECHTSPRECHUNG / CASE LAW

Post-war Reparations between Japan and China and Individual Claims: The Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese “Comfort Women” Case

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INTRODUCTION

On 27 April 2007, the Supreme Court of Japan delivered two judgments of historic significance regarding post-war reparations. Both cases concerned China: the Nishimatsu

* *See also the following contributions to previous issues of the Journal:* M. OKADA, Klagen auf Wiedergutmachung und die staatliche Verantwortung für Menschenrechtsverletzungen: Fragen und Aufgaben für Japan, *ZJapanR / J.Japan.L.* 14 (2002) 131; P. SCHMIDT, Auf der Suche nach Recht und Gerechtigkeit: der lange Weg der „Trostfrauen“, *ZJapanR / J.Japan.L.* 11 (2001) 203; ID., Japans Wiedergutmachung: Trostfrauen, *ZJapanR / J.Japan.L.* 8 (1999) 5; ID., Zwei neue Entscheidungen in Kriegsopferentschädigungsverfahren, *ZJapanR / J.Japan.L.* 3 (1997) 47; M. SCHEER, Zusammenfassende Übersetzung der Urteile: Distriktgericht Yamaguchi, Außenstelle Shimonoseki, vom 27. April 1998 (Schadensersatzklage koreanischer Frauen gegen den japanischen Staat) und Distriktgericht Tokyo vom 9. Oktober 1998 (Schadensersatzklage philippinischer Frauen gegen den japanischen Staat), *ZJapanR* 8 (1999) 181 / 187. (*The Editors*).

Construction Case,¹ and the Second Chinese “Comfort Women” Case.² Cases relating to the San Francisco Peace Treaty have largely been resolved through the ruling in the Former Dutch Prisoners of War Damages Case.³ The same is true for cases relating to the Japan-Korea Claims Agreement through the ruling in the Pacific War Korean Victims Reparations Case.⁴ In contrast, post-war reparations cases relating to China have taken until now to reach resolution. This is because the post-war reparations cases relating to China involved claims concerning a great variety of issues. These include forced relocation, forced labor, sexual slavery (euphemistically termed “comfort women” (*ianfu*)), prisoner of war abuse, germ warfare, atrocities, and abandoned chemical weapons. The incidents in these cases also far outnumber those of the other post-war reparations cases.

A key additional reason for the delay in resolving the China cases is the various issues in domestic and international law posed. First, for example, Japan concluded the Treaty of Peace between Japan and the Republic of China (hereinafter, “Japan-ROC Peace Treaty”)⁵ with the Government of the Republic of China (ROC), occupying only Taiwan, which had not been in a state of war with Japan but, rather, was part of the territory of Japan during World War II. Second, an Exchange of Notes limiting the applicable territory is annexed to that Treaty. Third, Article 11 of the Japan-ROC Peace Treaty provides that, unless otherwise provided for in the Treaty, the relevant provisions of the San Francisco Peace Treaty shall apply. However, it is not specified whether this includes the provisions in Article 14(b) of the San Francisco Peace Treaty regarding waiver of claims. Fourth, the People’s Republic of China (PRC) holds that the Japan-ROC Peace Treaty is void. Fifth, Paragraph 5 (war reparations) of the Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China (hereinafter, “(Japan-China) Joint Communiqué”)⁶ signed by Japan and the PRC provides for waiver. However, unlike the San Francisco Peace Treaty, the Joint Communiqué makes no explicit mention of waiver of claims by individual nationals. Sixth, the Japan-China Joint Communiqué is considered a political document rather than a treaty.

1 2nd Petty Bench of the Supreme Court, 27 April 2007, *Minshu*, vol. 61, no. 3 (2007), 1188. An English translation is available at <http://www.courts.go.jp/english/judgments/text/2007.04.27-2004.-Ju-.No..1658.html>.

2 1st Petty Bench of the Supreme Court, 27 April 2007, *Hanrei Jihô*, no. 1969 (11 August 2007), 38.

3 Tokyo High Court, 11 October 2001, *Hanrei Jihô*, no. 1769 (21 February 2002), 61; 3rd Petty Bench of the Supreme Court, 30 March 2004.

4 Tokyo High Court, 22 July 2003, *Hanrei Jihô*, no. 1843 (1 March 2004), 32; 2nd Petty Bench of the Supreme Court, 29 November 2004, *Hanrei Jihô*, no. 1879 (1 March 2005), 58.

5 UNTS (United Nations Treaty Series), vol. 138 (1952), 38-55.

6 Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China, *Japanese Annual of International Law*, no. 17 (1973), 81-83.

In this context, these two cases have gathered interest as the first judgments delivered by the Japanese Supreme Court regarding the problem of waiver of claims by individual nationals of the PRC under the Japan-ROC Peace Treaty and the Joint Communiqué. Indeed, regardless of any ruling in relation to points of dispute arising from domestic law—including tort and non-performance of obligations, extinctive prescription, time limitation, and sovereign immunity—the issue of waiver has the potential to trump any rulings on these points of law. The decisions in these two cases indicate the Supreme Court’s position on a decisive point of dispute—waiver of claims—common to all post-war reparations cases relating to China. It decided that nationals of the PRC had lost the capacity to litigate over claims against Japan and Japanese nationals that arose in the course of the prosecution of World War II. As the court of final appeal, the Supreme Court has therefore essentially closed all legal avenues for post-war reparations to Chinese nationals.⁷ Indeed, in the wake of the two rulings, all final appeals and applications for final appeals from the plaintiffs’ side regarding post-war reparations cases relating to China pending in the Supreme Court were rejected and claims in the lower courts were dismissed for essentially the same reasons given in these two cases.⁸ Any future resolution, therefore, will rely on a political solution.

In this article, having summarized the facts, the arguments of the parties, and the outcomes of the original trials, we provide a detailed account of the two Supreme Court cases. We then analyze the judgments in light of the Japan-ROC Peace Treaty, the Joint Communiqué, and the legal meaning of waiver of claims. Finally, we consider the official response of the Chinese Government to the Supreme Court ruling in the Nishimatsu Construction Case.

A. BACKGROUND

1. *Case facts*

The Nishimatsu Construction Case concerned forced relocation to Japan of Chinese nationals and forced labor during World War II. In the course of prosecuting the war against China, the Japanese Government decided to import Chinese nationals to meet labor shortages. Nishimatsu Construction (the appellant) was unable to secure the necessary labor for the construction of the Yasuno Power Plant. To meet the shortages Nishimatsu sought government approval to import Chinese labor and received 360 Chi-

7 Although even in the post-war reparation cases related to China, some aspects of the problem of abandoned chemical weapons may not be solved merely by consideration of the Japan-ROC Peace Treaty or the Joint Communiqué, at least in relation to the 1993 Chemical Weapons Convention.

8 *Hanrei tokuhô* [Special Case Report], *Hanrei Jihô*, no. 1969 (11 August 2007), 29. For a list of related cases including these, see at 43-46. With regard to the lower court cases, see Y. IWASAWA, *Kokusai-hô hanrei no ugoki* [Trends in International Law Judgments], *Jurisuto*, no. 1354 (10 April 2008), 302.

nese laborers in Qingdao on 19 July 1944. The five victims in this case were among these. After the laborers arrived in Japan, they were put to work under very poor conditions at the Yasuno Power Plant. They either were sent back to China when no longer able to work because of serious illness, or died or incurred physical disabilities through exposure to the atomic bomb detonated over Hiroshima on 6 August 1945. The victims gave no prior consent to the relocation or labor under Nishimatsu, nor did they enter into any contract of employment.

The victims argued to the Court that Nishimatsu had breached its duty of care and safety by subjecting them to forced labor under such harsh conditions. They sought damages from Nishimatsu based on non-performance of an obligation (*saimu furikô*). In response, Nishimatsu argued that there had been no forced relocation or forced labor, and there existed no contract of employment or corresponding legal relationship forming the basis of a duty of safety and care. As well as disputing the cause of action, Nishimatsu invoked extinctive prescription regarding the claims for damages for non-performance of an obligation. Nishimatsu furthermore asserted that, as a result of waiver of claims through the treaties and other documents that arose through the post-war settlement process, any obligation arising from law in relation to this case had been extinguished.

The victims in the Second Chinese “Comfort Women” Case were two Chinese women from Shanxi. When aged 15 and 13 respectively, the victims were incarcerated by the Japanese Army as retribution for their families’ alleged collaboration with the precursor to the Chinese People’s Liberation Army. Neither had experienced sexual relations before they were incarcerated. The first victim was taken in July 1942 (old calendar) and repeatedly raped by multiple Japanese soldiers, including a commanding officer, until finally released in September 1942 (old calendar). The second victim was subject to violence and group rape for approximately 40 days before her mother secured her release by payment to the Japanese Army. Throughout their lives, both victims experienced symptoms of grave post-traumatic stress disorder apparently caused by the incarceration and rape.

