ARTICLES

INDIVIDUAL CLAIMS: ARE THE POSITIONS OF THE U.S. AND JAPANESE GOVERNMENTS IN AGREEMENT IN THE AMERICAN POW FORCED LABOR CASES?

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I. INTRODUCTION

During World War II, some 27,000 American soldiers were captured by the Japanese military, and of those, over 11,000 died.[1] Many of these POWs were enslaved for the benefit of private Japanese companies. After more than half a century, surviving POWs are seeking compensation from these companies in American courts.

On February 6, 2003, the Court of Appeal of California, Fourth District, Division Three, dismissed one of the cases in which Mitsui and Mitsubishi were named defendants.[2] It ruled that the San Francisco Peace Treaty of 1951 had waived the claims of the plaintiffs, although it acknowledged the suffering of

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1. Mitsubishi Materials Corp. v. Super. Ct. of Orange County, 130 Cal. Rptr. 2d 734 (2003), *aff'd on rehearing*, 6 Cal. Rptr. 3d 159 (2003).

2. *Id.* at 734. There are two other cases that were consolidated with this case, they are: Ethel Georgean Jaeger, et al., v. Mitsubishi Materials Corp., (No. 814594), and Myrtle Marjorie Martin v. Mitsui & Co., Ltd., etc., et al., (No. BC 216710).

POWs who were used as forced laborers by the defendant companies.[3]

Article 14(b) of the Peace Treaty, which officially ended the war between Japan and the United States and other Allied Powers, reads:

> Except as otherwise provided in the present treaty, the Allied Powers waive all reparation 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.[4]

Deciding for the defendant-petitioner, the court said, "[T]he treaty, taken as a whole in historical context, precludes this lawsuit."[5] This conclusion is in line with the U.S. government's position that the Peace Treaty had waived all claims including individual claims. In its amicus curiae brief filed with the Court of Appeal, the U.S. government argued that, "the Treaty of Peace between the United States, other Allied nations, and Japan, waived the claims of American and Allied nationals against Japan and Japanese nationals arising out of the war."[6] The Japanese government has also submitted a diplomatic note setting out its position. It stated, "The government of Japan fully shares the position of the United States Government that claims of the United States and its nationals (including prisoners of war) against Japan and its nationals arising out of their actions during World War II were settled by the Peace Treaty."[7]

At first blush, the Japanese government's position may seem to agree with the position of the U.S. government. In fact, this is

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3. *Id.* at 749. Court of Appeal of California, Second Appellate District, Division Eight rendered an opposite decision, allowing the case brought by a Korean victim against a Japanese Company to proceed. Taiheiyo Cement Corp. v. Superior Court, 105 Cal. App. 4th 398 (2003). All other Japanese forced labor cases were removed to federal district court in the Northern District of California, and the Allied POW cases were dismissed in 2000. In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000). Non-POW cases were dismissed in 2001. In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 (N.D. Cal. 2001); In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1153 (N.D. Cal. 2001). The United States Court of Appeal for the Ninth Circuit affirmed their dismissals. Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).

4. Multilateral Treaty of Peace with Japan, Sep. 8, 1951, art. 14(b), 3 U.S.T. 3169, 3183 [hereinafter Peace Treaty].

5. *Mitsubishi Materials Corp.*, *supra* note 1, at 749.

6. Brief of Amicus Curiae United States Government in Support of Writ Petition, at 1, *Mitsubishi Materials Corp.*, 130 Cal. Rptr. 2d 734 (2002) (No. 814430) (emphasis added).

7. THE VIEWS OF THE GOVERNMENT OF JAPAN ON THE LAWSUITS AGAINST JAPANESE COMPANIES BY FORMER AMERICAN PRISONERS OF WAR AND OTHERS, Embassy of Japan 1 (2000).

not true. This article focuses on the Japanese government's position toward the issue of waiver of individual claims to determine how its position in the American POW cases compares with its position in past domestic cases in Japanese courts. As this article will demonstrate, until these American POW lawsuits were filed, the Japanese government had been arguing that individual claims had not been waived by the Peace Treaty.

Section II of this article provides the background for *Mitsubishi Materials Corp. v. Superior Court*.[8] Section III introduces the relevant portions of legal briefs filed by the Japanese government in Japanese domestic cases that dealt with the issue of waiver of individual claims pursuant to the Peace Treaty. It also references official oral and written testimonies made by Japanese government officials before the Japanese parliament, the Diet, on the same issue. These materials show that for 40 years the Japanese government explicitly stated that individual claims had not been waived. Section IV describes a shift in the Japanese government's position regarding the issue of waiver in early 2001. This section shows that the positions between the Japanese government and the U.S. government has converged only since 2001, when the Japanese government contradicted its earlier position and adopted the argument individual claims had been waived. Furthermore, this section advances possible explanations for this shift. Section V deals with other issues raised by the California Court of Appeal that, according to our survey, did not accurately reflect the reality in Japan with regard to the Peace Treaty. Section VI presents the best course of action for the Japanese government and defendant companies in the POW forced labor cases, in light of these contradictions. Finally, Section VII concludes with our recommendations to the US and Japanese governments, the defendant companies, and the American courts.

II. BACKGROUND OF THE U.S. POW CASES

Two forced labor cases, *Dillman v. Mitsubishi Materials Corp. et al.* and *Jaeger v. Mitsubishi Materials Corp.*, were filed in September 1999 with the Superior Court of Orange County in California.[9] *Martin v. Mitsui & Co., Ltd.* was filed in the Superior Court of Los Angeles County in California.[10] In these cases, former American POWs or widows of POWs brought lawsuits against Japanese companies seeking compensation for forced labor performed. Plaintiffs brought their suits under a California

8. *Mitsubishi Materials Corp., supra* note 1.
9. *Dillman*, (Cal. 1999) (No. 814430), *Jaeger*, (Cal. 1999) (No. 814594).
10. *Martin*, (Cal. 1999) (No. BC 21670).

statute enacted a few months earlier that extended the statute of limitations for their claims until the year 2010.

The applicable portion of the California statute reads:

> Any Second World War slave labor victim . . . may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state . . . Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.[11]

Defendants in response argued that the Peace Treaty barred these suits. That is, Defendants argued that Article 14(b) of the Peace Treaty, by its plain language, waived all such claims on behalf of U.S. nationals and therefore had the effect of precluding the claims brought by the plaintiffs. Mitsubishi filed a demurrer and Mitsui filed a motion for judgment on the pleadings.[12]

The three cases were consolidated as *Dillman v. Mitsubishi Materials Corp.* before Judge William F. McDonald of the Superior Court of Orange County.[13] On October 19, 2001, Judge McDonald overruled the demurrer and denied the motion for judgment on the pleadings.[14] Defendant companies challenged this order by filing a petition for a writ of mandate before the court. The appellate court issued a writ of mandate, commanding the trial court to vacate its prior orders and dismiss the case.[15] Plaintiffs filed a petition for rehearing, which was denied.[16] They then filed a petition for review with the California Supreme Court.[17] The Supreme Court granted review on April 30, 2003.[18]

III. JAPANESE GOVERNMENT'S POSITION ON THE ISSUE OF WAIVER WITH REGARD TO INDIVIDUAL CLAIMS

Post-war Japan has had a long history of grappling with the issue of individual claims as a result of the Peace Treaty and other bilateral treaties signed by its government. Until early

11. CAL. CIV. PROC. CODE § 354.6 (West 2003).
12. Plaintiff's Petition for Review at 9, *Mitsubishi Materials Corp.* (No. 814430).
13. *Dillman*, (Cal. 1999) (No. 814430) at 5.
14. *Dillman v. Mitsubishi*, (No. 814430), slip op. at 1 (Cal. Sup. Ct. 2001).
15. *Mitsubishi Materials Corp., supra* note 1, at 749.
16. *Mitsubishi Materials Corp., order denying rehearing* (No. 814430 & 814594).
17. Plaintiff's Petition for Review at 9, *Mitsubishi Materials Corp.*, (No. 814430).
18. Mitsubishi Materials Corp. v. Super. Ct. of Orange County, 133 Cal. Rptr. 2d 147 (2003).

