



BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University

VOLUME 8, NUMBER 1 (2015)

ISSN 2029-0454



Cit.: *Baltic Journal of Law & Politics* 8:1 (2015): 1-27

DOI: 10.1515/bjlp-2015-0009

QUALITATIVE ALLEVIATION OF WAR REPARATIONS IN *JUS POST BELLUM*: ANALYSIS OF *TRAVAUX PRÉPARATOIRES* OF ARTICLE 16 OF THE TREATY OF PEACE WITH JAPAN

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Received: March 25, 2015; reviews: 2; accepted: May 29, 2015.

ABSTRACT

As a case study contributing to empirical and inductive specifications of the *jus post bellum* principle for reparations, the author conducts an analysis of a provision of the Treaty of Peace with Japan that mandates that Japan make reparations from attached Japanese assets in neutral and ex-Axis countries to compensate the Allied prisoners of war. This study's findings elucidate the legal significance of the provision that war reparations can be qualitatively alleviated by virtue of substituting assets for pecuniary reparations, hence presenting inductive substantiation for implementing the *jus post bellum* principle for reparations.

KEYWORDS

Post-war Peacebuilding, *Jus Post Bellum*, Treaty of Peace with Japan, War Reparations

INTRODUCTION

In a series of academic inquiries on *jus post bellum*, a legal framework for norms applied to post-war peacebuilding,¹ the subject of war reparations² is widely considered.³ Two leading studies provide in-depth consideration on the commonality of contentions on alleviating reparations.

First, Stahn advocates the principle of “the humanization of reparations.” He derives the lesson that the claims for reparations be assessed in the light of the economic potential of defeated aggressor nations and the repercussions on the population of liable states from the practice of peace treaties.⁴ He understands this as one of the principles of post-conflict law that is the regulatory framework containing substantive legal rules and procedural principles.⁵

Second, May advances the theory of “*meionexia*.” Dwelling on *jus post bellum* principles as mere *lex ferenda*⁶ or moral norms exerting influence on the formation of legal norms until some lawmaking act,⁷ May presents six *jus post bellum* principles, dubbed 5R&P: retribution, reconciliation, rebuilding, restitution, reparation, and proportionality.⁸ He stresses the principle of reparation in

¹ The definition of *jus post bellum* is a highly contentious issue. On the manifold definitions, see, Kristen Boon, “*Jus Post Bellum* in the Age of Terrorism: Introductory Remarks,” *American Society of International Law Proceedings* 106 (2012): 331; Eric De Brabandere, “The Concept of *Jus Post Bellum* in International Law: A Normative Critique”: 124, 137; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014); Vincent Chetail, “Introduction: Post-conflict Peacebuilding – Ambiguity and Identity”: 18; in: Vincent Chetail, ed., *Post-conflict Peacebuilding: A Lexicon* (New York: OUP, 2009); Jennifer S. Easterday, “Peace Agreements as a Framework for *Jus Post Bellum*”: 382, 412, 413; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014); Jennifer Easterday, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Jennifer Easterday,” *American Society of International Law Proceedings* 106 (2012): 335; Jens Iverson, “Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum*: Outlining the Matrix of Definitions in Comparative Perspective”: 85; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014); Inger Österdahl, “Just War, Just Peace and the *Jus post Bellum*,” *Nordic Journal of International Law* 81 (2012): 281; Aurel Sari, “The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles”: 483; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014). Considering the above different treatises, this paper merely presents a convenient working definition; it is not designed to address the question about the definition of *jus post bellum*.

² War reparations mean the compensation fulfilled as responsibility for illegitimately triggering a war (Marco Sassòli, “Reparation”: 279; in: Vincent Chetail, ed., *Post-conflict Peacebuilding: A Lexicon* (New York: OUP, 2009)). Note that war indemnity claiming detriment and expenditures for a war, which is irrelevant to liability for illegalities, is a completely distinct notion (see, Natalino Ronzitti, “Reparation and Compensation”: 639; in: Nigel D. White and Christian Henderson, eds., *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (Cheltenham: Edward Elgar, 2013)).

³ See, Gabriella Blum and Natalie J. Lockwood, “Earthquakes and Wars: The Logic of International Reparations”: 178; in: Larry May and Elizabeth Edenberg, eds., *Jus Post Bellum and Transitional Justice* (New York: CUP, 2013); Inger Österdahl and Esther van Zadel, “What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles,” *Journal of Conflict & Security Law* 14(2) (2009): 180-181.

⁴ Carsten Stahn, “‘*Jus ad bellum*’, ‘*jus in bello*’ ... ‘*jus post bellum*’? – Rethinking the Conception of the Law of Armed Force,” *European Journal of International Law* 17(5) (2007): 939-940.

⁵ *Ibid.*: 937, 938.

⁶ Larry May, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Larry May,” *American Society of International Law Proceedings* 106 (2012): 332.

⁷ Larry May, “*Jus Post Bellum Proportionality* and the Fog of War,” *European Journal of International Law* 24(1) (2013): 318.

⁸ E.g., Larry May and Elizabeth Edenberg, “Introduction”: 3; in: Larry May and Elizabeth Edenberg, eds., *Jus Post Bellum and Transitional Justice* (New York: CUP, 2013).

conformity with the proportionality principle,⁹ and maintains that damaged states should spontaneously temper their reparation claims so that they must demand less than their due to gain a more secure and lasting peace when exacting full reparations imposes disproportionate burdens on aggressors, and he refers to this precept as “meionexia,” building on Grotius.¹⁰

Both arguments for which the mitigation of war reparations are enumerated as *jus post bellum* principles possess mutual specialties that are derived from the analyses of international practices regarding peacebuilding after World War II.¹¹ However, the theoretical foundations of investigations by Stahn and May should be qualified as mere schematic observations. Accordingly, as Stahn acknowledges, more empirical and inductive research is required under the discipline’s present conditions to identify organizing principles of *jus post bellum*, including the scope and limits of reparations, and to specify acceptable methods for implementing the principles.¹²

With reference to the above degree of advancement in *jus post bellum* reparation studies, this article conducts a case study positioning Japan’s reparations after World War II as the subject matter with a view of contributing to the empirical and inductive specifications of the principle for reparations. Hence, the author references Article 16 of the Treaty of Peace with Japan, which provides for extremely particular reparations¹³ from Japanese property within neutral and ex-Axis states.

⁹ The principle of proportionality is explained as, “Whatever is required by the application of other *jus post bellum* principles must not impose more harm on the peoples of the world than is alleviated by the application of these principles” (Larry May, *supra* note 7: 325).

¹⁰ Larry May, “*Jus Post Bellum*, Grotius, and *Meionexia*”: 18, 20; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014); Larry May, “Reparations, Restitution, and Transitional Justice”: 35-36, 42-43; in: Larry May and Andrew T. Forcehimes, eds., *Morality, Jus Post Bellum, and International Law* (New York: CUP, 2012); Larry May and Andrew T. Forcehimes, “Introduction”: 3-4; in: Larry May and Andrew T. Forcehimes, eds., *Morality, Jus Post Bellum, and International Law* (New York: CUP, 2012).

¹¹ Stahn shows that post-conflict law, including “the humanization of reparations” rests on a comparative survey of international practices in the eras of post-World Wars and post-Cold War (Carsten Stahn, *supra* note 4: 938). Comparing practices of reparations after World War II with those after World War I, May considers that the treatment of Germany and Japan after World War II not only provides exemplifications of “meionexia” but also sets the stage for contemporary discussions of *jus post bellum* (Larry May, “Reparations, Restitution, and Transitional Justice,” *supra* note 10: 36; Larry May and Elizabeth Edenberg, *supra* note 8: 14-15).

¹² Carsten Stahn, “*Jus Post Bellum*: Mapping the Discipline(s)”: 109; in: Carsten Stahn and Jann K. Kleffner, eds., *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (Hague: T.M.C.-Asser Press, 2008); Carsten Stahn, “The Future of *Jus Post Bellum*”: 236-237; in: Carsten Stahn and Jann K. Kleffner, eds., *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (Hague: T.M.C.-Asser Press, 2008); Jens Iverson, Jennifer S. Easterday, and Carsten Stahn, “Epilogue: *Jus Post Bellum* – Strategic Analysis and Future Directions”: 545; in: Carsten Stahn, Jennifer S. Easterday and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (New York: OUP, 2014). Moreover, Neff remarks that the question of war reparations would be one area where it is important to devise rules by virtue of the inductive approach (Stephen C. Neff, “Conflict Termination and Peace-making in the Law of Nations: A Historical Perspective”: 90; in: Carsten Stahn and Jann K. Kleffner, eds., *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (Hague: T.M.C.-Asser Press, 2008)).