The two victims⁹ sought damages and publication of an apology from the Japanese state on the basis of Article 715(1) (employer’s liability) of the Japanese Civil Code and employer’s liability arising from the Civil Code of China at the time of the wrongdoing. In response, Japan argued that the so-called “sovereign immunity” principle applies to this case. Furthermore, Japan argued that the prescribed time limitation period in the latter part of Article 724 (Restriction of Period of Right to Demand Compensation for Damages in Tort) of the Civil Code had elapsed. Japan also argued that, as a result of the waiver of claims by treaty through the process of post-war settlement, any duty arising from law in regard to claims relating to this case had been extinguished.

9 Five new appellants succeeded to the suit after one of the two Chinese victims died after filing.

2. *Post-war settlement between China and Japan*¹⁰

On 8 September 1951, Japan entered into the “Peace Treaty with Japan” (hereinafter, “San Francisco Peace Treaty”) with the 48 Allied powers and regained independence when the Treaty came into force on 28 April 1952. This Treaty established the framework for post-war settlement with Japan. It was concluded to bring to an end the state of war between each of the Allied powers and Japan, and resolve conclusively issues of territory, claims, and property. However, it did not become a comprehensive peace treaty because China was not invited to the peace conference, India declined to attend, and the Soviet Union refused to sign.

The San Francisco Peace Treaty¹¹ states the following with regard to wartime reparations and disposition of claims:

Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question [...]

2. (I) Subject to the provisions of subparagraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) [...]

(c) [...]

which on the first coming into force of the present Treaty were subject to its jurisdiction. [...]

(II) The following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers [...]

10 This summary, and the summary below regarding the first appeals and the final rulings, is drawn from the discussion by the Supreme Court in the Nishimatsu Construction and Second Chinese Comfort Women Cases (see *supra* notes 1 & 2).

11 UNTS, vol. 136 (1952), 45-77. See also the UCLA Center for East Asian Studies website: <http://www.international.ucla.edu/eas/documents/peace1951.htm>.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

China was to have been invited to the peace conference as an Allied power. However, because both the Governments of the PRC and the ROC claimed to be the sole legitimate government representing China, China was not invited and did not become a party to the San Francisco Peace Treaty. On 28 April 1952, the Japanese Government recognized the legitimacy of the Government of the ROC and concluded the Japan-ROC Peace Treaty, which came into force on 5 August 1952. As well as ending the state of war between Japan and the ROC, it provided in Article 11 that, unless otherwise provided for in the Treaty, problems arising between the two countries as a result of the existence of a state of war would be settled in accordance with the relevant provisions of the San Francisco Peace Treaty. The Protocol, an integral part the Treaty, provides that the ROC shall waive voluntarily the benefit of the “services” of Article 14(a)(1) of the San Francisco Peace Treaty (Protocol 1(b)). Moreover, the Exchange of Notes attached to the Japan-ROC Peace Treaty confirms that the terms of the Treaty shall be applicable to “all the territories which are now, or which may hereafter be, under the control of [the Government of the Republic of China].”

Subsequently, the Japanese Government adopted a policy that shifted recognition of government from the ROC to the PRC. Through the so-called normalization of relations between Japan and China, the Japan-China Joint Communiqué was signed on 29 September 1972. Paragraph 5 of the Joint Communiqué states:

“The Government of the People’s Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it waives demand for war reparations from Japan.”

Furthermore, on 12 August 1978, both nations signed the Treaty of Peace and Friendship between Japan and the PRC (hereinafter, “Japan-China Peace and Friendship Treaty”), which came into force on 23 October 1978. The preamble to this Treaty confirmed strict adherence to the principles of the Joint Communiqué.

3. *First Appeals*

In the Nishimatsu Construction Case, the Hiroshima High Court (July 9, 2004) rejected Nishimatsu's arguments and found for the victims.¹² The Court held that the series of acts undertaken by Nishimatsu amounted inescapably to forced relocation and forced labor. The Court acknowledged that there had been no direct contractual relationship between Nishimatsu and the victims. However, the Court found that there had been a special relationship resembling employment, which gave rise to a duty of safety and care. Because Nishimatsu did not satisfy this duty, the Court found it liable for non-performance of an obligation. The Court also found that invoking extinctive prescription was an impermissible abuse of rights.

Nishimatsu argued that any duty arising from law in relation to the claims in this case on behalf of Japan or a Japanese national had been extinguished as a result of the waiver of claims through the Japan-ROC Peace Treaty and the Joint Communiqué. However, the Court noted that Paragraph 5 of the Joint Communiqué does not refer explicitly to waiver of claims by Chinese nationals, merely “demand for war reparations.” The Court found that the rights of individual nationals who are injured parties to claim reparations for harm against a wrongdoer is a right attached to the individual and could not, in principle, be waived by treaty. As for whether Article 11 of the Japan-ROC Peace Treaty (adopting the “relevant provisions” of the San Francisco Peace Treaty) included provisions waiving the claim of individuals for reparations for loss, the Court was unconvinced. Finally, the Court doubted whether the Japan-ROC Peace Treaty applied to nationals of the PRC, because the Treaty is one between Japan and the ROC.

In the Second Chinese “Comfort Women” Case, the Tokyo High Court (18 March 2005) dismissed all of the victims' claims on appeal.¹³ The Court found that, under the Civil Code of China at the time, Japan was liable as an employer to pay consolation money (*isharyô*) for the harmful acts. Furthermore, the Court held, with regard to liability for tort under Japanese law, the recognized harmful acts could not be regarded as an

12 Hanrei Jihô, no. 1865 (11 October 2004), 62; Minshu, vol. 61, no. 3 (2007), 1542. For commentary, see M. ASADA, *Nikka heiwa jôyaku, nitchû kyôdô seimei to chûgoku kokumin no seikyû-ken* [The Japan-ROC Peace Treaty, the Japan-China Joint Communiqué and the Claims of Chinese Nationals], *Jurisuto*, no. 1291 (10 June 2005), 278-280; Y. NAKANISHI, *Kyôsei renkô, rôdô ni tsuite no sengo hoshô seikyû* [Postwar Reparation Claims for Forced Relocation and Labor], *Jurisuto*, no. 1302 (1 December 2005), 172-175; A. ARAI, *Dainiji sekai taisen chû no kyôsei renkô, kyôsei rôdô to anzen hairyô gimu ron, kikan seigen ron* [Forced Relocation and Forced Labor during World War II, Duty of Care, and Statute of Limitations], *Rissho Law Review*, vol. 39, no. 2 (2006), 237-271.

13 Shômu Geppô, vol. 51, no. 11 (November 2005), 2858. For commentary, see M. IGARASHI, *Nikka heiwa jôyaku to chûgoku kokumin no seikyû-ken* [The Japan-ROC Peace Treaty and the Claims of Chinese Nationals], *Jurisuto*, no. 1313 (10 June 2006), 291-292. H. YAMATE, *Chûgoku-jin “ianfu” niiji soshô tôkyô kôsai hanketsu ni tsuite* [On the Judgment of the Tokyo High Court on the Second Chinese “Comfort Women” Case], *Ritsumeikan Law Review*, nos. 300-301 (January 2006), 628-719.

act of war, military operation, or an act in pursuance of these, and could not therefore be considered to amount to an exercise of the public authority of the state. Therefore, the principle of sovereign immunity did not apply and Japan was *prima facie* liable for damages.

Nevertheless, the Court held, Article 11 of the Japan-ROC Peace Treaty applies the same provisions of Article 14(b) (waiver of claims, including individual claims, by Allied Powers) of the San Francisco Peace Treaty. The waiver of claims referred to here, the Court found, was not merely a waiver of the right to diplomatic protection, but rather a comprehensive waiver of claims. The Court found that, at the time of signing, the international community recognized the ROC as the government representing China, hence the Japan-ROC Peace Treaty, signed by the ROC as the government representing the Chinese state, had effect throughout China, including the mainland. The Court therefore held that the victims' claims had been waived under the Treaty. As for the Joint Communiqué, the Court held that its provisions on the waiver of wartime reparations merely confirmed the status quo under the Japan-ROC Peace Treaty and did not give rise to any new legal effects.

B. FINAL JUDGMENTS

The Supreme Court found against the victims in both cases. The judgments in the two cases were essentially the same, with a significant discrepancy in the Court's final comments (see below). In reaching its conclusion, the Court considered in turn the waiver of claims through post-war settlement, through the Japan-ROC Peace Treaty, and through Paragraph 5 of the Japan-China Joint Communiqué.

1. *Waiver of claims through post-war settlement*

The court began its discussion by outlining the concept of a "San Francisco Peace Treaty framework" for post-war settlement with Japan. Under this framework, Japan and the Allied Powers would mutually waive all claims¹⁴ that arose in the course of prosecuting the war. This included claims by individuals. At the same time, Japan would recognize its obligation to make war reparations¹⁵ to the Allied Powers, and cede any assets under the jurisdiction of Allied Powers. Japan would agree that specific reparations including so-called "service compensation" would be resolved bilaterally. The Court found that the San Francisco Peace Treaty created this overarching framework that would extend

14 The court defines "claims" in this context as "claims arising between the nations at war or nationals thereof in the course of prosecution of the war, which can be negotiated separately from war reparations."