2001, the government of Japan consistently took the position that individual claims were not waived by these treaties.

A. PRE-2001

1. The Japanese government's position in Domestic Cases

a. Peace Treaty Waiver of Claims Case

The Japanese government was first confronted with the issue of waiver of individual claims in a case in which it took the position that the San Francisco Peace Treaty did not waive individual claims. The position arose out of a 1956 case involving two American soldiers stationed in Japan during the U.S. occupation, who shot a Japanese civilian during the course of their robbery.[19] In this case, the Japanese victim believed that he could not sue the offenders because of the Peace Treaty. Thus, the victim brought suit against the government of Japan for damages since it was the government of Japan that had waived his individual claims against the offenders by Article 19(a) of the Peace Treaty.

Article 19(a) of the Peace Treaty stipulates:

> Japan waives all claims of Japan and its nationals against the Allied Powers and their national 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.[20]

With the Treaty in full effect in 1956, the government of Japan responded, "What is covered by Article 19(a) was, when compared with (c) of the same Article, only the claims of our country against the country that the offenders belong to, namely diplomatic protection, and it is understood that *claims of the victim against the offenders have not been waived.*"[21] The court disagreed with the government on its interpretation of "waiver" clause of the Peace Treaty and declared that Article 19(a) waived not only diplomatic protection but also individual claims of Japanese nationals against nationals of Allied Powers. The court, therefore, dismissed the case stating that the plaintiff could not

19. Horimoto v. Japan, 90 HANREI JIHÔ [Judicial Reports] 9, 10 (Tokyo Dist. Ct., Aug. 20, 1956).

20. Peace Treaty, *supra* note 3, at art. 19(a). This provision is considered to have the same effect as Article 14(b) with respect to waiving of individual claims. "Article 19(a), similarly closed off the possibility of claims being brought by Japanese nationals against the United States or its nationals arising out of both the war and the subsequent occupation of Japan." *Former U.S. World War II POW's: A Struggle for Justice Before the S. Judiciary Comm.*, 106th Cong. 12 (2000) (statement of Ronald J. Bettauer, Deputy Legal Adviser, U.S. Department of State).

21. *Horimoto*, 90 HANREI JIHÔ at 10 (emphasis added).

hold the government liable for damages that could not be recovered because of signing the Peace Treaty. It reasoned that Japan, as a defeated nation, had no choice but to sign the Treaty.

b. Appeal of the Peace Treaty Waiver of Claims Case (1959) Tokyo High Court

During the appeal, the government of Japan repeated its earlier arguments and elaborated on its interpretation of Article 19. It stated: "What was waived by the said Article (Article 19) were claims based on so-called diplomatic protection, which the Japanese government owned against foreign countries under international law, and it should be understood that claims owned by individual Japanese victims under international law or domestic law, which they exercise independently from their own government, were not waived." The government distinguished diplomatic protection clams between the sovereigns from individual claims between Japanese and U.S. nationals. Furthermore, the Peace Treaty did not merely preserve individual claims. According to the government, "because the [individual] claims were not owned by the government to begin with there should not be a situation where individuals lost their claims as a direct result of a treaty no matter what promise their government made by signing a treaty with a foreign country." In other words, the government did not believe it had the power to sign away individual claims even if it wanted to.[22]

The Tokyo High Court, like the trial court, did not agree with the government's position.
It ruled that Article 19(a) resulted in petitioner's loss of his individual claim but it was not illegal for the government of Japan to sign the Peace Treaty.[23] The court explained, "[T]he Peace Treaty was signed so that Japan could reclaim independence and the Japanese representatives to the Peace Treaty negotiations could not help but accept what Allied Powers demanded by Article 19. . ."[24] The dismissal was affirmed.

c. Canadian Property Case (1963) Tokyo District Court

In a Canadian property case, the Japanese government merely implied that individual claims had not been waived, while explicitly stating it could not protect the Japanese plaintiffs be-

22. Horimoto v. Japan, 10 KAMINSHŪ 712, 715-6 (Tokyo High Ct., Apr. 8, 1959) (emphasis added).

23. Haruyuki Yamate, *Dainijitaisenji no Kyoseirodo ni Taisuru Beikoku ni Okeru Tainichikigyo Sosho ni Tsuite*, KYOTO GAKUEN HOGAKU, [On WWII Forced Labor Lawsuit Against Japanese Companies in the United States], Vol. 2-3, at 99 (2000).

24. *Id.*

cause the Peace Treaty precluded the Japanese government from exercising its diplomatic protection for overseas assets held by Japanese nationals.

A Japanese couple who had lived in Canada from 1928 to 1943 sued the government of Japan seeking compensation for the property they left in Canada and later liquidated by the Canadian government under Article 14(a)2(1) of the Peace Treaty.

This specific subsection reads in pertinent part:

> Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interest of
> (a) Japan and Japanese nationals,
> (b) persons acting for or on behalf of Japan or Japanese nationals, and
> (c) entities owned or controlled by Japan or Japanese national which on the first coming into force of the present Treaty were subject to its jurisdiction.[25]

The plaintiffs sought compensation for their lost property under the Japanese Constitution Article 29(3) which stipulates, "Private property may be taken for public use upon just compensation therefor."[26] The Japanese government argued it must restrain itself from exercising its diplomatic protection for the plaintiffs in light of the Peace Treaty. However, for reasons that are not clear, it never explicitly argued that plaintiffs' individual claims were waived by the Peace Treaty. According to the government:

> The party who can change the ownership of the properties covered here is Allied Powers and not the government of Japan. Article 14(a)2(1) acknowledged that Allied Powers, based on their sovereign power, could liquidate assets of our nation or its nationals as their domestic action. This means that the government of Japan restrains itself from exercising its diplomatic protection for overseas assets held by Japanese nationals.[27]

That is, the Japanese government again offered the explanation of diplomatic protection between the sovereigns. However, both the government and court eschewed the waiver language of the Peace Treaty all together. Instead, the case turned on an interpretation of the Japanese Constitution. The court dismissed the case concluding that Article 29(3) of the Japanese Constitu-

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25. Peace Treaty, *supra* note 3, at 14(a)2(I).

26. NIHONKOKU KENPÔ [KENPÔ] [Constitution], art. 29, para. 3, (Japan) (stating, "Private property may be taken for public use upon just compensation therefor. . .") *available at* http://www.oefre.unibe.ch/law/icl/ja00000_.html#A029 (as of July 20, 2003).