¹³ Although Article 16 does not use the term “reparation,” the delegates of the United Kingdom and Australia unequivocally regarded Article 16 as a provision regarding reparation at the peace conference in San Francisco (*Records of Proceedings: Conference for the Conclusion and Signature of the Treaty of Peace with Japan* (Washington, D.C.: Department of State, 1951), 96, 246; Ministry of Foreign Affairs,

The purpose of this paper is to consider the legal significance of Article 16 and to discuss the question of whether this article offers substantiation of the principle for reparations. With a view to this consideration, the author confirms Article 16's legal effect. For this article provides that Japan shall pay reparations without expatiating legal requirements for this result, thus indicating that the legal effect of Article 16 strongly pertains to the legal significance of this provision. To ascertain the legal effect of Article 16, the author conducts an analysis of *travaux préparatoires* relating to Article 16, such as diplomatic negotiations in its drafting process, in accordance with Article 32 of the Vienna Convention on the Law of Treaties.

This paper is structured as follows: Section I considers the legal effects of the relevant provisions of the Japanese peace treaty drafts made by the United States by analyzing internal movements of the United States, commentaries attached to such relevant provisions, and an agreement between the United States and Japan. By this, the author outlines the formation of the United States' legal effect of restoration of Japanese assets in neutral countries. Section II considers the construal of the legal effect in the relevant provisions drafted by the United Kingdom by drawing on the analyses of a general agreement among the British Commonwealth, a recommendation by the United Kingdom, and the terms of those provisions. It becomes clear that the United Kingdom adopted the legal effect of appropriation for reparations of Japanese property in neutral and ex-Axis states. Section III analyzes the dissension between the two different legal effects resulting from interchanging memoranda and direct negotiations; therefore, this section reveals that the relevant provision of the first joint Anglo-American draft did not rule out the legal effect advocated by either side. Section IV analyzes the compromise between the two powers through diplomatic negotiations resulted in adopting the legal effect of substitution of Japanese assets in neutral and ex-Axis countries for monetary reparations. Section V analyzes the finalization of the relevant provision up to the final peace treaty draft and the peace conference in San Francisco. This section elucidates that this finalization yielded no variations in the construal of Article 16 of the Treaty of Peace with Japan when the United States and United Kingdom adopted the legal effect of substitution. The concluding section considers the legal significance of this provision on the basis of its legal effect, and examines the question of whether Article 16 substantiates the *jus post bellum* principle for reparations.

Provisional Verbatim Minutes of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan (Tokyo: Ministry of Foreign Affairs, 1951), 96, 284).

1. THE FORMATION PROCESS OF THE UNITED STATES' LEGAL EFFECT OF RESTORATION OF JAPANESE PROPERTY IN NEUTRAL COUNTRIES

1.1. NEGATIVE ABSENCE FROM THE PURVIEW OF THE JAPANESE PEACE TREATY

Despite commencing the peace treaty drafting process in 1945 immediately after World War II, the United States did not intend to address the disposal of Japanese property in neutral countries, which was distrained by the Allies, in a peace treaty usually stipulating the juridical relations not between neutral countries and belligerents but among belligerent nations. The United States adopted an attitude that left that problem outside the sphere of the treaty until 1948. Indeed, drafts of the treaty with Japan drawn out by the United States from 1945 to 1948 laid down confirmation of a reparations agreement,¹⁴ or Japan's obligation to repair.¹⁵ However, these drafts never mentioned Japanese assets held within neutral countries. Explaining the omission, the working group indicated that the drafts did not cover such property because of the probability of neutrals not being party to the peace treaty.¹⁶ According to the above analysis, the author reads the United States' actions as passive regarding the absence of provisions in the peace treaty carrying legal effect on the issue of Japanese property remaining within neutral countries.

The United States evidenced its passivity on the issue of Japanese property in neutral countries through the interim reparations program during the initial phases of Japan's occupation. Edwin Pauley's December 7, 1945 statement recommended removing any external Japanese assets, including those in neutral countries.¹⁷ However, Pauley's report of December 18, 1945, declared under "Foreign

¹⁴ The October 25, 1945 draft, Chapter VII, Paragraph A ("Peace Treaty with Japan (October 25, 1945)"; in: *Records of the Office of Northeast Asian Affairs, Relating to the Treaty of Peace with Japan* [microfilm] – Subject File, 1945-51 (Lot File 56 D 527) (hereafter *Lot File 56 D 527*). Box no. 1, Folder no. 15, Reel no. 1 (hereafter only numbers are listed in this archive order, for example, 1-15-1 in this case) (Modern Japanese Political History Materials Room, Japanese National Diet Library); "Peace Treaty with Japan (October 25, 1945)"; in: *Lot File 56 D 527*, 4-8-4; the March 19, 1947 draft, Chapter VII, Paragraph A ("Peace Treaty with Japan (March 19, 1947)"; in: *Lot File 56 D 527*, 1-15-1; "Peace Treaty with Japan (March 19, 1947)"; in: *Records of the Office of the Historian. Japanese Peace and Security Treaties, 1946-1952* [microfilm] (Lot File 78 D 173) (hereafter *Lot File 78 D 173*). Box no. 3, Folder no. 7, Reel no. 10 (hereafter only numbers are listed in this archive order, for example, 3-7-10 in this case). (Modern Japanese Political History Materials Room, Japanese National Diet Library)).

¹⁵ The July 25, 1947 draft, Chapter VII, Article 1 ("Japan Treaty (July 25, 1947)"; in: *Lot File 56 D 527*, 1-15-1; the August 5 draft, Article 32 ("Draft Treaty of Peace for Japan (August 5, 1947)": 1 (Chapter VI); in: *Lot File 78 D 173*, 3-8-10; "Draft Treaty of Peace with Japan (August 5, 1947)"; in: *Lot File 56 D 527*, 5-13-5; the November 7 draft, Article 32 ("Draft Treaty of Peace for Japan (November 7, 1947)": 33; in: *Lot File 56 D 527*, 1-15-1; the January 8, 1948 draft, Article 33 ("Treaty Draft of 8 Jan 1948": 1 (Chapter VII); in: *Lot File 78 D 173*, 4-1-11; "Excerpts from Draft Peace Treaty with Japan Dated January 8, 1948 (Chapter VII Claims Arising Out of the War)": 1; in: *Lot File 56 D 527*, 4-2-4).

¹⁶ "Notes of Meeting on Thursday, July 3, 1947": 3; in: *Lot File 56 D 527*, 5-14-6.

¹⁷ "Mr. Edwin W. Pauley, Personal Representative of the President on Reparations, to President Truman": 1008-1009; in: United States Department of State, [1945] *Foreign Relations of the United States*, Vol. 6.

Exchange" that Japan had no assets of substance in neutral countries,¹⁸ but never stated such under the section "Deprive Japan of All External Assets."¹⁹

1.2. THE LEGAL EFFECT OF RESTORATION

From 1948, the United States initiated the conversion of its reparations policy, discontinuing the exaction of interim reparations in 1949. Furthermore, it drew up the drafts of the treaty with Japan, implying that Japanese property in neutral countries would not be used for reparations. This is to say that the drafts created no legal effects of obliging Japan to pay reparations from such property. The Overseas Consultants report of February 26, 1948, recommended against removing productive facilities in Japan in an effort to return the Japanese economy to a self-supporting status.²⁰ The Johnston report of May 19, 1948, agreed with the Supreme Commander for the Allied Powers that Japan's peaceful industrial recovery was necessary to bring about a self-supporting economy and the recovery program became a primary objective of the occupation.²¹ Consequently, the National Security Council suggested no reparations from Japanese assets in neutral areas by advocating the United States' proposal to the Far Eastern Commission (FEC) that reparations be limited to the condemnation and liquidation of Japanese external assets located within the Allied territories at the time of Japan's capitulation²² and adopted the policy to terminate interim reparations.²³ Accordingly, before the FEC, the United States stated its recommendation to rescind the directive on interim reparations and announced that it had no intention of exacting additional interim reparations.²⁴ Toward this, the September 7, 1949 draft provided that the reparations claims of the Allied Powers be satisfied out of the Japanese assets received from Japan during the occupation and liquidation among the Allies'

¹⁸ "Reparations from Japan, Immediate Program, Report to the President from Edwin W. Pauley (December 18, 1945)": 10-11; in: Edwin W. Pauley, *Report on Japanese Reparations to the President of the United States: November 1945 to April 1946* (Washington, D.C.: Division of Publications Office of Public Affairs, 1946).

¹⁹ See, *ibid.*: 4-5.

²⁰ Overseas Consultants, Inc., *Report on Industrial Reparations Survey of Japan to the United States of America February 1948* (New York: Overseas Consultants, 1948), 16, 223-224.

²¹ "Report by the 'Johnson (sic) Committee' to the Secretary of the Army (Royall) on the Economic Position and Prospects of Japan and Korea and Measures Required to Improve Them, Transmitted April 26, 1948. Released to the Press, May 19, 1948": 162; in: Raymond Dennett and Robert K. Turner, eds., *Documents on American Foreign Relations*, Vol. 10 (Boston: World Peace Foundation, 1950).

