

# Liberal Japanese Peace Treaty

Stanley D. Metzger

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Stanley D. Metzger, *Liberal Japanese Peace Treaty*, 37 Cornell L. Rev. 382 (1952)  
Available at: <http://scholarship.law.cornell.edu/clr/vol37/iss3/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## THE LIBERAL JAPANESE PEACE TREATY

*Stanley D. Metzger\**

The Treaty of Peace with Japan signed at San Francisco on September 8, 1951 by forty-nine countries<sup>1</sup> has rightly been termed a "treaty of reconciliation."<sup>2</sup> In view of Japan's aggression,<sup>3</sup> the death and destruction of lives and property caused by her armed forces in the course of that aggression,<sup>4</sup> and the consequent feelings of the victims of aggression and others towards Japan,<sup>5</sup> the provisions of the treaty reflect the magnanimity of the signatories.

It would be a mistake, however, to assume that the provisions reflect nothing else. That the Treaty terms were drafted in the light of six years of benevolent occupation, as well as the emergence of a new power in the Far East willing to engage in aggression to further its ends,<sup>6</sup> is obvious. What is perhaps not so obvious is that the Treaty, albeit relatively short and uncomplicated as treaties go, contains solid provisions disposing of territorial, commercial, and economic problems (including claims, property, reparations, commercial practices), in a manner which, while consistent with the spirit of the Treaty, in many respects are less advantageous to Japan than similar dispensations have been toward other defeated enemies in World War II.

A comparison of the Japanese Peace Treaty with the Treaty of Peace with Italy of 1947,<sup>7</sup> which does not appear to enjoy a reputation for being a peace of reconciliation,<sup>8</sup> will, it is hoped, not only make clear

---

\* See Contributors' Section, Masthead, p. 439, for biographical data. The views expressed herein are those of the writer and do not necessarily reflect those of the Department of State.

<sup>1</sup> Conference for the Conclusion and Signature of the Treaty of Peace with Japan, San Francisco, California, September 4-8, 1951, *Record of Proceedings*, U. S. Dep't of State Pub. No. 4392, International Organization and Conference Series II, Far Eastern No. 3 (December 1951) pp. 391-404. Reference to this publication hereafter will be made to *Record of Proceedings*. The English text of the Treaty appears at pp. 313-326 of this Record.

<sup>2</sup> J. F. Dulles, *Security in the Pacific*, 30 Foreign Affairs 175 (January 1952).

<sup>3</sup> *Ibid.*

<sup>4</sup> Menzies, *The Pacific Settlement Seen from Australia*, 30 Foreign Affairs 188, 189 (January 1952); *Record of Proceedings* 225 (Statement of Carlos P. Romulo).

<sup>5</sup> Menzies, *supra* note 4.

<sup>6</sup> Communist China was found to be engaging in aggression in Korea in General Assembly Resolution 498 (V) of February 1, 1951.

<sup>7</sup> 61 STAT. 1245 (1947); U. S. Dep't of State Pub. No. 2960, Treaties and Other International Acts Series (referred to hereinafter as T. I. A. S.) 1648 (1947).

<sup>8</sup> See e.g. BENNS, *EUROPEAN HISTORY SINCE 1870* 776-7 (3d ed. 1950); *N. Y. Times*, Feb. 11, 1952, p. 24, col. 2 (editorial); 98 Cong. Rec. A722 (Feb. 6, 1952). The *Times*

their similarities and differences, but also disclose that the Japanese Treaty contains rocks as well as sand. It may even succeed in casting doubt upon Australian Prime Minister Menzies' assertion that "the [Japanese] economic settlement is a 'soft' one,"<sup>9</sup> if that essentially relative terminology is at all useful for objective characterization.

This article does not discuss all of those problems in detail, but rather compares the major provisions relating to territorial, economic and commercial dispositions.

### I. TERRITORIAL CLAUSES

The Territorial Articles of the Japanese Treaty are Articles 2, 3, 4, 10 and 21. Under these Articles, Japan renounces all right, title and claim to Korea (including the islands of Quelpart, Port Hamilton, and Dagelet), to Formosa and the Pescadores, to South Sakhalin and the Kurile Islands, and to the Spratly and Paracel Islands. Japan consents to United States' trusteeship over the Ryukus, the Bonins, and certain other small islands, to the already-established trusteeship over Japan's formerly mandated Pacific Islands, and "renounces all special rights and interests in China" (Article 10). This latter renunciation is not otherwise defined, but it clearly includes Manchuria, which had been organized by Japan in 1931-32 as the puppet state of Manchukuo. Although the United States never "recognized" Japanese control over Manchuria since such control represented the "fruits" of her aggressive behavior towards China,<sup>10</sup> other leading countries which are signatories to the Japanese Treaty had been even less vigorous in their opposition to Japan's adventure.<sup>11</sup> For practical purposes, therefore, Manchuria may be said to have been lost by Japan as a consequence of her defeat in World War II, and any doubts regarding it are resolved in Article 10.

Apart from the questions of title involved in the trusteeship of the Ryukus and Bonins (Japan will lose her control but not her "residual sovereignty" over these islands),<sup>12</sup> and apart from "strategic" considerations, these territorial losses mean much in terms of loss of resources and manpower which, theoretically at least, were advantageous to Japan and its people.

---

editorial stated that the Italian Treaty was "in many respects inexcusable" and "applauds every move to revise it," stating that "The lesson that should have been learned at Versailles—that a bad, punitive and unjust treaty cannot be enforced in the long run—has had to be learned again."

<sup>9</sup> Menzies, *supra* note 4, at 192.

<sup>10</sup> See STIMSON AND BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 235-236 (1947).