27. Akiyama v. Japan, 329 HANREI JIHÔ 7, 8 (Tokyo Dist. Ct., Feb. 25, 1963).

tion did not apply to the property taken by the Allied Powers as a result of the Peace Treaty.

d. Shimoda Case (1963) Tokyo District Court

The 1963 Shimoda decision, well-known in the English-speaking realm, explicitly addressed the issue regarding waiver of individual claims.[28] In this case, the Japanese court addressed the issue of whether the Japanese government owed compensation to atomic bomb victims of Hiroshima and Nagasaki for waiving their claims that would have existed, but for the signing of the Peace Treaty. The victims and families alleged that the Japanese government had an obligation to pay damages for waiving their potential claims against the United States.[29] To this, the government responded, "The government of Japan, by Article 19(a) of the Peace Treaty, *did not waive its nationals' individual claim* for damages against the government of the United States and President Truman . . ." It reiterated the distinction between diplomatic protection among sovereigns and individual claims. As for the diplomatic protection, "[i]t is a government's right to negotiate with foreign countries based on international law claims and therefore it is no doubt that it can be waived by an agreement with foreign countries." However, for claims brought by individuals, the "individual right to seek compensation without going through his/her government is different. No matter what a nation promised by signing a treaty with other foreign country, it will not directly affect it." The Japanese government unambiguously concluded that, "'claims of Japanese nationals' in Article 19 (a) should be interpreted as only that of Japanese government based on its nationals' claims, so-called diplomatic protection of Japan."[30]

The Japanese government continued to argue that individual claims were not waived, in spite of its own court's ruling in that individual claims were in fact waived by the Peace Treaty. The trial court ruled for the government by dismissing the case. However, it again disagreed with the government's theory and held that the Peace Treaty had waived individual claims.

e. Siberian Internee Compensation Case (1989)

In 1981, former Siberian internees brought a suit against the Japanese government. They argued that because the government waived their individual claims against the Soviet Union by the

28. Shimoda v. Japan, 355 HANREI JIHÔ, 17 (Tokyo Dist. Ct. Dec. 7, 1963), translated in part in 8 Japanese Ann. Intl. L. 212 (1964).

29. *Id.* at 23-24.

30. *Id.* (emphasis added).

Joint Declaration by the USSR and Japan, the Japanese government was obligated to compensate them for the labor they performed in the Soviet Union.[31]

Consistent with arguments in the Shimoda case, the Japanese government maintained that individual claims had not been waived. According to the government's reply brief, "the claims that Japan waived by Article 6(2) of the Joint Declaration by the USSR and Japan were claims owned by the government of Japan itself and diplomatic protection, and the *claims owned by the Japanese national individuals were not waived.*"[32]

The court held that the government did not have an obligation to compensate the former Siberian internees. This time, however, the court did not expressly state that plaintiffs' individual claims were waived. Instead it argued that even if only diplomatic protection was waived by the Treaty, (meaning individual claims were not waived) plaintiffs did not possess any means to realize their individual claims other than through the government's exercise of its diplomatic protection.[33] The court further reasoned that the sufferings of Siberian Internees were part of war damages that must be accepted by all citizens.[34] Ultimately, Supreme Court denied appeal in 1997.[35]

f. Siberian Internee Compensation Case (2000)

Another Siberian internee compensation case was filed in 1999.[36] The Japanese government filed an answer in 2000 where it repeated, "The claims that Japan waived by Article 6(2) of the Joint Declaration by the Union of Soviet Socialist Republics and Japan were claims owned by the government of Japan itself and diplomatic protection, and the *claims owned by Japanese nationals as individuals were not waived. . .* By the Joint Declaration by the Union of Soviet Socialist Republics and Japan, Japan never waived any rights owned by Japanese nationals."[37] That case was dismissed by both the trial and appellate courts on the same grounds as the 1989 Siberian internee compensation case. The case is now before the Supreme Court.

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31. Nikaido v. Japan, 1329 HANREI JIHÔ, 36 (TOKYO DIST. CT., APR. 18 1989).
32. *Id.* at 119 (emphasis added).
33. *Nikaido*, 1329 HANREI JIHÔ at 37.
34. *Id.*
35. Nikaido v. Japan, 51 MINSHÛ 1223 (Sup. Ct., Mar. 13, 1997) (Ruling on file with authors).
36. Plaintiff's Complaint, Matsumoto et al. v. Japan, (Osaka Dist. Ct. 2000) (*Wa*) No. 3409 (copy on file with authors: courtesy of Koichi Ikeda, plaintiff).
37. Government answer at 10, *Matsumoto et al.*, (Osaka Dist. Ct. 2000) (*Wa*) No. 3409, Vol. 4, (copy on file with authors: courtesy of Koichi Ikeda, plaintiff) (emphasis added).

2. *Testimonies by Government Officials before the National Diet*

a. Tsunoda Testimony in the National Diet (April 8, 1980)

Of equal interest are the official statements made by the Japanese government on the issue of waiver of individual claims. The following statement is in regards to the Joint Declaration by the Union of Soviet Socialist Republics and Japan.[38] The Joint Declaration by the USSR and Japan was signed in 1956 and reads in part, "The Union of Soviet Social Republics renounces all reparations claims against Japan. The USSR and Japan agree to renounce all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August, 1945."[39] It is considered that this waiver clause has the same effect as that of Article 14(b) and Article 19(a) of the Peace Treaty.[40]

On April 8, 1980, during the House of Representatives Cabinet Committee meeting, questions arose regarding claims of 600,000 Japanese soldiers, who were captured by the Soviet forces at the end of World War II taken to Siberia and forced to work under harsh Siberian conditions for 2-5 years. One diet member argued that claims for compensation against the Soviet government should have been made:

> The government has answered that Japanese soldiers should have been treated according to the Hague Convention but they were not. Therefore their claims for compensation for mistreatment should have been made against the Soviet government. Waiving of these claims in exchange of a normalization of relation [between Japan and the USSR] amounted to public use of private property and Article 29 of the Constitution [Takings Clause] should have been applied.[41] I ask what the government position is on this issue.

Reijiro Tsunoda, Director-General of the Cabinet Legal Bureau answered that the Peace Treaty waived the Japanese government's power to exercise diplomatic protection, but not individual claims:

> As for the claims waived by Article 6 of the Joint Declaration by the Union of Soviet Socialist Republics and Japan, the waiver was the same as in Article 19(a) of the Peace Treaty and it has been the basic position of the government of Japan that except for the government's own claims, it was diplomatic

38. Joint Declaration by the Union of Soviet Socialist Republics and Japan, (October 19, 1956) 1957, U.N.T.S 112. [hereinafter Joint Declaration by USSR and Japan].

39. *Id.* at 6.

40. See *infra* footnote 42.

41. KENPÔ art. 29, no. 3.

protection that was waived and that claims owned by Japanese nationals as individuals were not waived.[42]

b. Takashima Testimony in the National Diet (March 26, 1991)

Another government testimony on the same issue was made on March 26, 1991, during the House of Councilors Cabinet Committee meeting. Yushu Takashima, an official of the Foreign Ministry, was asked how individual claims of Siberian internees could be exercised. To this he responded, "Not having waived individual claims means that *individual claims* based on the domestic legal system of the Soviet Union *have not been waived.* Therefore, if an individual is to exercise his right to claims, it will have to be under the domestic law of the Soviet Union."[43]

c. Yanai Testimony in the National Diet (August 27, 1991)

During a House of Councilors Budget Committee meeting on August 27, 1991, Shunji Yanai, Chief of the Treaty Bureau of the Ministry of Foreign Affairs, explained what the settlement of claims between Japan and the Republic of Korea meant under "The Basic Agreement between Japan and the Republic of Korea." Although Yanai's testimony is regarding the Basic Agreement, its effect on individual claims is the same as that of the Peace Treaty. This is because Article 26 of the Peace Treaty states, "Japan . . . is prepared to conclude with any state which is signed or adhered to the United Nations Declaration of January 1, 1942 . . . a bilateral Treaty of Peace on the *same or substantially* the same terms as are provided for in the present Treaty."[44]

Yanai also reiterated that individual claims had not been waived:

> As the Honorable Councilwoman must be aware, the issue of claims between the two countries was finally and completely settled by so-called "The Japan-Korea Agreement on Right of Claims." What this means is that all claims that had existed between Japan and Korea, including nationals' claims, were settled—meaning that both Japan and Korea renounced the right of diplomatic protection they retained as states. Therefore, *it does not mean that so-called individual rights themselves were extinguished in the sense of domestic law.* It means that neither government can raise this issue as an exercise of the right of diplomatic protection.[45]

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42. *HR*, 91st Sess., Cabinet Committee, 8th Meeting [8 April, 1980], p. 5 (emphasis added).