²² "Recommendations with respect to U.S. Policy toward Japan, September 24, 1948": 10; in: Paul Kesaris, ed., *Documents of the National Security Council* [microfilm], Vol. 1, A:I:0301 (Washington, D.C.: University Publications of America, 1980).

²³ "Recommendations with respect to U.S. Policy toward Japan, May 6, 1949": 6; in: Paul Kesaris, ed., *Documents of the National Security Council* [microfilm], Vol. 1, A:I:0326 (Washington, D.C.: University Publications of America, 1980).

²⁴ "Extract from a Statement by General McCoy on the United States Government's Decision to End the Interim Programme of Reparation Deliveries, Made before the Far Eastern Commission, 12 May 1949": 729; in: Margaret Carlyle, ed., *Documents on International Affairs 1947-1948* (London: Oxford University Press, 1952).

territories,²⁵ indicating that the Japanese property in neutral states would not be spent for reparations. Consequently, the September 7 draft did not have the legal effect of obliging Japan to make reparations out of its assets in neutral nations.

Creating several drafts with similar provisions for reparations as the above draft, the United States revealed in the descriptions attached to the drafts its pet theory with respect to the legal effect that Japanese assets located in neutral countries be restored to Japan. By this, the author claims that the construal, wherein the United States' drafts had the legal effect of returning such assets to Japan, was admitted. Commentary on the October 13 draft explicitly stated that the import of omitting the mention of Japanese assets in neutral countries from the article dealing with satisfying the Allies' reparations claims²⁶ was to leave ownership of such property with Japan.²⁷ This commentary enumerated rationales for objections against reparations from Japanese property in neutral areas as follows: (1) such reparations should be contrary to the United States' basic position that Japan can spare no more reparations; and (2) approaching Congress for providing economic assistance to Japan after implementing such reparations should be difficult.²⁸ The explanation for the clause²⁹ in the December 29 draft on opposing satisfying reparations from Japanese assets in neutral countries exhibiting identical import as the October 13 commentary was because, in lieu of (2) above, expectations were that Congress and the American people would strongly object to the transfer for reparations of assets that might otherwise be used to strengthen the Japanese economy and reduce future aid requirements.³⁰

The said United States' legal effect of restoration could be established by abandoning reparations while confiscating Japanese property in the Allies' territories. In other words, given the context of the preceding paragraph and the fact that the United States' drafts did not enumerate Japanese assets in neutral countries as an exception to the waiver, it can be considered that these items corroborated *argumentum e contrario* that the legal effect of those drafts abandoned reparations out of such assets and restored them to Japan. While approving the Allies' right to retain and dispose all Japanese property within their territories, the August 17, 1950 draft provided that the Allied Powers and Japan

²⁵ See, Article 30 and 34. "Untitled Document": 11, 14-15; in: *Lot File 56 D 527*, 6-2-6.

²⁶ Article 31. "Treaty of Peace with Japan (October 13, 1949)": 11; in: *Lot File 78 D 173*, 1-6-8. The November 2 draft had one clause from this article. "Treaty of Peace with Japan (November 2, 1949)": 14; in: *Lot File 56 D 527*, 6-11-6.

²⁷ "Commentary on Treaty of Peace with Japan (October 13, 1949)": 5; in: *Lot File 78 D 173*, 1-6-8. Dunn grasped this exclusion as exemption from reparations from these assets (Frederick S. Dunn, *Peace-Making and the Settlement with Japan* (Princeton: Princeton University Press, 1963), 84).

²⁸ "Commentary on Treaty of Peace with Japan (October 13, 1949)," *supra* note 27: 5.

²⁹ Article 26. "Draft Treaty of Peace with Japan (December 29, 1949)": 13; in: *Lot File 56 D 527*, 6-4-6. The August 3, 1950 draft stipulated roughly the same article as this. "Japan, Treaty, Draft, 3 Aug 1950"; in: *Lot File 78 D 173*, 3-5-10.

³⁰ "Draft Treaty of Peace with Japan (December 29, 1949), Commentary, Draft Treaty": 5; in: *Lot File 56 D 527*, 6-4-6.

reciprocally waived claims against each other.³¹ The September 11 draft followed the provision of mutual renunciation of reparations from the August 17 draft.³² The sixth point of the Seven-point Memorandum of September 11 stated that all parties would waive claims stemming from war except the seizure of Japanese property within Allied territories and restitution of Allied property by Japan.³³

1.3. TENTATIVE AGREEMENT BETWEEN THE UNITED STATES AND JAPAN

On the face of the Seven-point Memorandum, Japan could grasp, albeit uncertainly, the United States' legal effect and intention to return Japanese assets in neutral countries. Initially, Japan assumed that Japanese property within neutral countries would not be used for reparations but for discharging Japan's liabilities corresponding to the credits of the Allies and neutrals.³⁴ However, on knowing the contents of the Seven-point Memorandum before the acquisition and after examination, Japan commented on the sixth point, stating that Japanese assets in neutrals could be interpreted as temporarily restored to Japan.³⁵

The United States and Japan, whose internal views presupposed the legal effect of restoration in this vein, initialed the memorandum as toward the peace treaty, shaping an interim understanding. On January 26, 1951, although the United States delivered the Seven-point Memorandum³⁶ and the agenda to Japan, the sole hare come up in the agenda concerned Japanese gold.³⁷ The United States' provisional memorandum of February 3, handed to Japan on February 5,³⁸ amplified the sixth point of the Seven-point Memorandum,³⁹ and both countries

³¹ Chapter VII, Paragraphs 16 and 17. "Japan Treaty Draft by Mr. Dulles": 5-6; in: *Lot File 78 D 173*, 1-2-7.

³² "Draft of a Peace Treaty With Japan": 1300-1301; in: United States Department of State, [1950] *Foreign Relations of the United States* (hereafter [1950] *FRUS*), Vol. 6.

³³ "Unsigned Memorandum Prepared in the Department of State": 1297; in: [1950] *FRUS*, vol. 6. The Seven-point Memorandum was released on November 24. "Untitled Document"; in: *Lot File 78 D 173*, 3-3-10. Note that the Eight-point Memorandum expatiating more than this sixth point was handed to the United Kingdom on January 12, 1951 ("Memorandum of Conversation, by the Special Assistant to the Consultant (Allison)": 796-797; in: United States Department of State, [1951] *Foreign Relations of the United States* (hereafter [1951] *FRUS*), Vol. 6).

³⁴ "Tainichi heiwa jōyaku sōtei taikō [Conceivable outline of the Treaty of Peace with Japan]": 528; in: Ministry of Foreign Affairs of Japan, ed., *Documents on Japanese Foreign Policy: Treaty of Peace with Japan Preparatory Work* (hereafter *DJFP: Preparatory Work*) (Tokyo: Ministry of Foreign Affairs of Japan, 2006) (in Japanese).

³⁵ "Beikoku no tainichi kōwa nana gensoku ni tsuite [On the seven points proposal on Japanese Peace Treaty drafted by the United States]": 77; in: Ministry of Foreign Affairs of Japan, ed., *Documents on Japanese Foreign Policy: Treaty of Peace with Japan Negotiation with the United States* (hereafter *DJFP: Negotiation with the US*) (Tokyo: Ministry of Foreign Affairs of Japan, 2007) (in Japanese).

³⁶ "Statement of Principles Regarding a Japanese Peace Treaty": 120; in: Ministry of Foreign Affairs of Japan, ed., *Documents on Japanese Foreign Policy: Records Related to the Conclusion of Treaty of Peace with Japan* (hereafter *DJFP: Records*), Vol. 2 (Tokyo: Ministry of Foreign Affairs of Japan, 2002).

³⁷ "Undated Agenda Handed the Prime Minister of Japan (Yoshida)": 816; in: [1951] *FRUS*, Vol. 6.

³⁸ "Provisional Memorandum": 206; in: *DJFP: Records*, Vol. 2.