15 The court defines "war reparations" as "money and other benefits to be provided by the defeated country to the victor country upon concluding peace between them."

even to non-signatories to the Treaty in any future bilateral treaty negotiations regarding post-war settlement.

The Court held that the reasoning behind such a framework was as follows. Were individual litigants permitted to seek resolution of the various claims that arose from the war, this would impose an excessive burden upon Japan and the Allied Powers as well as their nationals, and create uncertainty that would militate against the objectives of the Peace Treaty. However, the Court, rather than finding that “waiver of claims” in Article 14(b) extinguished such claims, held that “waiver” in this context merely entailed that these claims could not be used as the basis of litigation. As a corollary, in the Nishimatsu Case (but not the Second Chinese Comfort Women Case), the Court stated suggestively that despite the waiver of claims, “obligors are not prevented from voluntarily and spontaneously taking measures to satisfy specific claims....”

The victims had argued that private rights attached to individual nationals may not be limited through an agreement between states. However, the Court rejected this, stating that: “upon entering into a peace treaty to end a war, a state has the power to dispose of claims, including claims of individuals, on the basis of its sovereignty towards its nationals.”

2. *Waiver of claims under the Japan-ROC Peace Treaty*

The Court then ruled out the Japan-ROC Peace Treaty as a potential barrier to individual claims, finding that it was not applicable to Mainland China. The Court found that Article 11 of the Treaty (application of relevant provisions of the San Francisco Peace Treaty) could be construed to cover waiver of claims—including individual claims—in the same manner as Article 14 (b) of the San Francisco Peace Treaty. The Court was dubious of the capacity of the ROC to enter into a peace treaty, having been driven from the Chinese mainland at the time the treaty was signed. Nevertheless, given the international recognition (by numbers) of the ROC relative to the PRC at the time, and its right to represent China at the UN, Japan had validly recognized the ROC as the legitimate government of China. There was, therefore, no inherent impediment to Japan and the ROC concluding a peace treaty. Nevertheless, the court then referred to the Exchange of Notes attached to the Treaty. This stated:

“The terms of the present Treaty shall, in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its Government.”

According to the Court, this evinced a mere *possibility* that the provisions regarding war reparations and claims would apply to Mainland China at some future time. Accordingly, the Court found that Article 11 of the Japan-ROC Peace Treaty and Protocol 1(b), which waived “service compensation”, could not clearly be held to apply to mainland China (or the individual Chinese nationals who live there), which had never been under

the control of the ROC since the signing of the Treaty. The Japan-ROC Peace Treaty, therefore, did not rule out individual claims.

3. *Waiver of claims under Paragraph 5 of the Japan-China Joint Communiqué*

Paragraph 5 of the Japan-China Joint Communiqué was the decisive factor that, according to the Court, barred the victims from making individual claims. The Court found that the provisions of Paragraph 5 are unclear on (1) whose demand is being waived, (2) whether this applies to claims in addition to war reparations, and (3) whether this includes individuals. Nevertheless, the Court found that, in light of the process surrounding the normalization of relations between Japan and China, it was clear that the PRC regarded Paragraph 5 as a “creative” provision that laid down a comprehensive post-war settlement, including war reparations and disposition of claims. The Court also found that, for its part, Japan had considered that the issues of war reparations and claims had already been settled under the Japan-ROC Peace Treaty. Accordingly, Japan considered Paragraph 5 as a restatement in substance of the pre-existing settlement made under that Treaty as it applied to the PRC. In this context, the Court found that the Joint Communiqué had the substance of a peace treaty from the perspective of both governments.

The Court reiterated that the San Francisco Peace Treaty framework was critical to achieve the objectives of any peace treaty with Japan. The Court found that to depart from this framework and to settle the issue of war reparations without settling the disposition of claims, or to exclude individual claims from waiver, would create obstacles to achieving the goals of a peace treaty. Moreover, the Court could find no evidence that suggested that either Japan or China needed to settle the issue of disposition of claims in a manner inconsistent with the framework, nor that either nation raised such a proposal in the negotiations for normalization of their relations. Therefore, the Court could not attribute an exclusion of individual claims to Paragraph 5 of the Joint Communiqué merely because it did not clearly specify individual claims. The Court concluded that, like the San Francisco Peace Treaty framework, the Joint Communiqué had the objective of mutually waiving all claims that arose in the course of prosecuting the war, including claims held by individuals.

The Court then examined Paragraph 5 to determine whether it had the nature of a legal norm, with legal effect. First, the Court addressed the question of whether it could be a legal norm under international law, given that the Joint Communiqué had not been regarded as a treaty or ratified by the Japanese Diet. The Court answered this in the positive, in light of the PRC’s manifest recognition that Paragraph 5 was a creative legal norm in international law, at least as a unilateral declaration of the PRC. The Court further found that the Japan-China Peace and Friendship Treaty, indisputably a treaty under international law, confirmed that the principles stated in the Joint Communiqué should be strictly adhered to. Through this, the provisions of Paragraph 5 had acquired the nature of a legal norm within Japan as a treaty. The Court found that under the San

Francisco Peace Treaty framework, “waiver of claims” entailed that capacity to litigate based on such claims had been lost. The “waiver of claims” as provided by Paragraph 5 had the same effect, and did not require any further measures to be taken under domestic law.

Consequently, the Court found that pursuant to Paragraph 5 of the Joint Communiqué, nationals of the PRC had lost the capacity to litigate over claims against Japan and Japanese nationals or juridical persons that arose in the course of prosecuting the war. A defendant could therefore have a case dismissed by raising this defense.

4. *Voluntary measures to satisfy claims*

For the above reasons, the Court dismissed the victims’ final appeal in the Second Chinese Comfort Women Case, and recognized Nishimatsu’s final appeal in the Nishimatsu Construction Case. However, in the Nishimatsu Construction Case, the Court added to its conclusion:

“...even under the framework of the San Francisco Peace Treaty, obligors are not prevented from voluntarily and spontaneously taking measures to satisfy specific claims. Taking into account various circumstances in this case, for example the great psychological and physical harm suffered by the victims, the considerable benefit to the appellant from causing Chinese workers to undertake forced labor under [...] harsh working conditions, and the subsequent state compensation obtained by the appellant, we anticipate that the appellant and other parties concerned will make efforts to provide relief to the victims.”

C. ANALYSIS

In this analysis, we consider in detail the Court’s reasoning in relation to the Japan-ROC Peace Treaty, the Japan-China Joint Communiqué, waiver of claims in the context of post-war reparations, and the possibility of direct domestic application of waiver of claims.

1. *Japan-ROC Peace Treaty*

Three issues arise in the two cases that relate to the Japan-ROC Peace Treaty: how to interpret Article 11, which provides for application of the “relevant provisions” of the San Francisco Peace Treaty, the question of the ROC’s competency to conclude a peace treaty, and the significance of the Exchange of Notes relating to the scope of application of the Treaty.

Article 11

The Court found that disposition of claims, including individual claims, is clearly included within the “relevant provisions” of the San Francisco Peace Treaty referred to in Article 11. This is a sound interpretation. The first appeal in the Nishimatsu Case had questioned whether the relevant provisions referred to in Article 11 included the waiver provisions for individual claims for damages. However, the final ruling seems correct in light of Paragraph 1(b) of the Protocol to the Japan-ROC Peace Treaty and No. 4 of the Agreed Minutes for the Treaty, to which the Court failed to refer. Paragraph 1(b) states:

“As a sign of magnanimity and good will towards the Japanese people, the Republic of China voluntarily waives the benefit of the services to be made available by Japan pursuant to Article 14(a)(1) of the San Francisco Treaty.”

No. 4 of the Agreed Minutes states:

“... since the Republic of China has voluntarily waived the service compensation as stated in paragraph 1(b) of the Protocol of the present Treaty, the *only benefit that remains to be extended to her* under Article 14(a) of the San Francisco Treaty is Japan’s external assets as stipulated in Article 14(a)(2) of the same Treaty...” (emphasis added)

These provisions not only channel Article 14 (reparations and claims) of the San Francisco Peace Treaty through Article 11 of the Japan-ROC Peace Treaty, but also, by implication, indicate that the “relevant provisions” include those of Article 14(b) (waiver of claims, including individual claims, by Allied Powers).