43. *HC*, 120th Sess., Cabinet Committee, 3rd Meeting [26 March, 1991], p. 13.

44. Peace Treaty at art. 26 (emphasis added).

45. *HC*, 121st Sess., Budget Committee, 3rd Meeting [27 August 1991], p. 9-10 (emphasis added).

3. *Tetsuo Ito's Law Review Article (1994)*

In 1994, Tetsuo Ito, former Director of the Legal Affairs Division, Treaties Bureau of the Ministry of Foreign Affairs, wrote an article in which he summarized the official position of the Japanese government on the issue of individual claims. The article was entitled "Japan's Settlement of the Post-World War II Reparations and Claims."[46] The article reported that under the treaties, the Japanese government seemed to have relinquished its right of diplomatic protection with respect to claims of its nationals:

> [I]t seems the following view of the Japanese government is persuasive: the waiver by a state of claims of its nationals provided for in [the] treaties concerned *does not mean the renunciation of the right to claim themselves, which its nationals possess, or at least, can claim to possess*, on the basis of its municipal laws, but means the renunciation of the right of diplomatic protection, which the state possesses, in respect of claims of its nationals, under international law.[47]

4. *Prime Minister Obuchi's Statement (1997)*

In 1997, Hideyuki Aizawa of the House of Representatives again raised the issue of Siberian internees' individual claims. In response to Aizawa's written questionnaire, then Acting Prime Minister Keizo Obuchi repeated the earlier position, "As to the claims waived by Article 6 of the Joint Declaration by the Union of Soviet Socialist Republics and Japan, except for the government's own claims, it was diplomatic protection that was waived and *claims owned by Japanese nationals as individuals were not waived.*"[48]

B. AFTER 2001

We now turn to how the Japanese government has handled the issue of waiver of individual claims after 2001.

1. *Government's argument in Dutch POW Appeal Case (February 2001)*

In 1999, former Dutch POWs and civilian internees lost their case against the government of Japan for compensation for damages they suffered under the Japanese military during World War

46. Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, 37 JAPANESE ANN. INT'L L. 38, 68-69 (1994) (emphasis added) (reporting "view of the Japanese Government").

47. *Id.* at 68-69 (emphasis added).

48. House of Representatives Cabinet Questionnaire, Prime Minister Keizo Obuchi, Vol. 141 No. 9, (November 28, 1997) (emphasis added).

II.[49] On appeal, the Japanese government filed an answer on February 27, 2001, and changed its position, now arguing among other things:

> Waiver of claims stipulated in Article 14(b) [of the Peace Treaty] should be construed that the *government of Japan and Japanese nationals can refuse claims of nationals of Allied Powers based on domestic law because any legal obligation to answer those claims was extinguished* [by the signing of the Peace Treaty].[50]

For the first time, the government of Japan employed this new argument. When the same case was before the trial court in 1999, the government never mentioned that their obligation to answer claims had been extinguished by the Peace Treaty. Baffled by this sudden shift in the government's position, plaintiffs' counsel wrote to the government on April 5, 2001. The counsel asked whether the government had abandoned its previous position, which purported that individual claims had not been waived by the Peace Treaty.[51] The government's lawyers replied on April 20, 2001, that the government had not changed its position.[52] However, they also made a point that the government's position was in agreement with the Statement of Interest filed by the U.S government with the Federal District Court of Northern California[53] for *In re World War II Era Japanese Forced Labor Litigation* on August 17, 2000.[54] In that statement of interest, the U.S. government stated, "[I]n Article 14 of the Treaty, the Allied nations expressly waived – on behalf of themselves and their nationals – claims arising out of actions taken by Japan and its nationals during the war."[55] In 2001, the Tokyo High Court dismissed the Dutch POW lawsuit.[56]

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49. Lapre-Meeng v. Japan (Tokyo Dist. Ct. 1999) (*Wa*) No.1218 (copy on file with authors: courtesy of Yoshitaka Takagi, plaintiff's attorney).

50. Government answer at 18, Lapre-Meeng v. Japan (Tokyo High Ct. 2001) (*Ne*) No. 247, Vol. 3, (copy on file with authors: courtesy of Yoshitaka Takagi, plaintiff's attorney) (emphasis added).

51. Brief for plaintiff at 5, *Lapre-Meeng*, (Tokyo High Ct. 2001) (*Ne*) No. 247 (copy on file with authors: courtesy of Yoshitaka Takagi, plaintiffs' attorney).

52. *Id.*

53. Defendants in 11 cases had removed to federal district court.

54. Government answer at 19, *Lapre-Meeng*, (Tokyo High Ct. 2001) (*Ne*) No. 247, Vol. 3 (copy on file with authors: courtesy of Yoshiaki Takagi, plaintiff's attorney). Statement of Interest of United States of America, *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL-1347) (filed Aug. 17, 2000).

55. Statement of Interest of United States of America, *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 at 2 (N.D. Cal. 2000) (No. MDL-1347) (filed Aug. 17, 2000).

56. *Lapre-Meeng*, (Tokyo High Ct. 2001) (*Ne*) No. 247.

2. *Ebihara Testimony in the National Diet (March 22, 2001)*

The change in the government's position did not go unnoticed. Response in the Diet came within a month after the dismissal of the Dutch POW case. Hideo Den, a member of the House of Councilors, asked about the recent change in the government's position on "individual claims" during the House of Councilors Foreign Relations and Defense Committee meeting on March 22, 2001. Referring to the government's brief submitted for the Dutch POW appeal case, Den asked Shin Ebihara, Chief of the Treaty Bureau of the Ministry of Foreign Affairs, to explain why the government was now arguing that the POW claims were extinguished by the Peace Treaty when in the past, it maintained that individual claims had not been waived by it or the Joint Declaration by USSR and Japan.

Ebihara explained:

> It has been the position of our government that claims by nationals of Allied Powers would not be given relief. In our brief this time, we reiterated that pursuant to Article 14(b) 'the legal obligation to answer claims based on these claims and debts was considered extinguished and as a result relief is denied.[57]

Unsatisfied with this response, Den further asked if the new interpretation was put forward as a result of consultation between Japan and the United States where there was a need to bring the Japanese government's position in line with the U.S. position.[58]

Ebihara responded, "we are not saying that individual claims themselves were extinguished. . ." He continued to explain that the interpretation had been shared by both Japan and the United States from the outset and denied that it had been changed or that a new position had been adopted because of the recent lawsuits in the United States.[59]

Still unconvinced, Den stated, "I must conclude that your interpretation of waiving of nationals' claims, although dealt with separately in Article 14 and Article 19, is inconsistent because you are saying to only one group that individual claims were not waived."[60]

Ebihara reiterated:

> With all due respect, I must repeat that our position has been consistent that claims held by nationals themselves were not

57. *HC*, 151st Sess., Foreign Relations and Defense Committee, 4th Meeting [22 March 2001], p. 13.
58. *Id.* at 13-4.
59. *Id.* at 14.
60. *Id.*

> extinguished, but as a result of the San Francisco Peace Treaty, nationals could not obtain satisfaction regarding these claims, in other words although there is a right to claims, there can be no relief granted.[61]

In sum, this exchange established the Japanese government's current position, that although individual claims were not extinguished, the Japanese government's legal obligations to answer such claims were extinguished by the Peace Treaty.