<sup>11</sup> *Id.* at 237-240.

<sup>12</sup> *Record of Proceedings* 78 (Dulles' Statement).

It should be emphasized, of course, that although these territories are taken from Japanese control under the terms of the Treaty, the Cairo Statement,<sup>13</sup> the Potsdam Proclamation,<sup>14</sup> and the Instrument of Surrender<sup>15</sup> had earlier recorded the intention of the Allied Powers<sup>16</sup> and of Japan that the losses should occur. Consequently, not too much should be made of the fact that formal relinquishment took place in the Treaty; it would be fairer to state that the losses were an immediate consequence of Japan's defeat in war. Actually, most territorial losses suffered by defeated enemies are foreshadowed long before a peace treaty is accomplished. Italian territorial losses in some respects at least resulted from wartime pre-armistice commitments, *i.e.*, Britain's assurance regarding Libya to the Senussi Tribe.<sup>17</sup> Germany's loss of Alsace-Lorraine in the Treaty of Versailles<sup>18</sup> could certainly have been prognosticated with complete assurance.

Articles 1-14, 21, 22, 23, 27 and 33 of the Italian Peace Treaty in a broad sense dispose of territory. Under these Articles, Italy lost certain small areas on the border with France (Articles 2, 6), and Venezia Iulia and Trieste (Articles 3, 4, 11, 21), the Dodecanese Islands, and her possessions in Africa (Libya, Eritrea, and Italian Somaliland) (Article 23). In addition, Italy recognized and undertook to respect the sovereignty and independence of Albania (Article 27), and of Ethiopia (Article 33).

While accurate and current statistics on the "gross national product" of all these areas, the value of their imports and exports, and other data relevant to a definitive judgment concerning their relative "value" are not available, enough is known to make it quite safe to say that, discounting Manchuria and Ethiopia as areas which would have had to be disgorged as the "fruits of aggression,"<sup>19</sup> Japan's territorial losses were,

---

<sup>13</sup> *A Decade of American Foreign Policy, Basic Documents, 1941-49* p. 22 (Sen. Doc. No. 123, 81st Cong., 1st Sess., 1950).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* at 624-626.

<sup>16</sup> "Allied Powers" is used throughout to describe generally those countries on the Allied side who receive benefits and owe obligations under the treaties, not necessarily in the technical sense in which the term is used in the Japanese Treaty, and in place of the terms "Allied and Associated Powers" and "United Nations" which are used in the Italian Treaty. "Allied Powers" is defined in the Japanese Treaty as States at war with Japan provided that the State concerned has signed and ratified the Treaty (Article 25).

<sup>17</sup> Foreign Minister Eden stated in the House of Commons on January 8, 1942 that the Senussi would not again be subjected to Italian domination. EVANS-PRITCHARD, *THE SANUSI OF CYRENAICA* 227 (1949).

<sup>18</sup> Section V, Articles 51-79, *The Treaty of Versailles and After*, U. S. Dep't of State Pub. No. 2724, Conference Series No. 92, pp. 182-196 (1947).

<sup>19</sup> STIMSON AND BUNDY, *op. cit. supra* note 10, at 234.

in economic terms at least, greater than Italy's. Korea and Formosa, with a total estimated population of almost 40,000,000 and many agricultural and mineral resources,<sup>20</sup> are clearly more "valuable" than all the areas lost by Italy, so much of which consisted of large and barren acreage which was sparsely populated.

## II. CLAIMS AND PROPERTY

Articles 14-17 and 18-21 of the Japanese Treaty, and Articles 75-81 of the Italian Treaty dispose of claims and property matters.

### a) *Property (Japanese and Italian) in the jurisdiction of Allied Powers.*

Japan recognizes the right of all Allied Powers which sign and ratify the Treaty to seize and retain property of Japan and Japanese nationals which are subject to their jurisdiction.<sup>21</sup> A concrete example is the approximately \$85,000,000 worth of Japanese property in the United States; the treaty recognizes the right of the United States to retain and dispose of this property as it wishes. Since the War Claims Act of 1948 provides that the net proceeds of Japanese and German assets shall not be returned,<sup>22</sup> but shall be placed in a War Claims Fund from which payments are made to certain classes of Americans who suffered as a consequence of the war,<sup>23</sup> this property in fact as well as in law is lost to Japan and Japanese nationals.

---

<sup>20</sup> THE WORLD ALMANAC (1952) describes Korea, for example, as an area of 85,246 square miles with an estimated 29,291,000,000 people; this area includes deposits of gold, silver, zinc, copper, lead, iron, tungsten, graphite and hard coal in significant quantities; silk and rice are intensively cultivated, as well as barley, wheat, tobacco and beans (p. 333). Formosa is described as an island of 13,800 square miles with 7,617,753 inhabitants (1950 figure), which produces gold, silver, copper, coal, rice, tea, sugar, and other valuable agricultural products (p. 313).

Libya, on the other hand, is "one of the world's poorest countries. Its natural resources are meager; its 1,340,000 people almost penniless. . . . The country has a pathetically small list of products: Olives, sponges, raw salt produced from the Mediterranean waters in seaside evaporation beds, and esparto grass—a wild desert grass used in making fine paper—which was Libya's most valuable export last year." The *Washington Post*, Jan. 13, 1952, Sec. II, p. 1, col. 1; p. 2, col. 1.

<sup>21</sup> Article 14(a) 2. Certain minor categories of Japanese property which are excluded from the right of retention are discussed *infra*, pp. 387-388.

<sup>22</sup> 62 STAT. 1240, 1246 (1948), 50 U. S. C. §§ 2001, 2011 (1951).