The ROC’s competency to conclude a peace treaty

The Court was justified in recognizing the ROC’s competency to sign the Japan-ROC Peace Treaty. If there are competing governments in the same state, a third, external state may conclude a treaty with the government it recognizes. However, whether this is regarded objectively as an act of good faith having legal effect against third parties is determined in light of certain criteria, including the extent that a government is recognized by other states. As the Court notes, more states recognized the Government of the ROC than the PRC when the Japan-ROC Peace Treaty was concluded. Furthermore, the ROC occupied a seat at the UN, including the Security Council as a permanent member. Accordingly, Japan’s recognition of the ROC when concluding the Treaty was objectively legitimate and consistent with international law.

The fact that the ROC occupied only Taiwan and surrounding islands is not particularly important to recognition. During World War II, even European governments in exile situated in London, the territory of *another country*, concluded treaties with each other and with third-party states, yet these governments were regarded as possessing

“full treaty-making power.”¹⁶ This capacity was not considered to differ according to the type or subject of the treaty.¹⁷ At the time the San Francisco Peace Treaty came into force, Taiwan was no longer Japanese territory, thus the fact that the ROC was no longer a government in exile creates all the more reason to consider the ROC to have possessed full capacity to conclude treaties, including peace treaties. These factors justify the Court’s recognition of the Treaty, regardless of the PRC’s protestations.¹⁸

Scope of application

Japan holds that the Japan-ROC Peace Treaty was a one-off resolution of issues regarding the termination of the state of war, reparations, and property and claims.¹⁹ However, the question remains whether this applies to the PRC. During World War II, Taiwan was *de jure* part of Japan under the 1895 Treaty of Shimonoseki and was not involved in hostilities with Japan during the war, in contrast to Mainland China. It is therefore dubious whether a treaty concluded with the ROC, occupying only Taiwan, which waives claims relating to World War II should bind the PRC, which occupies the Chinese mainland and has consistently denied the validity of the Japan-ROC Peace Treaty. Rather than an issue of legal validity of the Treaty, this pertains to the problematic applicability of a valid treaty to a successive or new government.

The Court rejected the applicability of the Treaty to the mainland with regard to war reparations and provisions for disposition of claims. It based its argument on the Exchange of Notes attached to the Treaty, which provided that the Treaty applied to “all the territories which are now, or which may hereafter be under the control of [the Government of the Republic of China].” The Court interpreted this as an indication of a mere *possibility* that the treaty would be applied to the mainland at some date in the future. Although this argument is accessible, it gives rise to the following legal problems.

16 M. ROTTER, Government-in-Exile, in: R. BERNHARDT (ed.), Encyclopedia of Public International Law, vol. II (North-Holland, 1995), 610.

17 S. TALMON, Recognition of Governments in International Law: With Particular Reference to Governments in Exile (Oxford U.P., 1998), 135-136.

18 The third principle of the three principles of normalization indicated by the PRC upon the normalization of relations between Japan and China was that the “Japan-Taiwan Treaty” (referring to the Japan-ROC Peace Treaty) is illegal and invalid and must be repealed. Incidentally, the PRC makes the same assertion with regard to the San Francisco Peace Treaty. See for example: *Tai-nichi heiwa jōyaku chōin ni kansuru shū onrai gaikō buchō no seimei* [Zhou Enlai’s Declaration regarding the Signing of the Peace Treaty with Japan], in: *Nitchū kankei kihon shiryō shū* [Archive of Basic Japan-China Related Materials] 1949-1997, Kazankai, 1998, 25-27.

19 For example, *Hikoku saishū jumbi shomen (hojū)* [Defendant Nation’s Closing Brief (supplement)], submitted to the Kyoto District Court in the Kyoto Chinese Forced Relocation Case (The Oeyama Case), 17 July 2007, 26.

First, as Japan has argued, and as the Tokyo High Court held in the first appeal of the Second Chinese Comfort Women Case,²⁰ because a state of war is a comprehensive legal relationship between two states, ending the state of war cannot pertain to only one part of a state. One could argue that this also generally applies to post-war settlement, such as reparations and disposition of claims. Second, Diet deliberations regarding the Japan-ROC Peace Treaty indicate an initial conception of a limited peace, which gave way to ratification on the understanding that a state of war amounts to a comprehensive legal relationship between states.²¹ The rulings are phrased cautiously on the issue of applicability, revealing an apparent lack of conviction towards an argument that warrants decisive language. Furthermore, the Court explicitly admits that it attributes a meaning to the Treaty that differs from Japan's interpretation. However, the same also applies with regard to the ROC. During the drafting of the Japan-ROC Peace Treaty, the ROC desired that the Treaty apply to the mainland as the legitimate government representing the whole Chinese state. Accordingly, it follows that the Court has adopted an interpretation that is different from that of both parties to a bilateral treaty, which makes it implausible.

It seems to us that a state of war is indeed a comprehensive legal relationship between two states and thus it is difficult to conceive of ending a state of war with only one part of a state. The same is essentially true of reparations and disposition of claims. Accordingly, in contrast to the Court ruling, the various provisions of the Japan-ROC Peace Treaty relating to these matters are applicable to the Chinese mainland regardless of the Exchange of Notes as it relates to the scope of application. However, this still is limited to the relationship between Japan and the ROC. The problem is whether the Treaty is also valid regarding Japan's relationship with the PRC. The general principle relating to succession of governments is one of comprehensive succession.²² According to this, all treaties entered into by a previous government are in principle succeeded to by the new government. However, a new government need not as a matter of course succeed to a treaty infringing the "general interests of the nation" which was concluded by a previous government engaged in (or having lost) a civil war.²³ Hence, the Japan-ROC Peace Treaty, at least in regard to the waiver of reparations and claims infringing the general interests of the people of China, is not applicable to the PRC. In other words, Japan should have secured a separate agreement with the PRC, at least with regard to the waiver of reparations and claims by China.

20 Shōmu Geppō, vol. 51, no. 11 (November 2005), 2868.

21 On this point, see M. ASADA, *Nikka heiwa jōyaku to kokusai-hō* (3) [The Japan-ROC Peace Treaty and International Law (3)], *Hōgaku Ronsō*, vol. 152, no. 2 (November 2002), 4-18.

22 For example, S. Yamamoto, *Kokusai-hō* [International Law] (new ed.), Yūhikaku, 1994, 314; T. Sugihara etc., *Gendai kokusai-hō kōgi* [Contemporary International Law Lecture] (4th ed.), Yūhikaku, 2007, 67; R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, vol. I, 9th ed. (Longman, 1992), 234-235.

23 H. LAUTERPACHT, *Recognition in International Law* (Cambridge U.P., 1948), 93-94.

2. *Japan-China Joint Communiqué*

Because the Court rejected for different reasons the applicability of the Japan-ROC Peace Treaty to the Chinese mainland and the individual Chinese nationals who reside there, the fate of Chinese nationals' claims hinged upon the meaning and legal character of Paragraph 5 of the Japan-China Joint Communiqué.

Meaning of Paragraph 5

The Court found that because Paragraph 5 simply states a waiver of the demand for “war reparations” it is unclear whether this includes the disposition of claims and individual claims. Nonetheless, the Court held that, from the history of negotiations for the normalization of Sino-Japanese relations, the Joint Communiqué could only be regarded as having the substance of a peace treaty. Moreover, the Court held, during the negotiations and upon the signing of the Joint Communiqué, no aspect of the settlement differed from the framework of the San Francisco Peace Treaty, i.e. war reparations premised upon the mutual waiver of all claims including individual claims arising from the prosecution of war. The Court found that there was no evidence that it was necessary to depart from that framework, nor did either side raise such a prospect. Employing the concept of a “San Francisco Peace Treaty framework”, the Court concluded that, with regard to waiver of claims, the Joint Communiqué contained the same content as the San Francisco Peace Treaty.

The Court thus first indicates the general framework for peace treaties involving Japan (“San Francisco Peace Treaty framework”) and then employs indirect and negative evidence to avoid the difficulties of relying solely on the interpretation of the wording of Paragraph 5, which only mentions “war reparations”. The argument is clever and persuasive on one level. However, by relying *solely* on this contextual argument and without providing direct and positive evidence, these rulings are open to criticism on the basis that they lack an empirical basis.

Paragraph 5 of the Joint Communiqué was a unilateral declaration made by the PRC, and the content and legal character of that paragraph should be interpreted specifically in line with the intentions of the government that made the declaration. However, the Court's argument was based upon:

“the today publicly-known facts of the history of the negotiations gained through historical investigation of the official record of the negotiations for normalization of relations between Japan and China and the memoirs of related parties.”²⁴

24 For criticism of the Supreme Court position that these are publicly known facts, see T. TAKAHASHI, *Nitchû kokkô seijô-ka no kôshô katei wa mada “kôchi no jijitsu” to wa ienai* [The Negotiation Process behind the Normalization of Relations between Japan and China Cannot Yet Be Called “Well-Known Facts”], *Hôritsu Jihô*, vol. 80, no. 4 (April 2008), 102-104.

Nevertheless, this historical investigation relates to the Joint Communiqué as a whole rather than Paragraph 5 itself. The Court relies almost entirely on the concept of the San Francisco Peace Treaty framework to inform its interpretation of Paragraph 5.