³⁹ "Memorandum Prepared by the Dulles Mission": 852; in: [1951] *FRUS*, Vol. 6.

designated their tentative agreement by initialing the provisional memorandum of February 8,⁴⁰ which was exactly the same as that of February 3, on February 9.⁴¹

2. THE FORMATION PROCESS OF THE UNITED KINGDOM'S LEGAL EFFECT OF APPROPRIATION FOR REPARATIONS OF JAPANESE PROPERTY IN NEUTRAL AND EX-AXIS COUNTRIES

2.1. GENERAL AGREEMENT AMONG THE BRITISH COMMONWEALTH

While the United States constructed its legal effect of restoration, the British Commonwealth of Nations, primarily motivated by the special claim of the United Kingdom, agreed on allotting Japanese assets in neutral countries for reparations. The existence of this agreement suggested the germ of the directionality toward including the legal effect of appropriation of such assets for reparations in the peace treaty. During the British Commonwealth conference in Canberra from August 26 to September 2, 1947, the majority of the delegates approved the harsh reparation claims that all Japanese external assets, whether official or private, be relinquished by Japan and considered in computing the total reparations.⁴² The Commonwealth Working Party, during their convention held from May 1 to 17, 1950, agreed that no further reparations would be taken from Japanese internal industrial assets,⁴³ while simultaneously reaching a general agreement that Japanese assets in neutral countries be made available to Allies as reparations.⁴⁴ The United Kingdom indicated that this state should be deemed to have a special claim on Japanese assets in Switzerland, since the bulk of such property included reserve funds remitted to the International Committee of the Red Cross (ICRC) by the United Kingdom with the perspective of being used for the relief of British prisoners of war,⁴⁵ suggesting that this claim motivated the United Kingdom to demand reparations from Japanese assets in neutrals.

⁴⁰ "Provisional Memorandum (February 8, 1951)": 3; in: *Lot File 78 D 173*, 3-1-10; "Provisional Memorandum": 255-256; in: *DJFP: Records*, Vol. 2.

⁴¹ *DJFP: Records*, Vol. 2, 97-98.

⁴² See, "The British Embassy to the Department of State": 534; in: United States Department of State, [1947] *Foreign Relations of the United States*, Vol. 6; "Kyanbera ei renpō shokoku kaigi ni tsuite [On the Canberra Conference of the British Commonwealth]": 307; in: *DJFP: Preparatory Work* (in Japanese).

⁴³ "Commonwealth Working Party on Japanese Peace Treaty, 1st May to 17th May, 1950 (C.M.J.(50)8, FJ1021/75)": 8, para. 35; in: *Commonwealth Working Party on Japanese Peace Treaty, 1st May to 17th May, 1950, Report, FO371/83830*, The United Kingdom National Archives.

⁴⁴ *Ibid.*: 8, para. 36; Frederick S. Dunn, *supra* note 27: 119. In accordance with this agreement, India called for the United States to clarify its position about the possibility of making available Japanese assets in neutral countries and Thailand for reparations ("Memorandum of Conversation, by the Director of the Office of Northeast Asian Affairs (Allison)": 1381, 1383; in: [1950] *FRUS*, Vol. 6; "India's Preliminary Views on U.S. Memorandum on Japanese Peace Treaty": 2; in: *Lot File 78 D 173*, 3-3-10).

⁴⁵ "Commonwealth Working Party on Japanese Peace Treaty, 1st May to 17th May, 1950," *supra* note 43: 8, para. 36.

Although embodying a feasible device for reparations out of Japanese property within not only neutral countries as presented by the above general agreement but also ex-Axis states, the United Kingdom did not fructify this device as a clause in the peace treaty. The catholic document of December 19, 1950, referencing peace with Japan, proclaimed that the only practical way of making Japanese assets in neutral and ex-enemy countries that were under the joint control of China, the Union of Soviet Socialist Republics, the United States, and the United Kingdom on behalf of FEC available for reparations would be asset liquidation and pool allotment amongst the four powers.⁴⁶ Toward this, the United Kingdom exhibited its prior claim for the release of its prisoners of war,⁴⁷ explaining that pursuit of agreement for division of Japanese assets in neutrals and ex-Axis countries among four powers could be the sole solution wherein the Soviet Union and China would be expected to participate.⁴⁸ However, the United Kingdom merely submitted the provision of the peace treaty that Japanese overseas assets should under no circumstance be returned to Japan.⁴⁹ Hence, considering these movements of the British Commonwealth and the United Kingdom, it is apparent that the United Kingdom considered the legal effect of appropriating Japanese property in neutral and ex-Axis countries for reparations but did not attempt to codify this legal effect.

2.2. CODIFYING THE LEGAL EFFECT OF APPROPRIATION FOR REPARATIONS

In the March 1, 1951 draft, the United Kingdom codified its legal effect that Japanese assets within neutral and ex-enemy countries apply to reparations, laying its special prior claim about its prisoners of war. In other words, the grammatical interpretation of the relevant provisions of this draft led to the legal effect of appropriation. The chapter entitled, "Japanese Assets in Neutral Countries," provided that (1) the Japanese government transfer all Japanese assets of whatever nature located in territories of neutral countries at the time of surrender to the governments of the four powers (Paragraph 74); (2) the Japanese government exempt the neutral governments from all liability for such assets (Paragraph 75); and (3) the governments of the four powers liquidate such assets and hold the proceeds available for reparations claims by the Allies (Paragraph

⁴⁶ *Japanese Peace Treaty: General (C.P.(50)323)*, The United Kingdom National Archives, 3.

⁴⁷ *Ibid.*: 5, 10.

⁴⁸ *Ibid.*: 10.

⁴⁹ *Ibid.*

76).⁵⁰ However, the British prerogative secured their portion by means of excluding Swiss francs held by Japan in all neutrals, to which certain Allies had prior claims for restitution, as representing reserves for the relief of prisoners of war from the assets for reparations (Paragraph 76(b)).⁵¹

In "Japanese Assets in Germany, Austria, Bulgaria, Hungary, Rumania (*sic*), Finland, Italy, and Siam," it was enacted that Japanese assets in ex-enemy countries be subject to delivery to the Allies, absolved from responsibility and appropriated for reparations in the same fashion as the assets in neutrals (Paragraphs 77–79).⁵²

3. DISSENSION BETWEEN TWO LEGAL EFFECTS

3.1. EXCHANGE OF VIEWS BETWEEN THE UNITED STATES AND UNITED KINGDOM

Interchanging memoranda revealed the antagonism between the United States' legal effect of restoration and United Kingdom's legal effect of appropriation, accompanying competition for their respective peculiar claims lain at the root. The United Kingdom's aide-mémoire, addressing the United States on March 12, 1951, asserted that Japanese assets in neutral and ex-enemy countries not be returned to Japan,⁵³ inferring the use of these assets as reparations. The United States' aide-mémoire, sent to the United Kingdom the following day, reserved its position on the question of Japanese property in ex-enemy states, clarifying its direction toward making no effort to recover Japanese assets in neutral countries for the Allies.⁵⁴ The United States specified their reasons for contradicting the United Kingdom's legal effect of appropriation, as follows: (1) the total amount of Japanese property in neutral countries was relatively small; (2) a question stemmed as to whether the efficiencies achieved would be worth the endeavor to allot such assets for reparations; (3) the United States had prior claims for occupation costs; and (4)

⁵⁰ "Japanese Peace Treaty": 19 (serial number 120); in: *Documents of the Far Eastern Department*, FO371/92532, The United Kingdom National Archives.

⁵¹ *Ibid.*

⁵² *Ibid.*: 20 (serial number 121).

⁵³ "Aide-Memoire [the United Kingdom]": 5; in: *Lot File 78 D 173*, 2-9-9; "The British Embassy to the Department of State": 912; in: [1951] *FRUS*, Vol. 6. On the course up to this aide-mémoire, see, "Memorandum by Mr. Johnston on the present position on the Japanese Peace Treaty (FJ1022/26)": 317, n. 7; in: Heather J. Yasamee and K. A. Hamilton, eds., *Documents on British Policy Overseas*, Series 2, Vol. 4 (London: HMSO, 1991).

⁵⁴ "Aide-Memoire [the United States]": 7; in: *Lot File 78 D 173*, 2-9-9; "The Department of State to the British Embassy": 924; in: [1951] *FRUS*, Vol. 6. Note that the drafts, composed by the United States, laid down satisfaction of reparation claims by confiscating Japanese assets in the Allied territories. On the March 9 draft, see, "Provisional Draft of a Japanese Peace Treaty (March 9, 1951)": 9-10; in: *Lot File 78 D 173*, 2-8-9. On the March 12 draft, see, "Provisional Draft of a Japanese Peace Treaty (March 12, 1951)": 8-9; in: *Lot File 78 D 173*, 2-8-9. On the March 16 draft, see, "Provisional Draft of a Japanese Peace Treaty (March 16, 1951)": 8-9; in: *Lot File 78 D 173*, 2-8-9.

problem of shares.⁵⁵ Consequently, under (3), the complications of the preference order were created in respect to the British special claim for prisoners of war. This friction through interchanging the memoranda furnished an analysis that there was a conflict between the two incompatible legal effects with regard to Japanese property within neutral and ex-Axis states.