<sup>23</sup> 62 STAT. 1247 (1948), 50 U. S. C. §§ 2012, 2013 (1951). The War Claims Act provides compensation for (1) claims arising out of the detention, injury, disability, or death resulting from injury of employees of contractors with the United States; (2) claims of American civilians who were captured by the Japanese at Midway, Guam, Wake Island, and the Philippine Islands or in any territory or possession of the United States, or while in transit to or from any such place, or who went into hiding at any such place to avoid capture; (3) claims of members of the military or naval forces of the United States who,

The Italian Treaty, on the other hand, permitted Allied and Associated Powers to seize and retain property of Italy and Italian nationals (with similar minor exceptions) only "within the limits of its [the Allied Power's] claims and those of its nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Italian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned." (Article 79.) While the claims and debts of some Allied Powers and their nationals undoubtedly exceeded the value of Italian property within their jurisdictions, this was probably not the case regarding others. More important, however, is the fact that some Allied Powers returned the bulk of Italian property despite their right, under the claims formula, to retain it. For example, there was approximately \$62,000,000 worth of Italian property in the United States, (about \$18,000,000 of which had been "vested" and \$45,000,000 "blocked"),<sup>24</sup> almost all of which could have been retained. Prior to the entry into force of the Italian Treaty on September 15, 1947, the United States and Italy agreed on August 14, 1947, in the so-called Lombardo Agreement,<sup>25</sup> that almost all of this Italian property would be returned to Italy and Italian nationals, while Italy would transfer \$5,000,000 to the United States to be utilized "in such manner as the Government of the United States of America would deem appropriate, in application of the claims of United States nationals arising out of the war with Italy and not otherwise provided for."<sup>26</sup>

As a consequence, a very large proportion of Italian property in the United States will have been returned,<sup>27</sup> while practically all Japanese property will be retained by the United States.

This more drastic approach to Japanese property in Allied jurisdictions in the Treaty represents a continuation of differing pre-treaty treatment of Japanese and Italian property. During World War II, the

---

while imprisoned by the enemy, were not furnished with the quantity or quality of food to which they were entitled as prisoners of war under the terms of the Geneva Convention of July 27, 1949; and (4) claims of certain religious organizations for reimbursement of expenditures incurred for the purpose of furnishing aid to military personnel of the United States or to civilian American citizens during their imprisonment or internment in the Philippines.

<sup>24</sup> ANN. REP. OFFICE OF ALIEN PROPERTY 6 (1948).

<sup>25</sup> *Memoranda of Understandings between the United States and Italy, regarding settlement of certain wartime claims and related matters, and Italian assets in the United States and certain claims of United States nationals* (T. I. A. S. 1757). Ivan M. Lombardo was the Chief of the Italian Mission which negotiated these agreements with the United States.

<sup>26</sup> *Id.* at I.

<sup>27</sup> The United States statute authorizing return was enacted on August 5, 1947 (61 STAT. 784 (1947)), 50 U. S. C. § 32 (1951)).

United States treated Japanese and German enemy property more strictly than Italian, Hungarian, Rumanian and Bulgarian enemy property. Although all enemy property had been "blocked" (immobilized) by Treasury Department action, the President determined that the United States should take title to all property of Germany and Japan and their nationals by "vesting" performed by the Alien Property Custodian.<sup>28</sup> Only a small portion of Italian and satellite assets in the United States, however, was ever vested, the majority remaining blocked.<sup>29</sup> And when the United States Government enacted the War Claims Act of 1948 it limited the "no return of enemy property" provision to German and Japanese property.

The differentiation made by the United States between German and Japanese property on the one hand and Italian and satellite property mirrors, by and large, the treatment accorded to such property by other Allied Powers, and undoubtedly resulted in considerable part from the world-wide belief that Germany and Japan were the "major", and Italy and the satellite countries the "minor" enemies.

Mention should be made of the group of exceptions from the right of the Allied Powers to seize and retain property in their jurisdictions in both the Japanese Treaty<sup>30</sup> and the Italian Treaty;<sup>31</sup> the Allied Powers may not seize, or if they have already seized, must return certain kinds of property or the proceeds thereof if liquidated. Thus, Allied Powers are obliged to return property of Japanese individuals who resided in Allied territory during the war with the permission of that Allied Power except where such property was subjected to restrictions during the war and not released therefrom as of the date of the first coming into force of the Treaty; real property (including furniture and fixtures) owned by the Japanese Government and used for diplomatic and consular purposes; personal furniture and furnishings and other private property not of an investment nature and normally necessary for the carrying out of diplomatic and consular functions, which was owned by Japanese diplomatic and consular personnel; property belonging to Japanese religious bodies or private charitable institutions and used exclusively for religious or charitable purposes; Japanese property rights and interests which came within the jurisdiction of the Allied Power concerned as a consequence of the resumption of trade and financial relations after

---

<sup>28</sup> Exec. Order No. 9567, 10 FED. REG. 6917 (1945); see ANN. REP. ALIEN PROPERTY CUSTODIAN 1-7 (1945).

<sup>29</sup> ANN. REP. OFFICE OF ALIEN PROPERTY 5-9 (1948).

<sup>30</sup> Article 14(a) 2(II).

<sup>31</sup> Article 79, paragraph 6.