Certainly, the lack of evidence²⁵ of debate on individual claims in the drafting process for the Joint Communiqué (at least from the Japanese historical materials)²⁶ makes it difficult to demonstrate clearly that Paragraph 5 includes individual claims. Nevertheless, further related facts did exist that may have supported the Court's argument.²⁷ For example, the PRC's decision-making process surrounding the waiver of war reparations demonstrated a strong awareness of other peace treaties with Japan, including the Japan-ROC Peace Treaty: "China has reached the conclusion to display goodwill to the Japanese people no less than that of America or Taiwan." Furthermore, Premier Zhou Enlai, addressing a domestic audience with regard to his planned waiver of war reparations, rationalized that "the generosity of the Communist Party must be deeper than that of Chiang Kai-shek." From these facts, it is difficult to consider that the waiver of reparations under the Joint Communiqué would be of narrower scope than the Japan-ROC Peace Treaty.

The following facts could also explain why the Joint Communiqué, unlike the San Francisco Peace Treaty, only mentions a waiver of "war reparations." At the drafting stage of the San Francisco Peace Treaty only waiver of "[r]eparations claims of the Allied Powers" was mentioned.²⁸ The Japanese Government argued that this was insufficiently clear and the added wording of the current text "other claims of the Allied Powers and their nationals" was introduced for *clarification*.²⁹ Given the similarity of wording, Japan could have been expected to insist on the same revision to Paragraph 5. However, Japan's position was that post-war settlement with China had been resolved through the Japan-ROC Peace Treaty; thus to request such a revision could be taken as an admission that reparation claims lay with the PRC and, furthermore, that the Japan-ROC Peace Treaty was invalid. This would support the argument that Paragraph 5 includes individual claims despite the discrepancy in wording with the San Francisco Peace Treaty.

25 In the negotiations surrounding normalization of relations between Japan and China, the only substantial debate regarding the drafting in relation to the problem of reparation claims was the rephrasing of "claims" (*seikyû-ken*) to "demand" (*seikyû*), as proposed by the Japanese side: M. ASADA, *Nikka heiwa jôyaku to kokusai-hô* (4) [The Japan-ROC Peace Treaty and International Law (4)], *Hôgaku Ronsô*, vol. 152, no. 4 (January 2003), 14-18.

26 To the authors' knowledge, the historical materials on the Chinese side have not yet been publicly released.

27 For more detail, see M. ASADA, *Nikka heiwa jôyaku, nitchû kyôdô seimei to chûgoku kokumin no seikyû-ken* [The Japan-ROC Peace Treaty, the Japan-China Joint Communiqué and the Claims of Chinese Nationals], 279-280.

28 Foreign Relations of the United States, 1951, vol. VI, pt. 1, 948.

29 Minutes of the Special Committee on the Peace Treaty and the Japan-U.S. Security Treaty, House of Councillors, 12th Diet, no. 14 (9 November 1951), 5.

With regard to the concept of a San Francisco Peace Treaty framework, the Court's argument would have been supported further by relying on Article 26 of that Treaty:

“...Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.”

If Paragraph 5 of the Joint Communiqué had retained the claims of Chinese nationals, this would potentially pave the way for the claims of nationals of all the Allied Powers that were parties to the San Francisco Peace Treaty by virtue of this so-called “equality clause”.³⁰ Even as a unilateral declaration by the PRC, it is improbable that Japan would have signed the Joint Communiqué condoning such a result.

Legal character of Paragraph 5

Recall that the Court affirmed the status of Paragraph 5 as a creative legal norm under international law applicable in Japan. There are several problems with the Court's reasoning. First, the Court's reasoning could be taken to suggest that only Japan did not treat the Joint Communiqué as a treaty. However, China too did not consider the document a treaty. Nevertheless, the Court is correct that the PRC clearly regarded at least Paragraph 5 as a creative legal norm in international law. The PRC, which has consistently denied the validity of the Japan-ROC Peace Treaty, having declared the “waiver of demand for war reparations” can hardly then deny the legal nature of that declaration.

A second critical problem involves the Court's statement that the content of Paragraph 5 acquired the character of a legal norm as a treaty because it was referred to in the Japan-China Peace and Friendship Treaty. The “confirmation” in the Japan-China Peace and Friendship Treaty of adherence to the various principles of the Joint Communiqué is merely expressed in the preamble to the Treaty. A preamble to a treaty provides a context for the interpretation of the treaty by indicating the background and the object and purpose of the treaty³¹ (see Vienna Convention on the Law of Treaties Article 31(2)). In other words, a preamble does not essentially create new rights and duties. An important agreement, such as giving Paragraph 5 a new status as a legal norm, would normally be provided for in the main text of a treaty rather than the preamble. The Court's reliance on the preamble in this way therefore lacks persuasiveness.³²

30 This would apply in the case that the Joint Communiqué was regarded as a “peace settlement or war claims settlement” with a non-signatory state specified in Article 26 of the San Francisco Peace Treaty.

31 See, e.g., I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester U.P., 1984), 127-128; A. AUST, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge U.P., 2007), 235-236, 425-426.

32 However, in light of its position that post-war settlement between Japan and China had been legally resolved through the Japan-ROC Peace Treaty, it would probably have been

A third problem arises from the premise that settlement of post-war damages with Mainland China was made pursuant to Paragraph 5 of the Joint Communiqué. It appears logically inconsistent for Japan, which has adopted the position that the issue of post-war damages for China was legally resolved through the Japan-ROC Peace Treaty, to recognize Paragraph 5 as a legal norm, because it is impossible to resolve the same issue twice. One possible solution to this dilemma is to employ the concept of opposability toward a third-party as follows. The Japan-ROC Peace Treaty addressed reparations and claims including those with respect to the mainland, yet the effect of this cannot be automatically asserted (i.e., opposable) against the PRC, which denies the Treaty's validity. Nevertheless, if the Government of the PRC subsequently accedes to the settlement, the effect of the Treaty can then be asserted (i.e., opposable) against the PRC. In this sense, effect toward a third-party (i.e., opposability) may be acquired. The Japanese Government could conceive of the Joint Communiqué as operating in this way, and thereby resolve the dilemma.³³ However, it is quite a stretch to consider that the PRC, which has consistently denied the validity of the Japan-ROC Peace Treaty, would accede to the very provision of the treaty it regards as most problematic. Recognizing this perhaps, the Court found that the PRC, through the Joint Communiqué, undertook a fresh waiver of reparations and claims that merely mirrored the Japan-ROC Peace Treaty and the San Francisco Peace Treaty.

Indeed, Diet deliberations suggest that the Japanese Government was aware that it was difficult to consider that the relationship with Mainland China had been completely resolved through the Japan-ROC Peace Treaty. For example, Foreign Minister Katsuo Okazaki stated that the provisions relating to the reparations issue in the Japan-ROC Peace Treaty were limited to the ROC.³⁴ Moreover, even if the Joint Communiqué was not a comprehensive legal document, there was recognition that Paragraph 5 gave rise to legal effect. For example, Director-General of the Cabinet Legislation Bureau Hideo Sanada commented that the PRC had undertaken a unilateral act of declaring the waiver of demand for war reparations from Japan, and this was considered to have given rise to

impossible for Japan to accept that Paragraph 5 of the Joint Communiqué had obtained the status of a legal norm and that this was provided for in the main text of the Japan-China Peace and Friendship Treaty.

33 Of course, this view differs from the official position of the Japanese Government that post-war settlement between Japan and China had been legally resolved through the Japan-ROC Peace Treaty as a one-off act of disposition. However, Japan had at least once argued that this could be treated like the main text. For example, Parliamentary Vice-Minister for Foreign Affairs Kiyoshi Mizuno with regard to the waiver of demand for reparation through the Joint Communiqué stated: "The result as I appraised it was that, through different wording, we had convinced the PRC that the issue of post-war settlement had been resolved through the provisions of the Japan-ROC [Peace] Treaty." Minutes of the Cabinet Committee, House of Representatives, 71st Diet, no. 45 (26 July 1973), 7.

34 Minutes of the Foreign Affairs Committee, House of Councillors, 13th Diet, no. 42 (18 June 1952), 17.

legal effect.³⁵ This evidence gives further support to the view adopted by the Court that the settlement of reparation and claims for Mainland China was achieved through Paragraph 5 of the Joint Communiqué. On the other hand, it is unclear to what extent these two statements and the position of the Japanese Government that the issues had been legally resolved through the Japan-ROC Peace Treaty can be reconciled.

3. *Waiver of claims regarding post-war reparations*

As discussed above, the Court adopted the premise that the issue of post-war reparations between Japan and China was resolved according to the San Francisco Peace Treaty framework. It remains to define the specific content and effect of “waiver of claims” under this framework. This problem, rather than being a unique problem of post-war reparations between Japan and China, is rather a problem of the interpretation of Article 14(b) of the San Francisco Peace Treaty. Note that the Japanese Government appears to consider Article 14(b) (waiver by Allied Powers) and Article 19(a) (waiver by Japan) to share the same purpose.³⁶ Therefore, this discussion extends to both provisions.