The rivalry between the two legal effects could not be resolved through direct negotiation. During conversations on March 21 between the United States and United Kingdom, the United Kingdom underscored its claim for restitution of money accumulated in the Swiss Confederation to release its prisoners of war in Japan, while the United States, conversely, proposed that some sort of arrangement be made to return the reserves to the United Kingdom beyond the compass of the peace treaty,⁵⁶ cutting a juncture between the special claim and the legal effect of appropriation of the United Kingdom. On the other hand, replying to the United Kingdom's proposal that Japanese assets in neutral and ex-enemy countries where the United Kingdom and United States had sole control be surrendered for their disposal, the United States considered the possibility of accepting this suggestion.⁵⁷ However, in the report following the March 21 conversations, the United States maintained that one particular outstanding difference was that Japanese assets in neutral and ex-enemy countries should not be returned to Japan, and it affirmed that the United Kingdom's pretension to making them available for reparations was entirely unrealistic due to the unlikelihood that Japanese property under the joint control of the Allies, including the Soviet Union, would be released for general distribution and for the reasons listed in the March 13 aide-mémoire.⁵⁸ The result was that the United States' March 22 draft accompanied its identical article for reparations from the March 16 draft, including a supplementary note that suggested reparations would be made subject to current exchange of views.⁵⁹ Depending on the above negotiation and the context of the note attached to the March 22 draft, the author considers necessarily that the presentation of a legal effect about Japanese property in neutral and ex-Axis countries in the relevant provision of the peace treaty was reserved for future counsel.

⁵⁵ "Aide-Memoire [the United States]," *supra* note 54: 7; "The Department of State to the British Embassy," *supra* note 54: 924.

⁵⁶ "Memorandum of Conversation, by the Second Secretary of the Embassy in the United Kingdom (Marvin)": 937-938; in: [1951] *FRUS*, Vol. 6.

⁵⁷ *Ibid.*: 938.

⁵⁸ "The Deputy to the Consultant (Allison) to the Consultant to the Secretary (Dulles)": 963; in: [1951] *FRUS*, Vol. 6.

⁵⁹ "Provisional Draft of a Japanese Peace Treaty": 6; in: *Lot File 56 D 527*, 6-5-6; "Provisional Draft of a Japanese Peace Treaty": 6; in: *Lot File 56 D 527*, 6-11-6.

3.2. BRITISH DRAFT AND FIRST JOINT ANGLO-AMERICAN DRAFT

Article 28 of the April 7, 1951 draft, drawn by the United Kingdom, condensed the relevant provisions from the British March 1 draft, corroborating the continuation of the United Kingdom's adoption of the legal effect of appropriation. It was provided that: (1) Japan would transfer all assets of whatever nature that were located in the territories of neutrals and of Germany, Austria, Bulgaria, Hungary, Romania, Finland, Italy, and Thailand on September 2, 1945, to the representative Allies in those countries; (2) Japan should hold the governments of neutral and ex-Axis countries free of all liability for such assets; and (3) these assets should be at the disposal of the relevant Allied Powers, except Swiss francs held by Japan in all neutrals with regard to the relief of the Allied prisoners of war, to which specific Allies had prior restitution claims.⁶⁰

Thereupon, the United States, receiving this British draft on April 9, enforced its theoretical support for rebutting the legal effect of appropriation. The American comments of April 24 on the British draft, supplementing the previous grounds for refutation that the problem should stem toward agreement on division and cost-effectiveness, questioned whether the neutral countries could be expected to give effect to the peace treaty provision transferring Japanese assets in their territories to the Allies.⁶¹ Moreover, the document, claiming the elimination of the British provision that Japanese assets in ex-enemy countries be used as reparations, directed counterarguments to such a clause: (1) predictions were that Italy, which had joined the Allied Powers at the end game of the war, would object to the British provision that Italy could savor its right to retain and liquidate Japanese assets in its territory, as with the Allies; (2) the provision in question of the British draft of the Treaty of Peace with Japan ran counter to returning ex-Axis property in Germany to the former enemy states on the basis of peace treaties with other ex-enemy countries; and (3) the United States could not acquiesce to such a provision for delivering Japanese assets to the four powers, but to a hypothetical stipulation that the United Kingdom be justified to satisfy its special claim.⁶²

Informed by the United States of the British draft, Japan exhibited sympathy for the United States' legal effect by virtue of clarifying its intent to oppose Article 28 of this draft on account of the necessity to discharge liabilities during the hostilities. On the memorandum of April 17 on Article 28 of the British draft, Japan remarked that the provision should bring about harsh demands that were beyond

⁶⁰ "Provisional Draft of Japanese Peace Treaty (United Kingdom)": 24; reprinted in: *Memorandum by the Secretary of State for Foreign Affairs (C.P.(51)104)*, The United Kingdom National Archives.

⁶¹ "Comments on British Draft (April 24, 1951)": 6-7; in: *Lot File 56 D 527*, 6-10-6.

⁶² "Untitled Document [Mr. Hemmendinger to Mr. Allison]": 3; in: *Lot File 56 D 527*, 6-10-6.

precedent.⁶³ Japan's observations were delivered to the United States on April 20 and commented that Article 28 was one of the most objectionable provisions because it was totally unnecessary in practice, injured the Japanese national sentiment, and yielded a situation contrary to the very objective of the article.⁶⁴ During the April 21 talks with the United States, Japan submitted that Article 28 was the most obnoxious provision, although Japan could acquiesce in exacting Japanese assets in ex-enemy countries, since transfers of Japanese property in neutral countries could not be justified, pleading the need to pay war debts for Switzerland and Sweden.⁶⁵

Due to a series of conflicts between the two legal effects, the first collaborative draft of the United States and United Kingdom did not contain a provision for Japanese assets within neutral and ex-Axis states, along the lines of the United States' legal effect of restoration, simultaneously leaving a margin of adopting the United Kingdom's legal effect of appropriation. The May 3 joint draft prepared during the Anglo-American working discussions from April 25 to May 4⁶⁶ annexed the supplementary note that the United Kingdom reserved Article 28 of its April 7 draft for the stipulation that, while recognizing the lack of Japan's capacity to make adequate reparation, the Allies should have the right to seize, retain, and liquidate all Japanese property subject to their jurisdiction.⁶⁷ Thus at this stage, the legal effect's interpretation of the provision for reparations could have two distinct meanings and was still indeterminate.

⁶³ "Eikoku no tainichi heiwa jōyaku an [British provisional draft of the Treaty of Peace with Japan]": 620; in: *DJFP: Records*, Vol. 2 (in Japanese). Shigeru Yoshida, Prime Minister of Japan, put down his sentiments that the article took parsimonious measures and left persistent enmity. See, *DJFP: Records*, Vol. 2, 449 (in Japanese).

⁶⁴ "Observations on the British Draft Peace Treaty for Japan": 625; in: *DJFP: Records*, Vol. 2; "Editorial Note": 1003; in: [1951] *FRUS*, Vol. 6.

⁶⁵ "Eikokuan ni taishi kōtō chinjyutsu shitara waga kenkai wo osameta 4 gatsu 21 nichi no Nishimura jōyakukyokuchō Fearey kaidan kiroku [Record of conversations between Nishimura, Director of the Bureau of Treaties, and Fearey on April 21, which documented Japan's observations, stated verbally, of the British draft]": 633; in: *DJFP: Records*, Vol. 2 (in Japanese); "Japanese Comments on Individual Articles of British Draft Given Orally by Nishimura, Ando and Technical Assistants": 4; in: *Lot File 56 D 527*, 6-6-6.

⁶⁶ "Editorial Note": 1021-1022; in: [1951] *FRUS*, Vol. 6; "Sir O. Franks (Washington) to Mr. Morrison (Received 4 April, 6.06 a.m.) (No. 987 Telegraphic [F10345/14])": 396, n. 4; in: Heather J. Yasamee and K. A. Hamilton, eds., *supra* note 53. Note that these diplomatic correspondences documented that the May 3 draft left the policy difference in disposition of Japanese assets in neutral and ex-enemy countries undecided.

⁶⁷ "Draft Japanese Peace Treaty (May 3, 1951)": 9-10; in: *Lot File 56 D 527*, 4-6-4; "Draft Japanese Peace Treaty (May 3, 1951)": 9-10; in: *Lot File 78 D 173*, 2-2-9; "Joint United States-United Kingdom Draft Peace Treaty": 1031-1032; in: [1951] *FRUS*, Vol. 6.