3. *Appeal of the Siberian Internee Compensation Case (2001)*

The shift manifests itself in the ongoing Siberian Internee Compensation appeal. Recalling that from 1999 to 2000, the government of Japan strenuously insisted in the lower courts that individual claims had not been waived by the Joint Declaration by USSR and Japan. By November 15, 2001, the government's appellate brief filed with the Osaka High Court refrained from saying that claims had not been waived. Although prepared by the same government attorney, the brief no longer contained the sentence, "The claims that Japan waived by Article 6(2) of the Joint Declaration by the Union of Soviet Socialist Republics and Japan were claims owned by the government of Japan itself and diplomatic protection, and the claims owned by Japanese nationals were not waived."[62]

4. *Prime Minister Koizumi Statement (January 28, 2003)*

More recently, on January 28, 2003, Prime Minister Junichiro Koizumi responded to written questionnaires from the House of Councilors Mitsuru Sakurai on the issue of compensation for former Siberian internees. Again, we find an absence of the government's previous insistence that individual's claims had not been waived:

> As for the so-called 'Siberian Internees issue,' since Article 6 of the Joint Declaration by the Union of Soviet Socialist Republics and Japan stipulates, 'The Union of Soviet Socialist Republics renounces all reparations claims against Japan. The USSR and Japan agree to renounce all claims by either states, its institutions and citizens, against the other states, its institutions or citizens which have arisen as a result of the war since 9 August, 1945.' It has been the position of the government that our country does not have a legal responsibility for compensation.[63]

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61. *Id.*

62. Plaintiff's Brief No.1, Matsumoto et al. v. Japan, (Osaka High. Ct. 2002) (*Ne*) No. 118 (copy on file with authors: courtesy of Koichi Ikeda, plaintiff).

63. *Available at* http://www.uranus.dti.ne.jp/~sakurai/ (as of July 22, 2003).

He further argued that the ruling by the Supreme Court on March 13, 1997, in case No. 1751 (Siberian Internee Compensation case) shared the same reasoning.

IV. OBSERVATIONS AND POSSIBLE EXPLANATIONS

Despite the Japanese government's insistence that there is no discrepancy between its position on individual claims before 2001 and after 2001, the fact remains that until early 2001, the Japanese government had always taken the position that the Peace Treaty and other bilateral agreements did not waive individual claims. However, since early 2001, the Japanese government began to posit that although individual claims were never *extinguished*, Japan's legal obligation to answer such claims was extinguished by the Peace Treaty. Although Japanese government officials claim that this has been their "consistent position," there is very little, if any, on the record prior to 2001 that would show that the Japanese government had ever adopted this view in its past domestic cases.

A. ILO Attempts to Confirm Japan's Pre-2001 Position

All Japan Shipbuilding and Engineering Union has been very active on redressing Japan's wartime forced labor. Their efforts were frustrated by the Japanese government's insincere response to claims by former forced laborers from China and Korea whose lawsuits they were assisting. In recent years, the Union brought the issue to the International Labor Organization, ("ILO") asking it to confirm the Japanese government's position on the waiver issue. In 2003, the ILO issued *Report of the Committee of Experts on the Application of Conventions and Recommendations* regarding Japanese government's position on waiver of individual claims.[64] It wrote:

> All Japan Shipbuilding and Engineering Union indicated in its communications of June 2001 that, with regard to war-related compensation, the position of the Japanese government is that a treaty has put an end to the right to demand compensation and the right to diplomatic protection at the state level, but not the right of individuals to damages.[65]

The Union had listed three instances where the Japanese government took such a position, (i) the Shimoda case, (ii) the

64. ILO Forced Labour Convention (No. 29), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1930 Japan (ratification: 1932) Observation, (CEACR 2002/73rd Session) *available at* http://www.ilo.org/ilolex/cgilex/pdconv.pl?host=status01&textbase=iloeng&document=6594&chapter=6&query=%23year%3D2003+%2B+Japan%40ref&highlight=&querytype=bool&context=0 (as of Aug. 1, 2003).

65. *Id.* at § 1(b) (ii).

Siberian Internee Compensation case, and (iii) the Yanai testimony at the Diet.[66] After reading the Japanese government's response the ILO report stated:

> The Committee notes that, in its reply to the union's reference to these comments, the Government indicates that the statement of Mr. Shunji Yanai was intended to explain that all the issues of reparations claims related to the last war between Japan and the Allied Powers, including the claims of individuals, had been settled from the viewpoint of the right of diplomatic protection that is a concept of general international law. In other words, he explained that even if Japanese nationals' claims against the Allied Powers or their nationals were dismissed, Japan could no longer pursue state responsibilities of the Allied Powers. The Committee notes that the Government *did not provide any comments which refute the other examples cited by the union, namely, its statement in the Atomic Bomb Victims Lawsuit* (Final Judgment in 1963) and its statement of the interpretation of Article 6 of the Joint Declaration of Japan and the Soviet Union, in relation to the Siberian Internee Compensation Lawsuit (Final Judgment 1989) other than to quote the text of Article 6 of that declaration.[67]

In the United States, Congressmen and Senators have also pointed out the discrepancy in the Japanese government's position. In an op-ed article in the *Washington Post*, Senators Tom Harkin (D-IA) and Bob Smith (R-NH), and Congressmen Mike Honda (D-CA) and Dana Rohrabacher (R-CA) wrote, "Until the current litigation began, the Japanese government consistently took the position that the treaty did not waive such private claims."[68]

B. U.S. Government's Position/Japanese Government's Position

In an amicus curiae brief filed February 14, 2002, with the Court of Appeal of California in *Mitsubishi Materials v. Superior Court*,[69] the U.S. government stated its official position with regard to the Peace Treaty and individual claims. "[T]he Treaty of Peace between the United States, other Allied nations, and Japan, *waived* all clams of American and Allied nationals against Japan and Japanese nationals arising out of the war."[70] This has been the U.S. government's consistent position in the postwar

66. *Id.*
67. *Id* (emphasis added).
68. Tom Harkin, Mike Honda, Dana Rohrabacher, Bob Smith, Editorial, *Justice for Our Veterans*, Washington Post, Sat, October 6, 2001, at A27.
69. *Mitsubishi Materials Corp., supra* note 1.
70. Brief of Amicus Curiae United States Government in Support of Writ Petition, at 1, *Mitsubishi Materials Corp.*, 130 Cal. Rptr. 2d 734 (2002) (No. 814430) (emphasis added).

years with regard to the interpretation of waiver of individual claims.

To solidify its position on the issue of individual claims, the Japanese government filed a diplomatic note in August of 2000, claiming that, "[t]he government of Japan fully shares the position of the United States government that claims of the United States and its nationals (including prisoners of war) against Japan and its nationals arising out of their actions during World War II were *settled* by the Peace Treaty."[71]

Despite their insistence that the Japanese government "fully shares" the position of the U.S. government with regard to the individual claims for former POWs, even the word choice of their two official written statements, "waived" and "settled," cannot be read as being in accord. Having maintained for so long that individual claims had not been waived, the Japanese government was trapped by its own words and could not, with a straight face, say that the Peace Treaty waived all claims. Therefore they attempted to align themselves with the U.S. government's position by creating an impression of congruence through a careful choice of words instead of explicitly adopting or rejecting the waiver of individual claims. Its evasiveness reveals an attempt to maintain the appearance of consistency in light of its long-time domestic position that individual claims had not been waived.