The interpretation of the “waiver of claims” articles of the San Francisco Peace Treaty has been discussed considerably in the Japanese Diet in relation to the Dutch Prisoners of War Case. In March 2001, the House of Councillors Foreign Relations and Defense Committee addressed the question of whether Japan’s arguments in that case differed from those that it previously put forward in the Atomic Weapons Case. In the Atomic Weapons Case, Japan argued that only the right of diplomatic protection was waived by Article 19(a) of the San Francisco Peace Treaty and not the claims of injured individuals against an offending party.³⁷ A question of inconsistency arose because, in the first appeal hearing of the Dutch Prisoners of War Case, Japan argued that Article 14(b):

“extinguished any legal duties to accept a claim by a national of an Allied Power based on rights arising from domestic law, allowing the Japanese state and Japanese nationals to reject such a claim.”³⁸

35 Minutes of the Budget Committee, House of Representatives, 82nd Diet, no. 2 (11 October 1977), 24-25.

36 For example, in the brief lodged by Japan to the Tokyo High Court related to the Dutch Prisoners of War Case, a consistent interpretation is applied to the “waiver of claim provisions of the San Francisco Peace Treaty (14(b), 19(a))”, and no special distinction is drawn between the two: Brief (3) (27 February 2001), 8-9.

37 See, for example, Pleadings of the Japanese Government in the Peace Treaty Waiver of Claims Reparations Claims Case, Tokyo District Court (20 August 1956), Ka-Minshu, vol. 7, no. 8 (August 1956), 2241; Pleadings of the Japanese Government in the Atomic Weapons Case, Tokyo District Court (7 December 1963), Ka-Minshu, vol. 14, no. 12 (December 1963), 2451.

38 Brief (3) (27 February 2001), 18.

In response to the apparent inconsistency, Foreign Ministry Director-General of the Treaties Bureau Shin Ebihara stated that there was “absolutely no inconsistency” between the two positions and that the explanation made in the Atomic Weapons Case had made it clear that “everything had been resolved ... including problems relating to individual claims” with “diplomatic protection rights in mind.”³⁹

Furthermore, it was pointed out in the Diet, whereas Japan argued in the Atomic Weapons Case that the claims of individual nationals had not been extinguished, it argued that they had been completely extinguished with regard to former Dutch prisoners of war. In response to the question of whether this was a novel interpretation, Ebihara stated that the argument in the later case was not that individual claims themselves had been extinguished. Instead, he explained, through Article 14(b) of the San Francisco Peace Treaty,

“any legal duty to accept a claim based on these claims or obligations has been extinguished and as a result relief is denied...[therefore] satisfaction of claims cannot be obtained. In other words, the right exists but there is no relief.”⁴⁰

The Court held that:

“Considering that the purpose of the waiver of claims under the framework of the San Francisco Peace Treaty is to avoid leaving the issues concerning claims to [resolution] by way of the exercise of rights in individual, ex-post civil litigations, it is appropriate to construe the term ‘waiver’ of claims [in Article 14(b)] not to extinguish claims in substance but merely to remove the competency to pursue these claims in litigations.”

This position equates to ‘rights without judicial relief’ and is essentially the same position adopted by Japan in the first appeal of the Dutch War Prisoners Case.⁴¹

If the purpose of the San Francisco Peace Treaty framework is to avoid leaving the issues concerning claims to resolution by way of the exercise of rights in individual, ex-post civil litigation, it is not necessary to posit remaining “rights without relief” that survive waiver of claims. Other interpretations are equally functional. For example, a literal reading that claims are extinguished would also finally resolve the issues. Nevertheless, there are two factors that explain the Supreme Court’s attachment to the concept of surviving rights without relief. First, the loss of the right to litigate is the minimum necessary outcome to achieve the above-stated purpose of the San Francisco Peace Treaty framework. Second, it seems that the exchange between Japan and the Netherlands mediated by the US at the San Francisco Peace Conference in September

39 Minutes of the Foreign Affairs and Defense Committee, House of Councillors, 51st Diet, no. 4 (22 March 2001), 13.

40 Ibid, 14.

41 However, see the detailed discussion of this concept below.

1951 played a role. The Netherlands argued that if the term “waiver of claims” in the San Francisco Peace Treaty was to have the effect of extinguishing the claims of individual nationals, a constitutional problem would arise in Dutch law. The Japanese Government responded to this concern by preserving “rights without relief” and this understanding was reflected in an Exchange of Notes between Japanese Prime Minister Shigeru Yoshida and Dutch Foreign Minister Dirk Stikker.⁴² The Court relies upon this document in the Nishimatsu Case in passages that consider “waiver of claims” to amount to preservation of rights without relief.⁴³

Despite the existence of this Exchange of Notes, it is questionable whether an understanding between Japan and the Netherlands at the San Francisco Peace Conference pertains to the immediate cases involving litigants from China. First, a treaty such as the multilateral San Francisco Peace Treaty is in essence an instrument that concludes in one document a peace treaty that could equally have been concluded between each nation bilaterally. Hence, as the situations of each of the Allied powers differ – indeed, the date of commencement of the state of war differs according to nation – it seems that there is no necessity for perfect unison in interpretation down to the last detail.⁴⁴ Second, the understanding with the Netherlands regarding Article 14 (b) of the San Francisco Peace Treaty was made with the Netherlands only and was, furthermore, unknown to any other state.⁴⁵ Article 14(b) should not, therefore, be interpreted on the basis of this understanding. Third, there were good reasons why the Japanese Government did not consider the Exchange of Notes a reservation (a legal exclusion or modification) to the San Francisco Peace Treaty.⁴⁶ The Exchange of Notes remained a secret and informal agreement because if the reservation had been official it may have induced other states to make the same reservation.⁴⁷ This fact in itself suggests that, although not

42 On this point, see M. ASADA, *Tai-nichi heiwa jōyaku ni okeru “kokumin no seikyū-ken” no hōki* (1) [Waiver of “Nationals’ Claims” under the Treaty of Peace with Japan (1)], *Hōgaku Ronsō*, vol. 162, nos. 1-6 (March 2008), 63-80.

43 The court stated: “surrounding the interpretation of Article 14 (b) of the San Francisco Peace Treaty, it is a publicly known fact that Prime Minister Shigeru Yoshida signaled the possibility of voluntary measures in correspondence to the representative of the Netherlands, Foreign Minister Stikker.” The reason this is only touched upon in the Nishimatsu Case is that the matter of “voluntary and spontaneous measures” was only raised in that case.

44 However, this difference in interpretation may cause problems related to the purpose of Article 26 of the San Francisco Peace Treaty in the case that a difference arises that goes beyond a peace treaty with “substantially the same terms” with a state non-signatory to the Treaty.

45 Minutes of the Foreign Affairs Committee, House of Representatives, 24th Diet, no. 25 (30 March 1956), 21 (reply of Director-General of the Treaties Bureau of the Ministry of Foreign Affairs Takezō Shimoda). To the authors’ knowledge, the Yoshida-Stikker Exchange of Notes was first publicly announced when the San Francisco Peace Treaty came before the Dutch Parliament.

46 *Ibid.*, 21.

47 *Ibid.*, 22.

an official reservation, the contents of the Yoshida-Stikker Exchange of Notes embodied an interpretation that differed from the standard (i.e., toward the other Allied Powers) interpretation of Article 14(b) of the San Francisco Peace Treaty. In summary, the Court's espousal of the concept of "rights without relief" relying on the Exchange of Notes is unfounded.⁴⁸ The Tokyo High Court's position that the claims of Chinese nationals against Japan were extinguished is more tenable.⁴⁹

Ultimately, the Court rejected the argument that the claims had been extinguished, or that the waiver is limited to the right to diplomatic protection, and instead adopted the concept of "rights without relief". It is therefore necessary to explore the meaning of this concept. The Court held that it meant that a claimant is "merely deprived of the competency to pursue his/her claim in a litigation", rather than having his/her claim extinguished in substance. This amounts to a so-called "natural obligation", a right or claim that cannot be exercised in a court.⁵⁰ Although the performance of a natural obligation cannot be enforced through legal action in a court, if it is performed voluntarily by the obligor in response to the obligee's demand, the receipt of that performance will not amount to unjust enrichment on the basis of any benefit obtained.