4. ARRIVAL AT THE LEGAL EFFECT OF SUBSTITUTION OF JAPANESE ASSETS IN NEUTRAL AND EX-AXIS COUNTRIES FOR MONETARY REPARATIONS

4.1. THE UNITED KINGDOM'S ACCEPTANCE OF THE LEGAL EFFECT OF RESTORATION AND ADOPTION OF THE LEGAL EFFECT OF PECUNIARY COMPENSATION

In view of the United States' outright refusal of the legal effect of appropriation, the United Kingdom appeased the United States by concurring with the legal effect of restoration. However, as terms to the compromise, the United Kingdom developed its novel legal effect that Japan be required to disburse equivalent money for Japanese assets in neutral countries. The British memorandum of May 23, 1951, provided that the central rebuttal of the United States rested on the administrative difficulty of obtaining and liquidating Japanese assets in neutrals that were frozen by the Allied Powers, including China and the Soviet Union.⁶⁸ Consequently, the United Kingdom was prepared to agree that Japanese assets in neutral countries would be left to Japan by the peace treaty, provided Japan defray to the Allies the value of such assets; hence, the United Kingdom considered that its peculiar claim for restitution of reserve funds for its prisoners of war could be preferentially satisfied and that pecuniary compensation could simultaneously resolve the impenetrable problem of unfreezing Japanese property in neutral countries.⁶⁹

Accordingly, the United Kingdom's legal effects, which were advanced in the May 23 memorandum, resulted in two obligations: (1) the Allied Powers should restore Japanese assets in neutrals to Japan (the legal effect of restoration), and (2) Japan should pay the amount equal to the valuation on such assets (the legal effect of pecuniary compensation).

4.2. INVOCATION OF THE LEGAL EFFECT OF SUBSTITUTION BY THE UNITED STATES

Although the United Kingdom conceded to the legal effect of restoration, the United States, granting compensation for prisoners of war, devised the legal effect to elude Japan's money expenditures, such that Japanese assets in neutral and ex-enemy countries substitute pecuniary reparations, compensating the captive by means of delivering those assets to ICRC, entrusted with their liquidation and

⁶⁸ *Japanese Peace Treaty: Memorandum by the Secretary of State for Foreign Affairs (C.P.(51)137)*, The United Kingdom National Archives: 18.

⁶⁹ *Ibid.*: 2-3, 18.

distribution. By this, the United States reached a compromise with the United Kingdom, avoiding the predicament of shares and considering the United Kingdom's special claim. During the June 13, 1951 talks, the United States advanced an eclectic proposition that Japanese assets in neutral and ex-enemy countries be turned over to ICRC for distribution for the benefit of prisoners of war, and the United Kingdom showed a favorable posture that the acceptance of the proposal would be subject to the approval of the British Cabinet, but the two powers reserved their position on the question of whether Japanese assets in Thailand should be included in the assets transferred to the ICRC.⁷⁰ Consequently, the United States and United Kingdom inserted the new Article 16 into the revised joint draft of June 14, stipulating that Japan would transfer its assets in neutral and ex-enemy countries to the ICRC as an expression of its desire to indemnify prisoners of war.⁷¹ Therefore, following the context of the June 13 talks and the grammatical interpretation of Article 16 of the revised Anglo-American draft, the author conducts a consideration that this provision had the legal effect of substitution of Japanese property in neutral and ex-Axis states for monetary reparations.

Furthermore, the United States endeavored to persuade Japan,⁷² stressing that the import of the legal effect of substitution was the eschewal of Japan's money disbursement. It succeeded in the acquisition of Japan's virtual consent. During the June 25 talks with Japan, the United States illustrated the strong feelings from the United Kingdom and Australia that prisoners of war receive compensation, so that the United States advised Japan to make reparations, proposing a lenient solution that additional expenditures by Japan would not be required and contriving that Japanese assets in neutral and ex-enemy countries, which were difficult to return to Japan because of distraint by the Soviet Union as a co-trustee, be turned over to ICRC for the Allied prisoners of war.⁷³ In response, Japan officially announced their opposition to this solution, stating that its protest

⁷⁰ "Editorial Note": 1118-1119; in: [1951] *FRUS*, Vol. 6; "Summary Record of A Meeting Held on 13th June at 4 p.m. at the House of Commons (FJ1022/561)": 29, 31; in: *Japanese Peace Treaty. Summary Records of Meetings, FO371/92557*, The United Kingdom National Archives.

⁷¹ "Draft Japanese Peace Treaty (14th June, 1951)": 13; in: *Lot File 56 D 527*, 6-7-6; "Revised United States-United Kingdom Draft of a Japanese Peace Treaty": 1128; in: [1951] *FRUS*, Vol. 6. Article 16 was supplemented by an attached note stating that the status of Japanese assets in Thailand was subject to further consideration.

⁷² Japan assumed, based on the conflict between the United States and United Kingdom over assets in neutrals, that the question of these assets would be adjusted by negotiations between Japan and the relevant countries outside the peace treaty. On this point, see, "Dai 3 ji kōshō ni sonae sōri ni setsumei no tame jimutōkyoku no sakusei shita memo [Memorandum prepared by the administrative authorities for explaining to the prime minister as the provision against the third round of negotiation with the United States]": 346; in: *DJFP: Records*, Vol. 3 (in Japanese).

⁷³ "Memorandum of Conversation, by the Third Secretary of the Mission in Japan (Finn) [June 25, 1951]": 1143; in: [1951] *FRUS*, Vol. 6; "1951 nen 6 gatsu 25 nich gogo no Allison kaidan roku [Record of the talks with Allison on the afternoon of June 25, 1951]": 348; in: *DJFP: Records*, Vol. 3 (in Japanese).

was merely a superficial plea against the Japanese Diet.⁷⁴ This utterance suggested that Japan virtually consented to the legal effect of substitution.

5. FINALIZATION OF THE LEGAL EFFECT OF SUBSTITUTION

5.1. LIMITATION OF TARGETED ASSETS

Considering that Article 16 of the June 14, 1951 revised Anglo-American draft did not define the kinds of Japanese assets as objects of surrender to the ICRC, Japan submitted to the United States a request for several restrictions. Consequently, a rule for exceptions with respect to sorts of property was inserted in Article 16 with the legal effect of substitution remaining intact. After receiving Article 16 of the June 14 revised joint draft on June 28,⁷⁵ Japan requested, during the July 2 conversations with the United States, that (1) the transfer of Japanese assets be effected only after liquidation of all claims against such assets; (2) such assets be limited to public assets; and (3) the exceptions stipulated under Article 14, Paragraph (a)2,⁷⁶ enumerating the property of Japanese nationals residing with the permission of the government concerned ((I)(i)), property owned by the government of Japan and used for diplomatic or consular purposes ((I)(ii)), and so forth, be applied under Article 16,⁷⁷ grabbing the opportunity for the United States' consideration.⁷⁸ However, Article 16 of the July 3 draft solely provided that a portion of (3), i.e. the exclusion of assets listed under Article 14, Paragraph (a)2, except property of Japanese nationals living with the permission of the relevant governments (Article 14(a)2(I)(i)), was newly set in.⁷⁹ This rule for exceptions did

⁷⁴ "1951 nen 6 gatsu 28 nichi gogo no sōri Allison kōshi kaidan roku [Record of the talks between Prime Minister and Ambassador Allison on the afternoon of June 28, 1951]": 352; in: *DJFP: Records*, Vol. 3 (in Japanese); "The United States Political Adviser to SCAP (Sebald) to the Secretary of State [June 28, 1951]": 1162; in: [1951] *FRUS*, Vol. 6.

⁷⁵ "Memorandum of Conversation, by the Third Secretary of the Mission in Japan (Finn) [June 28, 1951]": 1154; in: [1951] *FRUS*, Vol. 6; "1951 nen 6 gatsu 28 nichi Allison kōshi yori juryō shita heiwa jōyaku shin anbum [New draft of the peace treaty received from Ambassador Allison on June 28, 1951]": 365; in: *DJFP: Records*, Vol. 3.

⁷⁶ "Revised United States-United Kingdom Draft of a Japanese Peace Treaty," *supra* note 71: 1126.

⁷⁷ "Observations": 373; in: *DJFP: Records*, vol. 3; "For Dulles from Allison": 2; in: *Lot File 78 D 173*, 2-8-9; "The United States Political Adviser to SCAP (Sebald) to the Secretary of State [July 2, 1951]": 1172; in: [1951] *FRUS*, Vol. 6.

⁷⁸ "1951 nen 7 gatsu 2 nichi gogo no Allison kaidan roku [Record of the talks with Allison on the afternoon of July 2, 1951]": 355; in: *DJFP: Records*, Vol. 3; "The United States Political Adviser to SCAP (Sebald) to the Secretary of State [July 2, 1951]," *supra* note 77: 1172, n. 4.

⁷⁹ "The Secretary of State to Certain Diplomatic Offices": 1174-1175; in: [1951] *FRUS*, Vol. 6; "Draft Japanese Peace Treaty": 586; in: *DJFP: Records*, Vol. 3. Article 16 of the July 3 draft provided that: "As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a)2(I)(ii) through (v) of the present Treaty shall be excepted from transfer. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions".

not vary the legal effect of substitution despite limiting the kinds of Japanese property subject to this effect.