September 2, 1945, the date Japan formally surrendered, except property resulting from transactions contrary to the law of the Allied Powers concerned (such as smuggled property); and, finally, property in Allied territory, such as stocks or bonds, representing obligations of Japan or Japanese nationals expressed in Japanese currency, and any such property representing any right, title, or interest in tangible property located in Japan or in enterprises organized under Japanese law. The Allied Powers are not obliged to return seized Japanese trade marks and literary and artistic property rights, although they agree to deal with these rights "on a basis as favorable to Japan as circumstances ruling in each country will permit."<sup>32</sup>

The Italian Treaty excepted from seizure and retention similar kinds of property. The following differences appear: under the Italian Treaty the Allied Powers are obliged to return literary and artistic property rights, while in the Japanese Treaty they merely agree to deal with these property rights on a basis as favorable to Japan as they consider possible; there is no obligation in the Italian Treaty to return private property of diplomatic and consular personnel while there is such an obligation in the Japanese Treaty; the obligation to return property of "non-hostile" Italians permitted to reside in Allied territory during the war is somewhat broader than the similar obligation contained in the Japanese Treaty;<sup>33</sup> there is no obligation in the Italian Treaty to return paper evidences of property which was located in Italy, while there is such a provision in the Japanese Treaty.<sup>34</sup>

It is difficult to say whether the differences in the treaties respecting these exceptions mean anything in monetary terms; it is safe to say, however, that if any such differences in results occur, they will be extremely small. These textual differences in the Treaties largely reflect minor distinctions in the treatment accorded during the war by Allied Powers to categories of property which were either "non-hostile" in character or not useful in monetary or other terms to the Allied Powers themselves.

(b) *Property (Japanese and Italian) in Neutral and Co-Enemy Jurisdictions*

The Italian Treaty contains no provision relating to the disposition of Italian property located in neutral (*i.e.*, Swiss) or co-enemy (*i.e.*,

<sup>32</sup> Article 14(a) 2(V).

<sup>33</sup> Compare Article 79, paragraph 6(c) of the Italian Treaty with Article 14(a) 2(II) (iv) of the Japanese Treaty.

<sup>34</sup> Article 14(a) 2(II) (v).

German) jurisdictions. In the absence of a special provision, Italian property in these areas remains Italian.

Japan, however, "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. . . ." This will be done as an expression of Japan's "desire to indemnify the members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan" (Article 16) in response to the deep resentment of those Allied Powers whose prisoners of war suffered greatly. Without doubt the "lawlessness and inhumanity in the conduct of war" displayed by Japan<sup>35</sup> will be recalled with greater bitterness in the years to come than any other single act of Japan's. Whatever can be done by Japan to soften that memory will unquestionably be enormously beneficial to its relations with other nations.

The United States has already stated that "since its own prisoners of war have received some indemnification out of the proceeds of Japanese assets we seized, we would assume that equity would require first distribution to those who have had no comparable indemnification."<sup>36</sup> Other Allied Powers had a much smaller fund of Japanese property in their jurisdictions from which their prisoners of war might receive compensation. Former prisoners of war of those countries are the intended beneficiaries of Article 16. Very rough estimates of the amount which may be available for distribution vary between fifteen and twenty-five million dollars.

### (c) *Allied Property in Japan and Italy*

Two types of allied property are dealt with in the Peace Treaties. One is the property of Allied Powers and their nationals which was located in Japan and Italy at the time of outbreak of war. The other is Allied property which was brought to Japan or Italy *after* the outbreak of war, being removed from Allied territory. The first is usually referred to under the rubric of "restoration" or "return" of property, and the second as "restitution."

In the Japanese Treaty, both types of property are disposed of in Article 15. Under that Article, Japan is obliged within six months after

---

<sup>35</sup> Menzies, *supra* note 4, at 194.

<sup>36</sup> *Record of Proceedings* 84 (Dulles' Statement).

application therefor (which must be made within nine months of the coming into force of the Treaty between Japan and the Allied Power concerned), to return tangible and intangible property and all rights or interests of any kind of Allied Powers and their nationals "which was within Japan at any time between December 7, 1941 and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud." (Article 15(a)). The property is to be returned free of all encumbrances and charges to which it may have been subjected because of the war, and without any charges for its return; if not applied for by or on behalf of the owner or by his Government within the nine-month period, it may be disposed of by the Japanese Government.

It will be noted that Japan must "return" and "restitute" existing property of the Allied Powers. With respect to Allied property which was in Japan on December 7, 1941, however, Japan has an additional obligation. If such property "cannot be returned or has suffered injury or damage as a result of the war,"<sup>37</sup> Japan must compensate the owner on terms no less favorable than those contained in a July 13, 1951 draft Compensation Law which was approved by the Japanese Cabinet but not yet enacted at the time of the signing of the Treaty.<sup>38</sup> This law is comprehensive in its treatment of various types of Allied property, and provides for 100% compensation in Yen, the local currency. Remittance of the Yen received in dollars or other foreign currency is subject to Japan's foreign exchange control laws and regulations. There is no obligation to compensate for lost, consumed, or destroyed Allied property which was removed to Japan during the war but had not been in Japan at the outset. Claims for this unrecoverable "removed" or looted property customarily fall into the "reparations" category, anomalous as it may seem.

The Italian Treaty dispensation, although similar, differs in one major and several minor particulars. The major difference is that under Article 78, the "restoration" Article, Italy is obliged to compensate for damaged or unreturnable property only "to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered,"; this 2/3ds compensation in lire is likewise subject to Italian foreign exchange regulations.

There are several minor differences, apart from the presence of some provisions in the Italian Treaty which were unnecessary in the Japanese

---

<sup>37</sup> Article 15(a).

<sup>38</sup> This draft law, as later amended, was enacted on November 26, 1951, and becomes effective upon the entry into force of the Treaty. From the point of view of the Allied Powers, the amendments have improved the draft.