The Court appears to consider the surviving claim as a claim that cannot be exercised in a court. However, the Japanese Government appears to adopt a view that differs somewhat in nuance. In Diet debates of 1993, Foreign Ministry Director-General of the Treaties Bureau Minoru Tanba stated that the meaning of "mutual waiver of claims" in the peace treaties involving Japan did not mean extinguishment of the claims themselves. Regarding the question of what becomes of such claims, he maintained that "it did not go so far as to extinguish each individual's right to take legal action in a court of the other nation." Rather, in the case that the issue is taken to court, "how a court decides is a matter for that particular jurisdiction."⁵¹ The Japanese Government appears to have upheld this position even after Director-General of the Treaties Bureau Ebihara's concept of "rights without relief" was presented to the House of Councillors

48 The Japanese Government holds that the views relating to claims indicated in the Yoshida-Stikker Exchange of Notes was an "indication of Japan's position towards the [San Francisco] Peace Treaty, rather than merely its position with regard to the Netherlands." Minutes of the Cabinet Committee, House of Councillors, 55th Diet, no. 3 (12 November 2002), 20 (reply of Director-General of the Treaties Bureau of the Ministry of Foreign Affairs Keiichi Hayashi).

49 In the Second Chinese Comfort Women Case: Shômu Geppô vol. 51, no.11 (November 2005), 2868.

50 On natural obligations, see Y. SHIOMI, *Saiken sôron* (I) [A Treatise on the Law of Obligations (I)] (2nd ed.) (Shinzansha, 2003), 248-257; R. HAYASHI et al., *Saiken sôron* [A Treatise on the Law of Obligations] (3rd ed.) (Seirinshoin, 1996), 71-74.

51 Minutes of the Foreign Affairs Committee, House of Councillors, 126th Diet, no. 3 (6 April 1993), 11. For a similar declaration (regarding litigation rights) made in relation to the Japan-China Joint Communiqué, see Minutes of the Cabinet Committee, House of Councillors, 123rd Diet, no. 4 (7 April 1992), 5 (reply of Chief Cabinet Secretary Kôichi Katô).

Foreign Affairs and Defense Committee in 2001.⁵² If this is the case, according to the position of the Japanese Government, what remains after the waiver of claims is the “right to take legal action but without relief.”

A number of problems arise from this. First, the “right to take legal action but without relief” has conceptual difficulties. If there is no possibility of relief, any right to take legal action has little meaning,⁵³ although it is possible that the Japanese Government conceives of some value in this “right to take legal action in form only”.⁵⁴ Second, the response of Director-General of the Treaties Bureau Tanba is unclear on the fate of substantive rights. It is by no means clear whether the statement that the claims themselves are not extinguished and are rather “decided by a court” is (1) a pronouncement in a general sense on the independence of jurisdictions, or (2) a reservation of the possibility for a court to recognize the justiciability of the claim. If (2), it is questionable whether this can properly be considered a “right without relief.” Furthermore, if the claim were to be recognized, substantive rights would continue to exist. In such a case, both the substantive rights and the right to take legal action would exist, which would not differ from the situation that the claim survived wholly intact (i.e., not waived at all). Conversely, if the substantive rights were extinguished, there would be no possibility of a court recognizing the claim. This would amount to a right to claim in name only, a concept of questionable utility. Furthermore, the problem of unjust enrichment would arise if voluntary satisfaction of the claim were received, although depending on the situation it could be possible to construe this legally as a mere gift. Ultimately, the

52 The reply of Director-General of the Treaties Bureau Tanba was also referred to in a recent paper by Director-General of the International Law Bureau of the Ministry of Foreign Affairs Ichiro Komatsu: I. KOMATSU, *Kokusai-hô no rikô kakuho to kokunai saiban-sho ni yoru kokusai-hô no tekiyô: iwayuru “beikoku POW soshô” o megutte* [The Guarantee of Enforcement of International Law and the Application of International Law by Domestic Courts: The So-called “American POW Cases”], in Y. SHIMADA et al. (eds.), *Kokusai funsô no tayôka to hôteki shori* [Diversification of International Disputes and Resolution through Law] (Shinzansha, 2006), 236.

53 Yasuhei Taniguchi is positive about the possibility of a new right arising through a substantive judgment of a court even with regard to an interest that has not yet been established as a substantive right: Y. TANIGUCHI, *Kenri gainen no seisei to uttae no rieki* [The Generation of a Rights Concept and the Interest of Litigation], in *Kôza minji soshô II soshô no teiki* [Civil Litigation Seminar II: Filing for Litigation] (Kôbundô, 1984), 163-180. However, “right without relief” here becomes the object of a claim, yet is not even capable of recognition as this kind of right.

54 On this point, Director-General of the International Law Bureau Ichirô Komatsu writes: “it is unthinkable that the [San Francisco] Peace Treaty goes so far as requiring [...] the prohibition of filing for litigation itself by one’s own nationals against a party to the Treaty” and that “it is in reality impossible for a government to supervise around the clock the actions of each of one’s individual nationals.” I. KOMATSU, *Kokusai-hô no rikô kakuho to kokunai saiban-sho ni yoru kokusai-hô no tekiyô*, [The Guarantee of Enforcement of International Law and the Application of International Law by Domestic Courts], 236.

Court's explanation that substantive rights survive but the right to litigate does not is conceptually clearer and avoids the problems discussed here.

4. *Possibility of direct application of waiver of claims*

The above discussion has mainly concerned legal issues surrounding international relations. However, the immediate question in this case is the domestic legal issue of whether a Japanese court can dismiss a claim by a Chinese national. For this to occur, the "waiver of claims" regarding the international relations discussed so far must have effect in domestic law also and, furthermore, the waiver must be able to be directly applied by a domestic court. On this, the Court held that the waiver of claims under the San Francisco Peace Treaty framework "removed competency to pursue the claims in litigation." The Court did not consider additional measures under domestic law a precondition to applying the waiver. The same was true of waiver of claims in Paragraph 5 of the Joint Communiqué, which, according to the Court, operated within the San Francisco framework. The Court did not clearly distinguish between the domestic effect of international law and the possibility of direct application under domestic law, nor did it undertake any specific consideration in light of the criteria for direct applicability. Nevertheless, because the competency to seek relief from a domestic court had been lost, it is difficult to conceive of any necessity for additional domestic measures beyond that. The Court's conclusion is therefore well founded.

It is important to note that the right arising from domestic law to take legal action based upon a claim for compensation for harm was not lost merely because this kind of agreement under international law has domestic effect and is potentially directly applicable. Rather, in Japan's legal framework, international law is superior in effect to that domestic law. The ruling would have benefited if the Court had clarified this.

5. *Voluntary measures to satisfy claims*

Recall that, in the Nishimatsu Case, the Court made the exhortation that with regard to waiver of claims under the San Francisco Peace Treaty framework, "the obligors are not prevented from voluntarily and spontaneously taking measures to satisfy specific claims" and that they were anticipated to do so. This passage is conspicuously absent in the Second Chinese Comfort Women Case, the only substantial difference between the two cases. The reason for this omission may be that certain measures have been taken with regard to the issue of sexual slavery through the framework of the Asian Women's Fund.⁵⁵ However, in reality, no Chinese nationals have accepted compensation, including so-called "atonement money" through the Asian Women's Fund.⁵⁶ Objectively

55 Officially named The National Fund for Asian Peace and Women.

56 It is generally pointed out that many victims (not necessarily referring to Chinese victims) refused to accept the money, because the Fund is essentially a private body rather than a

speaking, therefore, there has been no materialization of such “voluntary and spontaneous measures.” It appears that the Supreme Court has taken the view that voluntary and spontaneous measures have been taken with regard to former Chinese sexual slaves on the basis that a system for compensation has been established and that an offer of compensation is assumed to have been made thereby.

D. THE PRC’S RESPONSE

On the day the two judgments were delivered, PRC Foreign Ministry Spokesperson Liu Jianchao made the following comments:

“The waiver of war reparations claims against Japan made by China in the China-Japan Joint Communiqué was a political decision undertaken with the aim of achieving amity and coexistence between the peoples of both countries. China strongly opposes the Supreme Court of Japan’s actions in adopting a unilateral interpretation of its provisions disregarding the repeated solemn representations made by China. The interpretation of the China-Japan Joint Communiqué by the Japanese Supreme Court is illegal and invalid. We call on the Government of Japan to seriously address China’s concerns and resolve this problem appropriately. During the invasion of China, Japan forced Chinese nationals to relocate and treated them as slaves. This was a grave criminal act perpetrated against Chinese people by Japanese militarism and remains a grave and present human rights problem that has not been adequately resolved. The Chinese Government has already requested Japan to effect an adequate resolution with a responsible attitude to history.”⁵⁷

direct conduit of the state. T. MORRIS-SUZUKI, Japan’s ‘Comfort Women’: It’s time for the truth (in the ordinary, everyday sense of the word), *The Asia-Pacific Journal: Japan Focus*, 8 March 2007, <http://www.japanfocus.org/products/details/2373>. An alternative view has been expressed that the Chinese Government has used the issue for diplomatic leverage as evidenced in an official rejection of participation in the Asian Women’s Fund, yet tacit approval of Chinese nationals’ claims through the courts and campaigns involving visits to Japan of victims of sexual slavery: I. HATA, *Ianfu to senjô no sei* [Comfort Women and the Sex in the Battlefield] (Shinchôsha, 1999), 312. The Asian Women’s Fund has not made public the number by nation (except the Netherlands) of individual former sexual slaves who have received atonement money. However, the Fund has indicated which countries and regions have been the object of compensation programs: South Korea, Taiwan, the Philippines, the Netherlands, and Indonesia. See also Y. ÔNUMA, “*Ianfu*” *mondai to wa nan datta no ka* [What Was the “Comfort Women” Problem All about?] (*Chûô Kôron Shinsha*, 2007), 44-75, 105-106; I. HATA, *Ianfu to senjô no sei* [Comfort Women and the Sex in the Battlefield], 287-320.