The United States pushed the return of the proceeds from the sale of Japan's stocks of the Bank for International Settlements (BIS) within neutral countries to Japan; consequently, such turnover was excluded from the legal effect of substitution. In the June 25 talks with Japan, the United States enunciated objections against the United Kingdom's contention that Japan renounce its rights, including shares of BIS, agreeing that Japan could sell its stocks and vest with the proceeds from the sale.⁸⁰ In the June 28 talks with Japan, the United States confirmed that proceeds from the sale of Japan's shares in BIS should revert to Japan and not be treated as Japanese assets in neutral countries.⁸¹ Consequently, an expression excepting Japan's shares in BIS from transfer was constituted anew⁸² to prevent any interpretation that such shares would also be transferred to ICRC as a result of Article 8(c), providing that Japan renounce all rights acquired under the Statute of BIS.⁸³ Hence, the grammatical interpretation of Article 16 clarified that the legal effect of substitution did not range over Japan's stocks of BIS, whilst this effect was properly analyzed to be retained.

Japan asked for the clarification that Japan not be required to restore losses of damaged or consumed assets in neutral and ex-enemy countries but only be required to relinquish its existing assets in their status quo or their equivalent to ICRC. Subsequently, the legal effect of Article 16 was limited to substituting Japan's existing assets for monetary reparations. In the July 12 opinion note addressed to the United States, Japan insisted that the words "or the equivalent of such assets" inserted in Article 16 in the July 3 draft did not mean that Japan deliver complements to damaged or consumed assets, but that Japan might transfer, in lieu of Japanese assets that existed, the equivalent of those assets if Japan so desired.⁸⁴ At Japan's insistence, the draft, which had been sent to the Allies on July 20, changed the foregoing words of the July 3 draft to "or at its option, the equivalent of such assets,"⁸⁵ implying a limitation to the transfer of existing assets

⁸⁰ "Memorandum of Conversation, by the Third Secretary of the Mission in Japan (Finn) [June 25]": 1144; in: [1951] *FRUS*, Vol. 6.

⁸¹ "Memorandum of Conversation, by the Third Secretary of the Mission in Japan (Finn) [June 28]": 1153; in: [1951] *FRUS*, Vol. 6.

⁸² "The Secretary of State to Certain Diplomatic Offices," *supra* note 79: 1174-1175; "Draft Japanese Peace Treaty," *supra* note 79: 586.

⁸³ "Explanatory Study of Draft Japanese Peace Treaty": 37-38; in: *Lot File 78 D 173*, 1-6-8; "Nihon koku to no heiwa jōyaku sōan no kaisetsu [Explanatory Study of Draft Japanese Peace Treaty]": 691-692; in: *DJFP: Negotiation with the US* (in Japanese).

⁸⁴ "Observations on the Draft of the Peace Treaty": 609; in: *DJFP: Records*, Vol. 3; "Untitled Document [From Tokyo to Secretary of State]": 2; in: *Lot File 78 D 173*, 2-8-9; "The United States Political Adviser to SCAP (Sebald) to the Secretary of State [July 15, 1951]": 1196; in: [1951] *FRUS*, Vol. 6.

⁸⁵ "Draft Treaty of Peace with Japan (July 20, 1951)": 9-10; in: *Lot File 56 D 527*, 4-19-4; "Draft Treaty of Peace with Japan (July 20, 1951)": 9-10; in: *Lot File 56 D 527*, 6-8-6; "The Secretary of State to Certain Diplomatic Offices [the July 20 draft]": 1199-1200; in: [1951] *FRUS*, Vol. 6.

as their status quo or of the equivalent of such assets, at Japan's option.⁸⁶ Then, the United States represented in its July 24 memorandum addressed to Canada that "equivalent" meant the reasonable market value of existent assets in the status quo,⁸⁷ showing that the terminology did not signify the original value of damaged assets in the status quo ante. Based on the analysis of the above diplomatic negotiations, it is considered that Article 16 provided for the legal effect of substituting existing Japanese assets for monetary reparations.

Furthermore, Japan called for the United States to provide for saving the property of Japanese nationals who resided with the permission of the governments of neutrals and that had not been inserted into the July 3 and 20 drafts, despite Japan's request during the July 2 talks. However, the draft of the treaty eventually resulted in mere partial preclusion of such assets from the legal effect of substitution. On July 27, Japan presented its consideration for the construction of Article 16 that the property of Japanese nationals residing in neutral countries corresponding to those mentioned in Article 14(a)2(I)(i) be excepted from transfer⁸⁸ and eliciting the same sentiment toward those assets from the United States.⁸⁹ However, the United States had already professed in the July 24 memorandum to Canada that the assets of Japanese nationals who resided in neutral or ex-enemy countries during the war would be subject to liquidation.⁹⁰ Therefore, Article 16 of the final August 16 draft added an exclusion of the assets of Japanese people who did not reside in Japan when the treaty was implemented; Japan's aforementioned interpretation was strongly restrained.⁹¹ In other words, the grammatical interpretation of Article 16 of the final draft showed that the retentive legal effect of substitution did not run to those assets of Japanese people.

5.2. CONFINING OBJECT COUNTRIES

The United States schemed to persuade the United Kingdom into assenting to the United States' desire to leave Thailand the title of Japanese assets within Thai territory, on which the two powers reserved their positions from the Anglo-American dialogue of June 13, 1951. In the July 18 memorandum, considering the

⁸⁶ The fact that payment of equivalences was stipulated in the clause did not imply the adoption of pecuniary reparations on first sight, for Japan had the absolute option with regard to transferring the equivalent of existing assets. Hence, whether the legal effect of substitution transfigured was not discernible.

⁸⁷ "Reply to Memorandum of Canadian Government on Claims Clauses of Peace Treaty": 2; in: *Lot File 56 D 527*, 6-9-6.

⁸⁸ "Interpretation (2)": 746; in: *DJFP: Records*, vol. 3.

⁸⁹ "1951 nen 7 gatsu 27 nichi no Fujisaki Finn shokikan kaidan yōroku [Summary record of the talks between Fujisaki and Secretary Finn on July 27, 1951]": 748; in: *DJFP: Records*, vol. 3.

⁹⁰ "Reply to Memorandum of Canadian Government on Claims Clauses of Peace Treaty," *supra* note 87: 2.

⁹¹ "Treaty of Peace with Japan": 767-768; in: *DJFP: Records*, Vol. 3.

British assertion that assets in Thailand be used for the United Kingdom's benefit with any remainder transferred to ICRC under Article 16, the United States, for the strategic importance of resisting communism in Southeast Asia, propounded its proposal that the assets solely controlled by Thailand be released to the country and then request Thailand contribute to ICRC.⁹²

However, the United States and United Kingdom could not come to an accord on Japanese assets in Thailand before the conclusion of the Treaty of Peace with Japan. Hence, the problem of such assets was left irrelevant to the legal effect of substitution. The United States' August 10 memorandum addressed to Thailand unveiled that the United States and United Kingdom sympathized with making special provisions that Japanese assets in Thailand would be handled and disposed of separately from all other external Japanese property, while adjudging a substantial portion of those assets to Thailand.⁹³ Conversely, the August 30 memorandum by the United States concluded that (1) it was impossible to reach an Anglo-American understanding at that time on the partition of assets in Thailand and (2) an agreement might be easier after the peace conference in San Francisco and after an array of neutrals indicated their reaction to Article 16.⁹⁴ Consequently, the United States suggested pigeonholing the problem until settlement could be reached outside the peace treaty. Thus, Thailand did not fall within the countries targeted by Article 16, so that the problem of Japanese property in Thailand had no impact on the legal effect of this provision.

5.3. CONFIRMATION OF JAPAN'S FREE WILL

ICRC sought to confirm that Japan was under obligation to the legal effect of substitution on its own free will. The epistle from the president of ICRC, enclosed in the letter from the president of the Japanese Red Cross Society and read by the Japanese government on August 10, 1951, requested the government to render confirmation in writing, reassuring ICRC that the obligations undertaken by Japan under Article 16 were indeed based on freely-arrived approval.⁹⁵

After signing the treaty, Japan recognized that it had accepted the legal effect of substitution on its own accord. In the August 10 draft of courses of action, Japan deliberated, given its domestic policy, whether it was advisable to issue an

⁹² "The Secretary of State to the Embassy in the United Kingdom": 1201-1202; in: [1951] *FRUS*, Vol. 6.

⁹³ "Memorandum by the Deputy Director of the Office of Philippine and Southeast Asian Affairs (Gibson) to the Assistant Secretary of State for Far Eastern Affairs (Rusk)": 1254; in: [1951] *FRUS*, Vol. 6.

⁹⁴ "Memorandum by the Officer in Charge of Thai and Malayan Affairs (Landon) to the Assistant Secretary of State for Far Eastern Affairs (Rusk)": 1310; in: [1951] *FRUS*, Vol. 6. Notice that no final settlement was reached during 1951. *Ibid.*: 1311, n.1.