Treaty because the situations were not duplicated.<sup>39</sup> Thus, Italy is obliged to restore "restituted" property "in good order and, in this connection, shall bear all costs in Italy relating to labor, materials and transport";<sup>40</sup> Japan need not repair property brought to Japan after the outbreak of war before turning it back. In addition, if Italy cannot restitute Allied objects of artistic, historical or archeological value, it must transfer "objects of the same kind as, and of approximately equivalent value to, the objects removed, insofar as such objects are obtainable in Italy." (Article 75, paragraph 9); Japan has no such obligation, however limited it may be considered, to replace lost or destroyed looted art objects.

These are the principal substantive differences in the treaties respecting treatment of Allied property. By far the most important is the difference in compensation—100% in the case of Japan, 66 2/3% in Italy's case. Placing the obligations side by side, this difference tips the balance, so far as the greater burden is concerned, toward Japan.

(d) *Claims Waived by Japan and Italy*

In Article 19 of the Treaty, Japan makes a most comprehensive waiver of claims. It waives all of its claims and those of Japanese 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."<sup>41</sup> This waiver specifically includes any claims arising out of actions taken by any Allied Power with respect to Japanese ships between September 1, 1939 and the coming into force of the Treaty<sup>42</sup> as well as claims and debts which may have arisen regarding Japanese prisoners of war and civilian in-

---

<sup>39</sup> The property of Allied Powers and their nationals were exempted from exceptional levies on "capital assets" imposed between the Italian Armistice and the Treaty for the specific purpose of meeting occupation costs, reparations, or other charges arising out of the war. (Article 78, paragraph (6)). This was not necessary in the Japanese Treaty, since no such levies upon Allied nationals had been permitted in Japan by the Supreme Commander. Again, Italy was obliged to restitute looted or wrongfully removed monetary gold of the Allies (Article 78, paragraph (8)); there is now no such gold known to exist in Japan.

<sup>40</sup> Italian Peace Treaty, Article 75, paragraph 3.

<sup>41</sup> Article 19(a).

<sup>42</sup> If an Allied Power has taken action respecting Japanese ships which came within its jurisdiction after September 2, 1945, as a consequence of the resumption of trade relations between Japan and that Power, any claims which may arise from such action are not waived. (See Article 14(a)2(II)(iv)).

ternees in the hands of Allied Powers.<sup>43</sup> These specific waivers were necessary because many actions affecting ships and armed or civilian personnel were taken outside Japanese territory.

Japanese claims "specifically recognized in the laws of any Allied Power enacted since September 2, 1945," the date of Surrender, are, however, excluded from the waiver.<sup>44</sup> This clause was added primarily in order to avoid waiver of those claims of Japanese nationals which were recognized in the Act of July 2, 1948.<sup>45</sup> That Act authorizes the Attorney General to adjudicate claims of and compensate persons of Japanese ancestry who suffered property losses as a result of the re-location program (whereby persons of Japanese origin were moved from coastal areas to interior centers) which was undertaken by the United States during the war. Had the clause not been inserted, the claims of Japanese nationals under that Act could not have been paid as a consequence of the otherwise inclusive waiver in the later-ratified Treaty.<sup>46</sup>

In addition, Japan recognizes the validity of all acts and omissions "done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time," and specifically undertakes not to take "action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions."<sup>47</sup>

Japan also renounces, subject to reciprocal renunciation, all claims against Germany and German nationals on behalf of the Japanese Government and Japanese nationals except claims arising out of pre-September 1, 1939 contracts and claims arising out of renewed trade and financial relations between Japan and Germany after Germany's surrender. However, as indicated above, Japanese property in Germany is to be transferred to the International Committee of the Red Cross under the provisions of Article 16. Furthermore, Japan is obliged under Article 20, to insure such disposition of German assets in Japan as "has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945 to dispose of these assets."<sup>48</sup>

---

<sup>43</sup> Article 19(b).

<sup>44</sup> *Ibid.*

<sup>45</sup> 62 STAT. 1231 (1948), 50 U. S. C. §§ 1981, 1982, 1983 (1951).

<sup>46</sup> See *Cook v. United States*, 288 U. S. 102, 118-119 (1933); *Whitney v. Robertson*, 124 U. S. 190, 194 (1888).

<sup>47</sup> Article 19(d).

<sup>48</sup> Pursuant to the Protocol (*supra* note 13, at 39-40) and the Paris Agreement on Reparation from Germany of January 24, 1946 (T. I. A. S. 1655), the assets will be divided according to agreed percentages among countries receiving reparations from Germany, except Poland and the U. S. S. R.

The waiver of claims by Japan is undoubtedly as broad, with the single exception consciously made, as drafting ingenuity permitted. There was a general desire to wipe the slate clean so far as Japanese claims were concerned, in order that international haggling concerning them would not complicate the delicate task of facilitating Japan's re-entry into the friendly association of nations.

The Italian waiver of claims set out in Article 76 of the Italian Peace Treaty is also very comprehensive. The differences between it and the Japanese waiver are largely linguistic and insubstantial. There are two differences, however, which are relatively substantial. Although Italy waived "claims and debts arising out of the Conventions on prisoners of war now in force"<sup>49</sup> as did the Japanese in Article 19(b) of the Japanese Treaty, the United States agreed nevertheless, in the Lombardo Agreement of August 14, 1947,<sup>50</sup> to "continue to honor in lira, at the prevailing rate of exchange applicable to the Government of the United States of America expenditures in Italy at the time of payment . . . all valid evidences of obligations made out by the Government of the United States of America or its agencies . . . to former Italian prisoners of war and surrendered Italian personnel, both officer and enlisted. . . ."<sup>51</sup> Despite the Treaty waiver, therefore, the United States, by agreement executed approximately one month before the entry into force of the Italian Treaty, agreed to pay amounts due to prisoners of war under the Geneva Convention of July 27, 1929.<sup>52</sup> The amount actually paid by the United States is estimated at more than \$26 million.