C. What Explains Japan's Pre-2001 Position and Shift After 2001?

The foregoing survey revealed that despite Ebihara's testimony on the Diet floor, there indeed exists a discrepancy between Japan's pre-2001 and post-2001 positions on individual claims. Why did the Japanese government insist so stubbornly before 2001 that individual claims were not waived? One possible explanation is that the Japanese government did not want to compensate more than a half million returning Siberian internees. Many of those veterans had endured 2-5 years of forced labor and were returning to Japan in the late 1940's and early 1950's. It was soon thereafter, that the Japanese government began arguing that individual claims had not been waived. By maintaining that the internees' claims were not waived, the Japanese government could argue that such claims were still open, and theoretically could be maintained in Soviet courts. After 2001, however, the government began appending a new explanation emphasizing that Japan had no legal responsibility to answer

71. The Views of the Government of Japan on the Lawsuits against Japanese Companies by Former American Prisoners of War and Others, *supra* note 7, at 1 (second emphasis added).

those individual claims. This article will now turn to possible explanations for this 2001 shift.

Professor Haruyuki Yamate of the Kyoto Gakuen University of Japan, after observing a series of Japanese cases, wrote an article entitled, "Clauses Waiving Reparation and Claims in Japan's Postwar Treaties." There he theorized, "In order to better prepare for POW cases in the United States, the Japanese government was now facing the need to bring its argument in line with that of the United States' government."[72]

Given the timing of the shift, it is only logical to assume that the case *In re World War II Era Japanese Forced Labor Litigation*,[73] played a role in Japan's shift on its position regarding individual claims. In that case Judge Vaughn R. Walker unequivocally stated that POWs individual claims had been waived by the Peace Treaty. Although until this time, the Japanese government's primary concern had been the prospect of having to compensate Siberian internees, they were now faced with the pressing issue of American POW lawsuits in the United States. Having read Judge Walker's decision, the Japanese government must have concluded that it needed to align its position with that of the U.S. in order to help the Japanese defendant companies defend their cases.

V. ADDITIONAL ISSUES RAISED BY THE CALIFORNIA COURT OF APPEAL DECISION: CONFLICTING EVIDENCE

In its decision to dismiss, the California Appeals Court wrote, "Without a waiver of all war crime claims that could have been brought by either side, Japan and the United States might have wrangled endlessly about the liabilities arising out of the war."[74] Further, in its footnote the court expressed its concern that allowing POW cases would undermine the good relations that the Peace Treaty was intended to promote, "Indeed, the commencement of a similar case in federal court has prompted one commentator to note that allowing domestic law claims by former American POWs threatens the good relations that the 1951 treaty was intended to promote." The court noted this is especially the case because "throughout the suit, many plaintiffs went on record as saying that they desired to have their day in

72. Haruyuki Yamate, *Nihon no Sengoshori Jyoyaku ni Okeru Baisho/Seikyukenhoki Jyoko* [Clauses Waiving Reparation and Claims in Japan's Postwar Treaties], 1 KYOTO GAKUEN HOGAKU 76 (2001).

73. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d, 939, *supra* note 3.

74. *Mitsubishi Materials Corp.*, *supra* note 1, at 743.

court for purposes of revealing the details of wartime offenses committed against American soldiers in the Pacific. . .The Japanese responded to these observations by exclaiming that these claims were a 'form of extortion' and that if the United States desired to do so, the gloves essentially would come off." The court observed that "in an effort to combat the [POW] claims and show that America was not without guilt in the Second World War, Japanese officials voiced a desire to surface the questionable usage of atomic warfare in both Hiroshima and Nagasaki." Hence, the court pronounced that tensions would have soared had the World War II case gone before a jury.[75]

This statement, however, is false and misleading for a variety of reasons. These reasons are explored in the next two sections.

A. Not All Japanese View These POW Lawsuits as "Extortion"

Japanese society does not monolithically see POW lawsuits as a form of "extortion." Despite the government's firm insistence that the Peace Treaty settled the claims of former POWs, there have been many voices calling for an honorable resolution to this issue. The *Asahi Shimbun*, the second largest daily newspaper in Japan with a circulation of eight million, wrote in its editorial, "We feel the time is right for the Japanese government to back down from its stubborn insistence that all such matters (compensation issues) were resolved under the San Francisco Peace Treaty, and exhibit renewed sincerity in searching out more acceptable solutions to these claims."[76] It also ran four oped pieces on this topic in the past two years two of which were written by one of the authors of this article.[77] On September 28, 2001, former Diet member Yukihisa Fujita listed what Japan should do regarding POW cases:

1) Companies involved should work cooperatively to reach an out-of-court settlement;
2) Disputes should be settled while the plaintiffs, who are aging former prisoners of war, are alive;

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75. *Id.* at 744 (quoting Nicholas P. Van Deven, *Taking One for the Team: Principle of Treaty Adherence as a Social Imperative for Preserving Globalization and International Legal Legitimacy as Upheld in* In re World War II Era Japanese Forced Labor Litigation, 46 St. Louis U. L.J. 1091, 1122-23 (2002)).

76. Editorial, Asahi Shimbun, April 28, 2002 at 1.

77. Kinue Tokudome, Op/Ed, *Watashi no Shiten*, [My View Point], *Senji Hosho: Kigyo wa Beihoryo Sosho ni Seii Shimese*, [Wartime Compensation: Japanese Companies Should Show Sincerity in POW Lawsuits in the U.S.], Asahi Shimbun, Jul. 27, 2001, at 13. Kinue Tokudome, Op/Ed, *Watashi no Shiten*, [My View Point], *Beiheihoryo Hosho: Seii Shimeshite Wakai Hatase*, [American POW's Compensation: Show Sincerity and Achieve Reconciliation], Asahi Shimbun, Apr. 8, 2003, at 10.

3) The Japanese government should apologize to individual prisoners of war; and
4) Japan should reach an agreement with the U.S. government over these proposed settlements.[78]

Additionally, *Asahi Shimbun* carried an op-ed piece by Dr. Lester Tenney, one of the POW plaintiffs, in which he wrote, "I strongly believe that forgiveness and responsibility go hand in hand. One without the other is meaningless."[79]

Some members of the National Diet have also displayed support for former POWs. When Dr. Tenney visited the Diet in March of 2003, more than a dozen lawmakers greeted him warmly. Tomiko Okazaki, House of Councilors member and the leader of lawmakers seeking a legislative solution for victims of Japanese war crimes, spoke on the record during the House of Councilors Cabinet meeting about Dr. Tenney. She said:

> The day before yesterday, I met Dr. Tenney who is visiting Japan. Some heartless members of the media in Japan have portrayed him as an anti-Japan flag bearer. . .but in reality he loves Japan and once hosted a Japanese exchange student at his home. He says, "I forgave Japan, forgave but will not forget. . . In order to reclaim my freedom I want the Japanese company to say one word 'sorry' and as a proof to show that I was not a slave I want them to compensate me, whatever amount." Those victims who seek an apology and compensation are not necessarily all anti-Japanese. They seek to restore their honor and human dignity. . .[80]

In 2000, a group of Japanese human rights lawyers and scholars also proposed for the creation of a "Japan Forced Labor Compensation Fund." They visited Germany and modeled the proposal after the German foundation, "Remembrance, Responsibility and Future."[81] According to their proposal, a foundation to which both the Japanese government and Japanese companies will contribute would:

1) Benefit to serve as an apology to individual victims and to help compensate for damages.