⁹⁵ "1951 nen 8 gatsu 10 nichi Shimazu nihon sekijūji-sha shachō no gaimu daijin ate shokan [August 10, 1951 letter addressed to Minister of Foreign Affairs from Shimazu, President of Japanese Red Cross Society]": 712-713; in: *DJFP: Records*, Vol. 3.

immediate proclamation with respect to freewill acceptance.⁹⁶ The August 13 response to the president of the Japanese Red Cross Society promised that Japan would reply to ICRC another time following the signature of the treaty.⁹⁷ In the August 18 letter to the counselor of ICRC, Japan represented that its government was prepared to give a statement about its acceptance of the obligation on voluntary basis to ICRC after the signing.⁹⁸ After signing the treaty, Japan would inform ICRC that the Japanese government had accepted the obligations under Article 16 on its own free will in a letter to the president of ICRC, which was not delivered.⁹⁹ The above context regarding Japan's free will yielded no transfiguration of the legal effect of substitution.

5.4. THE PURVIEW OF THE BENEFICIARIES

The Netherlands acquiesced in Article 16 despite its complaint that interned civilians were not covered as beneficiaries under the article, merely desiring to negotiate with Japan outside the peace treaty. Therefore, Dutch contentions never affected the legal effect of Article 16. During the September 3, 1951 conversations with the United States, the Netherlands indicated that limiting the beneficial owners under Article 16 to prisoners of war caused difficulty with discrimination against interned civilians and elicited a commitment to devise some adjustments for such civilians from the United States.¹⁰⁰ During the September 6 plenary of the San Francisco peace conference, the Netherlands' delegate stated that civil internees should have the moral rights to be treated on, at least, equal footing with prisoners of war and that the Netherlands hoped Japan would be willing to meet its moral obligation over future conversations between the two countries.¹⁰¹

Norway claimed that its interned crew should be treated as beneficiaries, finding potential for stretching the legal effect of substitution of Article 16 to include sailors. During the September 6 plenary of the conference, Norway's Delegate stated that Norwegian merchant seamen interned in Japan suffered hardships and deprivations similar to prisoners of war and should be entitled to the same

⁹⁶ "8 gatsu 10 nichi jōyaku kyoku sakusei no taisho hōshin an [August 10 draft of courses of action drawn out by the Bureau of Treaties of the Ministry of Foreign Affairs of Japan]": 715; in: *DJFP: Records*, Vol. 3 (in Japanese).

⁹⁷ "8 gatsu 13 nichi gaimu jimujikan no Shimazu nihon sekijūji-sha shachō ate kaitō [August 13 response from Administrative Vice-minister for Foreign Affairs to Shimazu, President of Japanese Red Cross Society]": 716; in: *DJFP: Records*, Vol. 3 (in Japanese).

⁹⁸ "8 gatsu 18 nichi gaimu jikan no Wolf hakase ate shokan [August 18 letter of Vice-minister for Foreign Affairs addressed to Dr. Wolf]": 716-717; in: *DJFP: Records*, Vol. 3.

⁹⁹ "Tokyo kara jisan shi sono mama Tokyo ni mochikaetta jōyaku dai 16 jō ni kansuru sekijūji kokusai iinkai iinchō ate shokan an [Draft of the letter for President of the International Committee of the Red Cross with regard to Article 16, which was brought from Tokyo and arrived back at Tokyo without delivering]": 366; in: *DJFP: Records*, Vol. 4.

¹⁰⁰ "Memorandum of Conversation, by the Deputy Director of the Office of British Commonwealth and Northern European Affairs (Satterthwaite)": 1324-1325; in: [1951] *FRUS*, Vol. 6.

¹⁰¹ *Records of Proceedings*, *supra* note 13: 197-198; Ministry of Foreign Affairs, *supra* note 13: 220-221.

indemnification as the captive soldiers.¹⁰² In response to this, Japan proposed during the September 9 talks with Norway that the Japanese government was prepared to negotiate with the Allied Powers over stretching the objects of compensation under Article 16 to cover Norwegian seamen.¹⁰³

5.5. ADOPTION OF ARTICLE 16 OF THE TREATY OF PEACE WITH JAPAN

As a result of the finalization up to the preceding section, Article 16 of the Treaty of Peace with Japan was adopted without any alteration to the legal effect of substitution. This article states:

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a)2(II)(ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.¹⁰⁴

CONCLUSION

This article has considered the interpretation of Article 16 of the Treaty of Peace with Japan with regard to its legal effect by means of analyzing *travaux préparatoires* for drafting this treaty in conformity with Article 32 of the Vienna Convention on the Law of Treaties. This study confirms that Article 16 should be interpreted to provide for the legal effect of substitution, thereby overcoming the antagonism between the United States' legal effect of restoration and the United Kingdom's legal effect of appropriation.

¹⁰² *Records of Proceedings*, *supra* note 13: 141-142; Ministry of Foreign Affairs, *supra* note 13: 147.

¹⁰³ "Norway taishi to jōyaku kyokuchō kaidan no ken [On the talks between the Norwegian Ambassador and Director of the Bureau of Treaties of the Ministry of Foreign Affairs]":362-363; in: *DJFP: Records*, Vol. 4 (in Japanese).

¹⁰⁴ "Treaty of Peace with Japan"; in: *Lot File 56 D 527*, 4-3-4; "Treaty of Peace with Japan"; in: *Lot File 78 D 173*, 4-14-11; "Treaty of Peace with Japan": 623-624; in: *DJFP: Records*, Vol. 5.

The legal effect of substitution was achieved by virtue of monetary payments as the equivalent of Japanese assets in neutral and ex-enemy countries at the option of Japan. Although Japan intended to substitute its deposited balances in the Bank of Switzerland for pecuniary reparations as indemnification to Allied prisoners of war, the Swiss government declined to take the necessary steps for Japan to withdraw savings from the bank to substitute as reparations under Article 16 because the Swiss Confederation had represented Japanese interests during the war and made advances on their behalf; therefore, they believed they had a prior claim for reimbursement.¹⁰⁵ Accordingly, a conference between the United Kingdom and Japan confirmed that its obligation to the Allies under Article 16 became entirely fulfilled by means of depositing £4,500,000 to ICRC in May 1955.¹⁰⁶ However, Japan's disbursement of this money only meant that Japan opted to separate substituting its assets in neutral and ex-enemy countries for pecuniary reparations and paying the equivalent of those assets, so that the analysis adopted by Article 16 under the legal effect of substitution could not be reversed in hindsight.

As previously mentioned in the Introduction, the author considers the legal significance of Article 16 on the basis of its legal effect. The legal significance of this provision premised on the legal effect of substitution can be deemed a qualitative alleviation of war reparations. Indeed, the bulk of Japanese property in neutral and ex-Axis countries was bank balances;¹⁰⁷ hence, transferring those assets made little difference on the surface relative to pecuniary reparations equal to the deposits. However, given that these savings were distrained and not fluid, conveyance of Japan's bank credits in place of ready cash could be considered not quantitative diminution but qualitative alleviation of reparations for Japan when compared with reparations from hard money with extreme fluidity.¹⁰⁸

In conclusion the article addresses the question of whether Article 16 offers substantiation of the *jus post bellum* principle for reparations based on the legal significance of this provision. The principle for reparations stresses the directionality toward alleviating war reparations, so that qualitative alleviation of reparations as the legal significance of Article 16 should be deemed subsumed into this principle.

¹⁰⁵ Shigeru Yoshida, *The Yoshida Memoirs: The Story of Japan in Crisis*, trans. Kenichi Yoshida (Westport: Greenwood Press, 1973), 119.

¹⁰⁶ Shigeru Yoshida, *Kaisō Jūnen [Ten Years Memoirs]*, Vol. 3 (Tokyo: Chuokoron-sha, INC, 1998), 208-209 (in Japanese).

¹⁰⁷ See, "Japanese Assets in the Neutral Countries": 1-3; in: *Lot File 56 D 527*, 6-10-6; "Japanese Assets in Switzerland": 1-2; in: *Lot File 56 D 527*, 6-10-6; "Japanese Assets in Ex-Enemy Countries": 1; in: *Lot File 56 D 527*, 6-10-6; "Japanese Assets in Germany": 1; in: *Lot File 56 D 527*, 6-10-6; "Zai gai zaisan chōsa shiryō [Observations of survey on the Japanese external assets]": 858-859; in: *DJFP: Records*, Vol. 3 (in Japanese).

¹⁰⁸ The United States stated that it was difficult to see why Japan would consider it to be in its interest to immediately pay good hard money rather than simply transfer its sealed property to ICRC ("Memorandum (October 12, 1951)": 1; in: *Lot File 56 D 527*, 5-12-5).

Accordingly, as the embodiment of qualitative alleviation of reparations, Article 16 of the Treaty of Peace with Japan offers substantiation inducing specification of the *jus post bellum* principle for reparations.

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