Another substantial difference concerns Italian property in Germany. Although Italy, like Japan, waives on its own behalf and on behalf of its nationals all claims against Germany and German nationals outstanding at Germany's surrender, except those arising out of contracts and other obligations entered into before September 1, 1939, the Italian Treaty specifically provides that the property of Italy and Italian nationals in Germany shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed,<sup>53</sup> and, further, that "identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution."

On balance, there is really not much to choose between the scope of

---

<sup>49</sup> Article 76, paragraph (5).

<sup>50</sup> See note 25 *supra*.

<sup>51</sup> Article II, paragraph 11(a).

<sup>52</sup> 47 STAT. 2021 (1932).

<sup>53</sup> Article 77, paragraph 1.

waivers of claims made by Japan and Italy in the treaties. Both are comprehensive and couched in language designed to eliminate cavilling. Since one of the principal objects of peace treaties is to "settle questions still outstanding as a result of the existence of a state of war,"<sup>54</sup> and since possible claims by the defeated enemy are among such questions, it is altogether fitting and proper that they be disposed of as cleanly as possible. It is believed that both treaties will have accomplished this task successfully. Such differences as there are, however, favor Italy, not Japan.

(e) *Claims Waived by Allied Powers*

Both the Japanese and Italian Treaties contain a waiver of claims by the Allied Powers.

Article 14(b) of the Japanese Treaty reads:

(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.

In Article 80 of the Italian Treaty the Allied Powers declared that the "rights attributed to them under Articles 74 [Reparations] and 79 [Italian property in Allied Territory] of the present treaty cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory, with the exception of claims based on Articles 75 [Restitution of Allied property by Italy] and 78 [Return of Allied property in Italy]."

Although there are certain textual differences in these two articles, they are remarkably similar in effect. In essence they provide for an Allied waiver for prior acts of the defeated enemy, except insofar as the Treaty itself recognizes Allied interests. An interesting and quite important point lies beneath these thoroughgoing waivers, however. Note that the Japanese Treaty states that claims are waived "except as otherwise provided in the Peace Treaty," and the Italian Treaty effects a waiver by stating that "the rights attributed" to Allied Powers under certain articles and "claims based on" other articles satisfy all of their claims, including those not provided for in some manner by the treaties. Under the reparations articles of the two treaties (Article 74 of the Italian Treaty, Article 14 of the Japanese Treaty), both Italy and Japan have assumed certain reparations obligations; under other

---

<sup>54</sup> Preamble, 1st Paragraph, Japanese Treaty.

articles, as we have seen, they have assumed a number of other specific obligations. Suppose either or both countries fail to honor their reparations obligations. Will the Allied Powers, nevertheless, be deemed to have "waived" their claims in that event? Any opinions concerning the inter-relationship of the Allied waiver and the performance of the reparations and other obligations undertaken by Japan and Italy are necessarily speculative at this stage; so far as the Japanese Peace Treaty is concerned, if "there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice." (Article 22.) It does appear, however, that the language of the waiver articles in both treaties is so cast that the waiver may not be deemed to bind an Allied Power in the absence of good faith efforts on the part of Japan and Italy to fulfill the obligations assumed by them in the treaties. A contrary view would result in the acceptance of the word for the deed on one side only of the bargain, a result sufficiently unusual to appear to require much greater evidence of that specific intention than the language itself discloses.

### III. REPARATIONS

As indicated, Italy's reparations obligations, set out in Article 74 of the Italian Treaty, comprise specific amounts to specified countries, while Japan's obligations in this regard are "unliquidated" in character. Italy is obliged to pay a total of \$360 million to five countries: \$5 million to Albania, \$25 million to Ethiopia, 105 million to Greece, \$125 million to Yugoslavia, and \$100 million to the U.S.S.R. Although specified in dollar terms, reparation is to be made from certain material sources, such as ships and capital goods or services, with the quantities and types of goods and services to be delivered to be the subject of agreement between the reparations receiving countries and Italy, and may be spread over a period of seven years.

Italy's performance of its reparations obligations under Article 74 has not yet been completed. An arrangement was made with Greece in 1949 respecting both the amount of total reparations to that country and the manner of its payment; the amount of reparations was reduced by mutual agreement.<sup>65</sup> It is understood, however, that discussions between Italy and the other reparations receiving countries are in various

---

<sup>65</sup> ACCORDO TRA L'ITALIA E LA GRECIA DI COLLABORAZIONE ECONOMICA E DI REGOLAMENTO DELLE QUESTIONI DERIVANTI DAL TRATTATO DI PACE FRA LE POTENZE ALLEATE E ASSOCIATE E L'ITALIA, Article 19 (Roma 1949).

stages of progress. Whether the amounts finally paid in money and materials, taking into account the method of computing these payments, will in the end approach \$360 million cannot, of course, be accurately foretold at this time. To say that it would not be surprising if the total amount of payments actually made by Italy turns out to be something less than the dollar figures set out in Article 74 of the Treaty, would not, however, be an overstatement.

Apart from the questions of China and security, Article 14 of the Japanese Treaty presented greater difficulty than any other feature of the Treaty. As stated by John Foster Dulles, whose brilliant and persistent efforts played a large part in the achievement of the Treaty, "Reparation is usually the most controversial aspect of peace making. The present peace is no exception."<sup>56</sup> The Article is sufficiently important to warrant quotation:

(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. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.<sup>57</sup>

The Treaty recognizes that Japan should pay reparation for the damage and suffering caused by it during the war. How does the Treaty envisage the effectuation of that principle? An authoritative statement was made by Mr. Dulles in San Francisco:

Japan has a population not now fully employed, and it has industrial capacity not now fully employed. Both of these aspects of unemployment are caused by lack of raw materials. These, however, are possessed in goodly measure by the countries which were overrun by Japan's armed aggression. If these war-devastated countries send to Japan the raw materials which many of them have in abundance, the Japanese could process them for

---

<sup>56</sup> *Record of Proceedings* 82.