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78. Yukihisa Fujita, Op/Ed, *Watashi no Shiten*, [My View Point], *Senji Hosho: Beihoryo Sosho no Seijiteki Kaiketsu wo*, [Wartime Compensation: Political Solutions to American POW lawsuits], ASAHI SHIMBUN, Sept. 28, 2001, at 15.

79. Lester Tenney, Op/Ed, *Watashi no Shiten*, [My View Point], *Beiheihoryo: Kyosei Rodo wa Kigyoga Sekinin wo*, [American POW: Companies Take Responsibility for Forced Labor], ASAHI SHIMBUN, Nov. 7, 2001, at 13.

80. *HR*, 156th Normal sess. Cabinet Committee, March 20, 2003. Vol. 1, No. 2 at 11.

81. *Available at* http://www.state.gov/documents/organization/6531.doc (as of Aug. 30, 2003). By creating the foundation the German government and companies, both of which contributed to the foundation, took, "moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II."

2) Make condolence payments to the families of victims.
3) Plan and implement projects to investigate and research the past, and to educate future generations about this issue.
4) Implement projects to achieve lasting peace through mutual exchanges with the citizens of victimized countries.[82]

B. Atomic Bomb Victims Not Likely to Sue the U.S.

The Court of Appeal opinion gave credence to the possibility that if American POWs are allowed to sue Japanese companies, then victims of the atomic bombs may bring suits against the U.S. government. Japanese Ambassador Shunji Yanai also made a veiled threat along similar lines. He said on June 27, 2000, the day before the Senate Judiciary Committee held a hearing on POW forced labor lawsuits, "The Japanese side has something to say to the U.S. regarding the compensation issue."[83]

However, atomic bomb victims are not likely able to sue the United States since the illegality of nuclear weapons is far from being established. For example, although the Shimoda case decided that the dropping of the atomic bomb was a violation of international law,[84] when the Minister of Foreign Affairs was questioned a few months after the decision, he stated that he could not agree with the decision.[85] He went on to say that "the atomic bombing was no doubt a tragic and regrettable incident, but that he could not state conclusively, as a matter of strict law, that the bombing had been in violation of international law, inasmuch as no rule of positive international law would appear to have existed on this point."[86]

The International Court of Justice has also decided in 1996 that, "[T]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons. . .the Court cannot conclude definitively whether the threat or use of nuclear weapons would

82. A Proposal for a Japan Forced Labor Compensation Fund, October 11, 2000, Committee for Study of the Japan Forced Labor Compensation Fund, Representative: Shoichi Matsuo, Professor, Hosei University.

83. *Japan Backs Firms that Used Forced Labor, Ex-POWs Step up Reparation Campaign*, Japan Times Online, June 30, 2000, *available at* http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20000630a8.htm (as of July 26, 2003).

84. Anthony D'Amato, *Book Review: The Practice of Japan in International Law, 1961-1970*, 78 Am. J. Int'l. L. 733 (1984) (book review).

85. The Practice of Japan in International Law, 1961-1970, 403 (Shigeru Oda & Hisashi Owada eds., 1982).

86. *Id.*

be lawful or unlawful."[87] Therefore it does not seem likely that atomic bomb victims have a cause of action.

VI. SETTLEMENT IS IN THE BEST INTERESTS OF ALL PARTIES

A. SETTLEMENT TALKS PROVIDE AN OPPORTUNITY FOR JAPAN TO SHOW SINCERITY

What has come to light from this survey on how the government of Japan has dealt with the issue of individual claims is that it has seldom shown genuine sincerity toward those victims who suffered as a result of its aggressive war. Moreover, at present, it seems that the Japanese government is failing to seize its last opportunity to do so.[88]

A long legal battle is in no one's best interests. For the Japanese defendant companies, being exonerated legally will never compare to the recognition and respect that can be earned by taking moral responsibility. They may prevail in court on technical grounds; yet even if they do, they will undoubtedly pay the price of losing goodwill from segments within the U.S. population. On the other hand, if defendant companies and the Japanese government acknowledge the historical fact of forced labor, offer a sincere apology, and pay just compensation to victims, such acts will bring long overdue justice to victims of wartime forced labor, as well as help Japan gain respect in the international community.

Indeed, many parties in the United States have repeatedly offered the Japanese side a chance to come to the table for settlement talks. Both houses of the U.S. Congress passed a resolution urging the U.S. administration to facilitate settlement negotiations.[89] It also introduced bills calling for the U.S. government to pay compensation to former POWs.[90]

Even those lawmakers who introduced the bills enabling POW lawsuits to proceed in the courts[91] have been working to-

87. Legality of the Threat or use of Nuclear Weapons, 1996, I.C.J. 226. (Jul. 8, 1996), *available at* http://www.lawschool.cornell.edu/library/cijwww/icjwww/idecisions/isummaries/iunanaummary960708.htm (as of July 20, 2003).

88. An example of a possible role for the Japanese government to play can be found in a book by Michael Bazyler, HOLOCAUST JUSTICE, THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS, (New York University Press 2003). This is an example of a successful settlement for similar World War II forced labor lawsuits where the government also became involved. See also, STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, (PUBLIC AFFAIRS, 2003).

89. S. Con. Res. 158, 106th Cong. (2000).

90. S. 1302, 107th Cong. (2001)., H.R. 2835, 107th Cong. (2001). H.R. 2658, 108th Cong. Title IX (2003).

91. S. 1154, 107th Cong. (2001)., H.R. 1198, 107th Cong. (2001).

ward a settlement behind the scenes. In February 2002, a group comprised of Congressmen sent a letter to President George W. Bush as he prepared to leave for a trip to Japan, urging the President to work towards the resolution of these lawsuits.[92] Major American veteran's organizations, such as the American Legion and the Veterans of Foreign Wars, have also sent letters to the President to the same effect.[93] Indeed, all of these groups await the Japanese side to take this opportunity to show genuine sincerity in resolving these lawsuits.

B. SETTLEMENT WILL NOT VIOLATE THE PEACE TREATY

One concern that has been raised is the negative effect of the POW cases on US-Japan relations. As stated above, the decision to dismiss the Dillman case by the Court of Appeal of California included concerns that allowing POWs claims may threaten the good relations established by the Peace Treaty. According to the court, one of the concerns was, "[t]he danger of a cycle of recriminations when each side perceives itself to have been the object of grievous wrongs. There was a need for a mutual release of war claims to assure lasting peace."[94] The U.S. government has emphasized in their official statements that these lawsuits should not be allowed to go forward because "for nearly 50 years, this Treaty has sustained our security interests and supported peace and stability throughout East Asia."[95] The Japanese government has also advised that allowing these cases to proceed would go against what the Peace Treaty intended. In its most recent statement it reiterated:

> The government of Japan is deeply concerned that. . .a wave of lawsuits has been brought against a number of Japanese companies. If a U.S. court permits the reopening of war claims set-

92. Letter from Roscoe Bartlett, Steve Chabot, Lane Evans, Mike Honda, Duncan Hunter, Ileana Ros-Lehtinen, and Dana Rohrabacher, Congress of the United States, House of Representatives, to George W. Bush, President of the United States, (Feb. 12, 2002) (copy on file with authors). The letter in pertinent part stated: "We therefore ask that, during your visit to Tokyo, this issue [American POW forced labor lawsuit] be raised with a view toward seeking Japanese cooperation in moving toward a mutually agreeable outcome."

93. Letter from Richard J. Santos, the National Commander of the American Legion, and James N. Goldsmith, the Commander-in-Chief of the Veterans of Foreign Wars, to George W. Bush, President of the United States (Feb. 7, 2002) (copy on file with authors).