57 “*Nishimatsu kensetsu*” *soshô hanketsu ni kansuru komento, chûgoku gaikôbu hôdô-kan* [Comment on the “Nishimatsu Construction” Case, Spokesperson of the Chinese Ministry of Foreign Affairs, (28 April 2007)], website of the Chinese Embassy of Japan: <http://www.china-embassy.or.jp/jpn/fyrth/t314884.htm>.

Underlying the apparent severity of this response lies an important omission from a legal point of view. It does not contain a clear repudiation of the Supreme Court's finding that Paragraph 5 of the Joint Communiqué, the central provision in these cases, waived the claims of individuals. This is of particular import considering that the comment was in response to a question soliciting comment from the Chinese side regarding the fact that the Japanese Supreme Court found that it was possible to interpret the waiver of claims for war reparations by the Joint Communiqué to include the claims of individuals for compensatory damages. From this omission, one can assume that the Chinese Government deliberately chose not to directly challenge this interpretation. Indeed, this may amount to a case of "acquiescence", the principle that when no objection is made where an objection is normally expected, a certain legal effect may arise.⁵⁸

The heart of Liu Jianchao's comment is that the Supreme Court employed an interpretation that is unilateral (which, according to him, is illegal and invalid).⁵⁹ This assertion is questionable. When a treaty or other international document arises in a domestic case, it is natural for a court to undertake interpretation of any such documents as far as is necessary. If this were to be invalid as a "unilateral interpretation," it would be impossible for any domestic court to apply international law, including treaties. Finally, it is unclear to whom such "repeated solemn representations" were made and by what channels. Yet, even if this refers to the standard representations made through diplomatic channels, the judiciary would not be bound to heed them, nor should it be.

58 This has been treated elsewhere: M. ASADA, *Nikka heiwa jōyaku to kokusai-hō* (5) [The Japan-ROC Peace Treaty and International Law (5)], *Hōgaku Ronsō*, vol. 156, no. 2 (November 2004), 36. However, this occasion in particular seems to have called for an objection from the PRC. See further, Y. TAKAGI, *Nitchū kyōdō seimei daigo kō no wiin jōyaku-hō jōyaku no gensoku ni yoru shihō kaishaku* [Judicial Interpretation of Paragraph 5 of the Japan-China Joint Communiqué through the Principles of the Vienna Convention on the Law of Treaties], *Hōritsu Jihō*, vol. 80, no. 4 (April 2008), 100-101. On the principle of acquiescence, see I.C. MACGIBBON, *The Scope of Acquiescence in International Law*, *British Year Book of International Law*, vol. 31 (1954), 143, 182-183; J. MÜLLER & T. COTTIER, *Acquiescence*, in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. I (North-Holland, 1992), 14.

59 This point was emphasized by Spokesperson Liu in a press conference on the day before the judgments were handed down: "The China-Japan Joint Communiqué is a solemn political diplomatic document signed by both governments of China and Japan, and forms political foundations for recovery and development of the post-war China-Japan relationship. It documents important principles stated by both sides and should not be subject to unilateral interpretation of its provisions, including judicial interpretation." *26/4/2007 no chūgoku gaikōbu liu jianchao hōdō-kan no teirei kisha kaiken* [Foreign Ministry Spokesperson Liu Jianchao's 26 July 2007 Press Conference], website of the Chinese Embassy of Japan: <http://www.china-embassy.or.jp/jpn/fyrth/t314453.htm>.

CONCLUSION

In this article, we have examined the two Supreme Court judgments involving Chinese nationals' claims for post-World War II reparations. These judgments differ from the large number of lower court judgments so far which have interpreted the wording of Paragraph 5 of the Joint Communiqué to the effect that the claims of individual Chinese nationals had not been waived by the Joint Communiqué. The Supreme Court judgments also reject the Japanese Government's position that Japan has legally resolved any issues of reparations and claims relating to China through the Japan-ROC Peace Treaty. Instead, the Supreme Court, while recognizing the validity of the Japan-ROC Peace Treaty, casts doubts on its applicability to the Chinese mainland because of the existence of an Exchange of Notes pertaining to the scope of application. The Court developed a novel interpretation drawing from the history of normalization of relations between Japan and China. The Court read a mutual waiver of claims including individual claims into the "waiver of demand for war reparations" of Paragraph 5 of the Joint Communiqué. These judgments deserve attention from the practical viewpoint that they represent a significant change from the trend of pre-existing lower court cases and effectively send the issue of resolving the grievances of Chinese nationals against Japan back to the political sphere. They also deserve attention from the theoretical viewpoint that such an interpretation was relatively original in both scholarship and precedent.⁶⁰ While the conclusion may be unsatisfying and individual arguments are not unproblematic, as a whole these judgments should be evaluated positively for their thorough research and conceptual underpinnings that far surpass the pre-existing lower court cases.⁶¹

60 However, Asada offers the same interpretation, at least with regard to the interpretation of Paragraph 5 of the Japan-China Joint Communiqué: M. ASADA, *Nikka heiwa jōyaku to kokusai-hō* (1)-(5) [The Japan-ROC Peace Treaty and International Law (1)-(5)], *Hōgaku Ronsō*, vol. 147, no. 4 - vol. 156, no. 2 (July 2000-November 2004), according to *Hanrei tokuhō* [Special Case Report], *Hanrei Jihō*, no. 1969 (11 August 2007), 31.

61 This is also the case from the perspective of international law, although the expression "ratification by the Diet" used in regard to the legal character of the Joint Communiqué is clearly erroneous. Furthermore, the judgments erroneously provide the 1956 Japan-Netherlands Protocol on Private Claims as an example of a bilateral treaty between Japan and a state that did not become a party to the San Francisco Peace Treaty. The Netherlands is a party to the San Francisco Treaty.

ZUSAMMENFASSUNG

Am 27. April 2007 hat der Oberste Gerichtshof Japans zwei Urteile zum Thema Reparationszahlungen gefällt, die von historischer Tragweite sind. Beide Entscheidungen betrafen China. Das eine war der sog. „Nishimatsu-Bau-Fall“ und das andere der sog. „zweite chinesische ‚Trostrfrauen‘-Fall“. In beiden Fällen ging der OGH zwar einerseits von der Gültigkeit des Friedensvertrages zwischen Japan und der Republik China (ROC) von 1952 aus, bezweifelte andererseits aber dessen Anwendbarkeit auf Festlandchina, wegen des den Vertrag begleitenden Austausches von Noten, in denen klargestellt wurde, dass dieser lediglich für diejenigen Gebiete Geltung entfalten sollte, die sich zum Zeitpunkt des Vertragsschlusses unter der Herrschaft der ROC befanden oder künftig darunter fallen würden. Stattdessen stützte sich der OGH für Festlandchina auf das Gemeinsame Kommuniqué zwischen den Regierungen Japans und der Volksrepublik China (PRC) aus dem Jahr 1972. Damit entwickelte der OGH eine neue Interpretation, die sich maßgeblich aus der Normalisierung des Verhältnisses zwischen Japan und China ableitete.

Der Gerichtshof interpretierte den „Verzicht auf kriegsbedingte Reparationszahlungen“ in Art. 5 des Gemeinsamen Kommuniqués dahingehend, dass dieser als ein wechselseitiger Verzicht unter Einschluss aller möglichen individuellen Schadensersatzforderungen zu verstehen sei. Als Ergebnis seiner Interpretation stellte der OGH fest, dass damit alle Staatsangehörigen der PRC das Recht verloren hatten, Schadensersatzklagen gegen Japan oder japanische Staatsangehörige geltend zu machen. Die beiden Entscheidungen signalisieren eine klare Abkehr von dem auf der Ebene der Instanzgerichte zu beobachtenden Trend und führen zu einer exklusiven Zurückverweisung der Anliegen geschädigter chinesischer Staatsbürger in die Sphäre des Politischen. Die Urteile verdienen ferner auch aus theoretischer Sicht besondere Aufmerksamkeit, als die von dem OGH entwickelte Interpretation Neuland betritt, das zuvor weder in der Literatur noch von den Instanzgerichten besprochen worden war.

(dt. Übersetzung durch die Red.)