<sup>57</sup> *Id.* at 319-320.

the creditor countries and by these services, freely given, provide appreciable reparations. The arrangements could cover not merely consumer goods but machinery and capital goods which would enable underdeveloped countries to speed up developing their own industry, so as hereafter to lessen their dependence on outside industrial power.

This is, in essence, the formula expressed in Article 14(a) 1. It results from prolonged exchanges of views, particularly with such countries as the Philippines and Indonesia, which were occupied by Japanese forces and injured in a way which places on the Allied Powers as a whole, and on Japan, a very clear duty to seek all means of reparation which are realistic.

I am frank to say that the treaty is a better, fairer treaty than first drafted. That results from the proper insistence of some governments that all possibilities of reparation should be exhaustively explored. That has been done, and the result is a fresh demonstration of the worth of the free processes of free and equal people. Those processes have here produced a treaty formula which serves the ideal of justice within an economic framework which can benefit all concerned.<sup>58</sup>

No one now knows what the aggregate cost to Japan of the fulfillment of its obligations under Article 14(a)1 will amount to in the end. As the Article states, negotiations must be concluded between Japan and those Allied Powers entitled; since the negotiations will undoubtedly result in the fulfillment of the reparations obligations over a period of years, it will probably be some time before reasonably accurate conclusions can be drawn. At this stage, therefore, very little more than guesses are in order. It would be surprising, however, if in the end the value of Japan's reparations under Article 14 should prove to be less than the dollar amounts which were specified in the Italian Treaty; it may well be greater.

#### IV. COMMERCIAL PRACTICES

Article 12 of the Japanese Treaty and Article 82 of the Italian Treaty set forth the obligations of Japan and Italy in the field of commercial relations with the Allied Powers in a generally similar manner.

Japan declares its readiness to enter promptly into negotiations with each of the Allied Powers for the conclusion of treaties and agreements to place their trading, maritime and other commercial relations on a stable and friendly basis. Pending the conclusion of such treaties, Japan will, during a period of four years from the first coming into force of the treaty, accord to the Allied Powers, their nationals, products and vessels, most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the im-

---

<sup>58</sup> *Id.* at 83-84.

portation and exportation of goods; and will accord national treatment (treatment equivalent to that accorded Japanese nationals) with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests; Japan will further insure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

Japan will not, however, be obliged to accord national or most-favored-nation treatment, as the case may be, to an Allied Power unless that Power reciprocates. It is important to note, in this connection, that the Allied Power has sole discretion in the matter; it need not grant national or most-favored-nation treatment to Japan. If the Allied Power decides to grant to Japan national or most-favored-nation treatment, then Japan *must* accord such treatment in regard to the same matter to the Allied Power; if the Allied Power chooses not to so treat Japan, Japan need not accord the Allied Power such favorable treatment. This conception of what may be termed "one-sided reciprocity" also appears in the Italian Treaty. Japan, however, is obliged, in the absence of conclusion of separate bilateral agreements, to accord national and most-favored-nation treatment on this basis of one-sided reciprocity for a period of four years while Italy was so obliged only for a period of eighteen months from the coming into force of the Italian Treaty.

The significance of this arrangement and its duration should not be lightly dismissed. Suppose Allied Power X believes that it has a good market in Japan for certain broad categories of commodities which it produces, but is fearful of Japanese competition with its products in certain other categories in the Allied Power's home market. Allied Power X can magnanimously accord national or most-favored-nation treatment to Japan in respect of those categories for which it anticipates a good market in Japan (those being products which Japan either does not produce or does not produce competitively), and thereby oblige Japan to grant such treatment to those products exported by the Allied Power. On the other hand, Allied Power X may simply refrain from according to Japan national or most-favored-nation treatment respecting those other categories of goods which are fiercely competitive in the home market. While it is true that in these circumstances Japan is not obliged to grant favorable treatment in respect of those latter goods, Allied Power X, if it acts in that way, can secure an important market for certain of its goods, while protecting its home market from the competition of other Japanese goods. Of course, a large scale application of this selective approach to most-favored-nation conduct might result in such an accumu-

lation of external obligations on Japan's part (either in foreign currencies or Yen or both) as to jeopardize Japan's balance of payments or external financial position; this might result especially if such conduct were engaged in by a number of countries whose supplies were desperately needed by Japan. In that case, Japan might depart from the principle of national or most-favored-nation treatment because of the need to safeguard its "external financial position or balance of payments", provided that the departure "is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner."<sup>59</sup> But it can easily be seen that, short of jeopardizing Japan's balance of payments or external financial position, the workings of one-sided reciprocity may have significant results in terms of international trade.

It should be noted, furthermore, that the exception to the rule of reciprocity on account of balance of payments does not apply as to shipping and navigation.<sup>60</sup> This means that regardless of the effect upon Japan's external finances, national treatment with respect to shipping must continue to be accorded during the four-year period, if the Allied Power reciprocates. What effect this will have on the growth of Japan's merchant marine, which at present is not sufficiently large to take advantage to any appreciable degree of an Allied Power's grant of national treatment while the Allied Power for its part may be able to supply a significant portion of Japan's shipping needs, remains to be seen.