94. *Mitsubishi Materials Corp.*, *supra* note 1, at 742-43.

95. *World War II Slave Labor Lawsuit: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 83-84 (2000) (statement of Ronald J. Bettauer, Deputy Legal Advisor, U.S. Dept. of State).

> tlements attained by the Peace Treaty, such a decision would have negative repercussions . . .[96]

Whatever the validity of these concerns, a legislative measure by the Japanese government to resolve the POW issue would not unravel the Peace Treaty itself. On September 8, 1999, then Chief Cabinet Secretary Hiromu Nonaka, answering a question by Shoji Motooka, member of the House of Councilors, clarified the government's position on the possibility of a legislative solution to the war- related compensation issues. After repeating the long-held position of "[t]he San Francisco Peace Treaty and other bilateral treaties solved those issues," he nevertheless went on to say, "Based on these treaties, what kinds of measures, including new legislation, we will take for so-called 'Comfort Women' was not an issue prescribed by these treaties. In addition, I think that taking such measures will not create a constitutional problem."[97]

Although Nonaka's statement was meant to clarify the government's position on the issue of "Comfort Women," the significance lies in that the Japanese government made it clear that if legislation were to be enacted to address the issues that were purportedly dealt with in the Peace Treaty, it would not have the effect of unraveling the treaty. Similarly, lawsuits, if settled, may improve the relationship between the two countries in the long run.

C. Learning from History

Stuart Eizenstat, former Under Secretary of Commerce, who spearheaded the Clinton Administration's effort to mediate the Nazi-era litigations, wrote in his book, *Imperfect Justice*:

> I believe that the most lasting legacy of the effort I led was simply the emergence of the truth . . . At our encouragement, twenty-one countries, from Argentina and Brazil to Latvia and Lithuania, have established some twenty-eight historical commissions to examine their roles in World War II . . . It was not only government that launched retrospectives. Daimler-Chrysler, Degussa, and Deutsche Bank hired historians to catalogue their involvement with the Third Reich.[98]

This begs the question: what will be the lasting legacy if all the POWs cases are dismissed? Japanese companies that used

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96. The Views of the Government of Japan on section 354.6 of Code of Civil Procedure of the State of California, Submitted to the Department of State, February 20, 2003, at 2.

97. *HC*, 145th Sess, Budget Settlement Committee, September 8, 1999, Vol. 14, No. 1 at 17.

98. Stuart Eizenstat, Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II 346-48 (Public Affairs, 2003).

Allied POWs as well as Chinese and Korean civilians as forced laborers have seldom acknowledged their wartime involvements, much less taken responsibility for them. It is unlikely that these companies will voluntarily open up their company archives.[99]

Neither has the government of Japan been willing to make records on its wartime history available to the public. When the Japanese Imperial Government Disclosure Act of 2000 was enacted by the U.S. legislature in December of 2000[100] to declassify U.S. records on Japanese war crimes, the Japanese Embassy in Washington, DC sent a facsimile to the State Department asking if there will be prior consultation.[101] In implementing this new law, the U.S. government determined that, "anything relating to American and Allied Prisoners of War should be considered relevant as most POWs suffered at the hands of their Japanese captors."[102] Having officially declared that it opposed POW lawsuits, the Japanese Embassy attempted to preview these records which could contain possibly incriminating information for the Japanese defendant companies. These actions are in stark contrast with the recent trend in the international community where many democratic countries try to face their dark past squarely.

Therefore, a settlement that includes an uncovering of all the relevant records, in addition to a clear apology and just compensation, would reveal the full scope of the Japanese forced labor issue. Only then, can the true lessons of history be learned.

VII. CONCLUSION

The foregoing survey is only a preliminary investigation of important facts regarding the Japanese government's position on

99. *See U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan*, CRS REPORT FOR CONGRESS, The Library of Congress, at 12 (Updated July 27, 2001) ("Because researchers lack access to Japanese government and private company records, no one knows how many people Japanese firms used as forced laborers.").

100. *Japanese Imperial Government Disclosure Act of 2000,* 106th Cong. (Pub. L. 106-567) Title VIII (2000).

101. Facsimile from Masaki Takaoka, Congressional Affairs Section, Embassy of Japan, to Mr. Hotz, State Department, Office of Japan Affairs, dated December 28, 2000. "This is about 'Disclosure of Information on Japanese Imperial Government,' and I am somewhat concerned about potential effects of your release of Japanese Imperial Army records on Japan and its relationship with the United States. . .Can the US government provide to the Japanese government beforehand specific records scheduled to be released under this law?" The cover page of this facsimile was released on April 8, 2002, and the letter was released on July 28, 2003 to Kinue Tokudome by the United States Department of State, Freedom of Information Act Office (Request No. 200101588) (copy on file with authors).

102. *Search Term List Regarding World War II Japanese War Crimes, War Criminals, Prosecution, and Looting*, Interagency Working Group [IWG], December 5, 2000.

the issue of waiver of individual claims. We have undertaken to translate relevant portions of judicial opinions and government statements that were contrary to the U.S. government's position. In doing so, it has become our belief that the defendant companies and the U.S. government have an obligation to complete an investigation on Japan's position on waiver of individual claims. This must be done with full cooperation from the Japanese government since the position it took for half a century after the signing of the Peace Treaty would not preclude American POW forced labor lawsuits. If Japan insists that its position is in accord with that of the United States, it must explain the discrepancy identified in this article.

The California Supreme Court, in hearing the *Dillman* appeal, should not dismiss the case until it has heard a satisfactory explanation on this troubling issue. In the interim, the defendant companies should decide that it is in the best interest of all parties to settle *Dillman* and all other forced labor cases.

Dr. Tenney, one of the plaintiffs of the POW forced labor lawsuits against Japanese companies, wrote Mr. Koichi Ikeda, one of the plaintiffs of the Siberian internees claim lawsuit against the Japanese government:

> Sometimes the courage to live is harder than having to die. We have some of the same heart breaking tragedies of the past, the pain is the same, the mental torture is the same and the humiliation is the same. Justice is not just a word; it is a feeling, a desire for those guilty to face up to their responsibility. Too bad the rest of the world can't see that people are just people after all. All have the same needs and feel the same pain. Thanks for making me a part of this great effort of living together. Good luck to you, my friend, keep your spirits high and do not surrender yourself again.[103]

Mr. Ikeda replied:

> Your words, "Forgiveness and responsibility go hand in hand. One without the other is meaningless," (Asahi Shimbun oped) left a profound impression on me because that was exactly the same conclusion I reached as someone who had gone through a similar tragedy. I believe that the day will soon come when "Justice" is finally restored. I pray that you will be well when you see that day.[104]

The Japanese government is now presented with most likely the last opportunity to bring justice to those victims who, like Dr. Tenney and Mr. Ikeda, suffered unspeakable cruelty. It should come forward, clarify its position on individual claims, and en-

103. E-mail from Dr. Lester Tenney, to Mr. Koichi Ikeda, (Oct. 23, 2002, 02:28 PST) (on file with authors).

104. E-mail from Mr. Ikeda, to Dr. Tenney, (Oct. 24, 2002, 7:26 JST) (on file with authors).

courage defendant companies to settle American POW forced labor lawsuits.

POSTSCRIPT

The California Supreme Court, on February 24, 2004, denied the second petition filed by the plaintiffs asking for a review on the *Dillman* case, ending the former POWs' four and a half year legal battle. It is hoped that the defendant companies, now having been legally exonerated, will take the initiative with the Japanese government in order to bring an honorable closure to the tragic episode of POW forced labor during World War II.