Article 82 of the Italian Treaty, while more loosely drafted than its counterpart, Article 12, is nevertheless substantially similar. It does not contain a specific exception relating to the balance of payments and does contain a clause on commercial aviation, which grants to Allied Powers "equality of opportunity in obtaining international commercial aviation rights in Italian territory."<sup>61</sup> The Japanese Treaty article on civil aviation (Article 13) grants Allied Powers, during a period of four years from the first coming into force of the treaty, "treatment no less favorable with respect to air-traffic rights and privileges than those exercised by such powers on the date of such coming into force" as well as "equality of opportunity in respect to the operation and development of air services."

The fact that Italy's treaty obligations in the field of commercial relations, pending bilateral arrangements, lasted only eighteen months while Japan's persist for a period of four years, is the most important

---

<sup>59</sup> Article 12(d).

<sup>60</sup> *Ibid.*

<sup>61</sup> Article 82, paragraph (1) (d).

difference in the commercial relations provisions of the treaties. While eighteen months is a very short time for trade patterns and relationships to become crystallized, four years is an ample period during which trade arrangements can become established. It is very doubtful whether the one-sided reciprocity arrangement in the Italian Treaty has had real effect, either during the eighteen months' period when it was operative or since. It would be rash, however, to make such a statement at this time regarding the future international trade of Japan.

#### V. CONCLUSIONS AND OBSERVATIONS

The territorial, economic, and commercial articles of the Japanese Treaty are more severe than their counterparts in the Italian Treaty. It would be a great mistake, however, to draw from this any inference or conclusion that the Japanese Treaty is not liberal or that the Italian Treaty is liberal. Such a characterization of this or that peace treaty is permissible only after its provisions have been compared, not with the provisions of other treaties, but with other provisions which might have been satisfactory to responsible Allied Powers in the light of the war waged by the defeated enemy.

In that light, the economic and commercial provisions of the Japanese Treaty are liberal, but not "soft." Nothing in the Treaty's provisions places artificial restraints upon Japan's ability to improve the standard of living of its people by producing more, trading more, and distributing the benefits accruing from these endeavors more equitably. The Treaty provisions contain no restrictions upon the size or growth of Japanese industry. Japan's reparations obligations are designed so as not to create a foreign exchange burden. Japan's plants and equipment are not dismantled and removed and its gold reserves are not distributed as reparation. The idea of reciprocity in trade relations is contained in the Treaty. At one time or other, several countries were willing or eager to see the Treaty contain these kinds of provisions, believing that the great destruction wrought by Japan during its flagrantly aggressive and cruel conduct of war merited a harsh or punitive treaty. "Bitterness and distrust" was "the sentiment of many."<sup>62</sup>

Believing that it was essential to break "the vicious cycle of war-victory-peace-war," and that it was impossible to do so by imposing a "peace of vengeance," the United States urged a "peace of reconciliation."<sup>63</sup> After months of preliminary discussions with a number of

---

<sup>62</sup> *Record of Proceedings* 74 (Dulles' Statement).

<sup>63</sup> *Ibid.*

interested countries, it circulated a draft in March 1951 which was studied by over twenty countries. The United Kingdom, which had been conferring with the Commonwealth countries, then produced a text of its own which was more detailed and severe. In June 1951, "the United States and the United Kingdom combined their parallel efforts and jointly drafted a text to reconcile and reflect still more fully the different views that had been developed."<sup>64</sup> This text was circulated to the Allied Powers during the first half of July. A number of changes were suggested by various countries, and a number were made. On August 13, 1951 the text which became the signed treaty was published. By an "effort of self-control which is perhaps unprecedented in history"<sup>65</sup> each country had subordinated "some special interests so that a broad base of unity might be found."<sup>66</sup> It was out of this crucible that the economic and commercial articles were forged. The varying quantities of iron which were put into the mixture by all countries contributed to the strength of the resultant articles.

The territorial dispositions in the Japanese Treaty are severe. Japan is restricted in the main to the four principal home islands. But although these territorial losses are set out in the Treaty, they are not really of the Treaty. The Treaty merely "formally ratifies the territorial provisions of the Potsdam Surrender Terms, which, so far as Japan is concerned, were actually carried into effect 6 years ago."<sup>67</sup> Had the circumstances of 1951 prevailed in 1945, or had declarations made then and earlier been left unsaid, it may be doubted whether all of the territorial provisions of the Japanese Treaty of 1951 would have been what they are.

The Treaty "contains, no doubt, imperfections,"<sup>68</sup> but many fewer than most. While it is quite literally true that no country was "completely satisfied," neither does any country really believe that it contains "the seeds of another war."<sup>69</sup>

In the negotiation of all treaties, some kind of balance, some collective judgment is eventually struck. When the representatives of forty-eight Allied Powers negotiate, the resulting agreement will represent the individual views of all to a certain extent, in much the same manner as legislation reflects the opinions of representatives of the forty-eight

---

<sup>64</sup> *Id.* at 76.

<sup>65</sup> *Id.* at 75.

<sup>66</sup> *Id.* at 76.

<sup>67</sup> *Id.* at 77.

<sup>68</sup> *Id.* at 86.

<sup>69</sup> *Ibid.*

states. But in the course of the negotiation of a treaty, as in the legislative process, an underlying character of the document becomes formed, which is quite different from a mathematical mean between extremes. While the views of each individual legislator or nation will be reflected, the essential content and direction of the treaty or law will usually transcend any individual judgment. This character will usually be shaped by the predominating opinion at the time, and its provisions will in a broad sense be consistent with that character.

The dispositive provisions of the Japanese Treaty are neither harsh or punitive, nor soft or formless. In this they are consistent with the Treaty as a whole. What the ultimate characterization of the Japanese Treaty will be only time and others will tell. So far as can now be judged, however, to call it a liberal treaty of peace would be close to the mark.