

The Treatment of Takeshima in the Treaty of Peace with Japan

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Abstract

The range of Japan's territory after World War II was determined by the Treaty of Peace with Japan (signed in San Francisco on September 8, 1951). The provision relating to Takeshima is Article 2 (a), which provides: "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet."

Some early drafts of the treaty placed Takeshima outside the range of Japan. However, the revised US–UK draft of June 1951 prescribed Article 2 (a) based on the understanding that Takeshima is Japanese territory. In July 1951, the Republic of Korea requested the US to amend that provision to state that Dokdo (the Korean name for Takeshima) is ROK territory, but in its response that August the US refused the ROK request to amend the provision, stating that Takeshima is Japanese territory. The provision in the revised US–UK draft became Article 2 (a) without any changes, and this determined that there was no change to Takeshima's status as Japanese territory after the war.

Today, the ROK is claiming that SCAPIN (Supreme Commander for the Allied Powers Instruction Note) 677, which excludes Takeshima from the jurisdiction of the Japanese government under the Occupation, is based on the Cairo Declaration (which states that Japan will be expelled from areas it has taken) and that the San Francisco Peace Treaty is an extension of this policy. The ROK also insists that the above-mentioned August 1951 response from the US was only the opinion of the US and has no binding force to determine the territorial rights of Dokdo. However, Takeshima was never Korean territory, so the argument that it was "taken" does not hold. Furthermore, the above-mentioned drafting process, which includes the US response, has significance in interpreting the terms of the treaty (confirming the meaning of "Korea" in Article 2 (a)) as "the preparatory work of the treaty."

1 Changes to Japanese Territory after World War II

With the end of World War II, Japan accepted the Potsdam Declaration (July 26, 1945). Paragraph 8 of the Potsdam Declaration reads: "The terms of the Cairo Declaration shall be

carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." The Cairo Declaration (announced December 1, 1943) prescribes, "It is their [US, UK and China] purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers . . . are determined that in due course Korea shall become free and independent."

Japanese carried out sea lion hunting and abalone fishing on Takeshima with permission from the government (the shogunate) in the 17th century, and Takeshima was incorporated into Shimane Prefecture through the procedures under modern international law in 1905: the island has never belonged to any country other than Japan. Accordingly, when determining the minor islands in paragraph 8 of the Potsdam Declaration, it was expected that Takeshima would be retained by Japan. The determination of which islands would be retained by Japan other than Honshu, Hokkaido, Kyushu and Shikoku, and which islands would be separated from Japan was made by the Treaty of Peace with Japan (signed in San Francisco on September 8, 1951, entered into effect on April 28, 1952). Article 2 (a) of the treaty—"Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet"—is the provision that relates to Takeshima.

2 Drafts by the US Department of State

The drafting of the Treaty of Peace with Japan began with the preparation of a draft of territorial clauses by the persons in charge at the US Department of State in March 1947,¹ after the Treaty of Peace with Italy was signed. The Department of State drafts underwent numerous revisions thereafter; the main subsequent versions included the drafts of August 5, 1947, January 1948, October 13, 1949, November 2, 1949, and December 29, 1949². The Department of State drafts listed the islands retained by Japan, and individually stipulated the

1 US National Archives and Records Administration (NARA), State Department Records, RG59, Decimal File 1945-49, Box 3501, 740.0011PW (PEACE) /3-2047.

2 1947.8.5 draft: NARA, RG59, 740.0011PW (PEACE) /8-647; 1948.1 draft: NARA, RG59, Lot56 D527, Records of the Office of Northeast Asian Affairs Relating to the Treaty of Peace with Japan, Box 4; 1949.10.13 draft: NARA, RG59, Decimal File 1945-49, Box 3503, 740.0011PW (PEACE) /10-1449; 1949.11.2 draft: NARA, RG59, 740.0011PW (PEACE) /11-749; 1949.12.29 draft: NARA, RG59, Lot54 D423, Japanese Peace Treaty Files of John Foster Dulles, Box 12, Treaty Drafts 1949-March 1951.

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territories to be separated from Japan. Among these, the drafts through November 2, 1949 included Takeshima in the clause on territories to be renounced in favor of Korea³.

In response to the November 2 draft, William J. Sebald, the acting US political adviser for Japan, submitted commentary to the Department of State via telegram and detailed commentary stating that Japan's claim to Takeshima "is old and appears valid."⁴ This position was adopted, and in the December 29, 1949 draft, Takeshima was removed from the clause on territories to be renounced in favor of Korea (Article 6; see footnote 3), and added to the list of islands to be retained by Japan at the beginning of the territorial provisions (Article 3 Paragraph 1): "The territory of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including the islands of the Inland Sea (Seto Naikai); Tsushima, Takeshima (Liancourt Rocks), Oki Retto, Sado, Okujiri, Rebun, Riishiri. . . . All of the islands identified above, with a three-mile belt of territorial waters, shall belong to Japan."

3 Draft by Secretary of State Consultant Dulles

Next, "Daft #2"⁵ dated August 7, 1950 was prepared by John Foster Dulles, who was serving as a consultant to the Secretary of State. This and the subsequent drafts were much simpler compared with the previous drafts prepared by the Department of State, and did not have any provisions listing the islands belonging to Japan. The provision related to Korea in the August 7 draft reads, "4. Japan recognizes the independence of Korea and will base its relation with Korea on the resolutions adopted by the United Nations Assembly on December __, 1948." This draft was revised on September 11, 1950,⁶ with its main points summarized in a seven-item memorandum of that same date⁷ The concerned section "3. Territory" simply states that "Japan would (a) recognize the independence of Korea; (b) agree to U.N. trusteeship, with the U.S. as administering authority, of the Ryukyu and Bonin Islands and (c) accept the future decision of the U.K., U.S.S.R., China and U.S. with reference to the status of Formosa, Pescadores, South Sakhalin and the Kuriles. . . ."

Because of the adoption of such simplified wording, there were no provisions listing the islands that belong to Japan and no mention of Takeshima, but there was no change to the understanding that Takeshima is Japanese territory. Responding to a question from the government of Australia, regarding the seven principles, for "more precise information concerning the disposition of former Japanese territories," the Department of State replied, "It is thought that the islands of the Inland Sea, Oki Retto, Sado, Okujiri, Rebun, Riishiri, Tsushima, Takeshima . . . all long recognized as Japanese, would be retained by Japan. . . ."⁸

After the seven-point memorandum, the work of drafting the Treaty of Peace with Japan by the US government passed through the January 12, 1951 new memorandum (submitted by Dulles to the UK Ambassador) and the February 3, 1951 Dulles mission memorandum (unofficially presented to the Japanese government on February 5) to become the March 23, 1951 Provisional United States Draft of a Japanese Peace Treaty.⁹ The provision related to Korea in this US draft (Article 3) reads, "Japan renounces all rights, titles and claims to Korea, Formosa and the Pescadores. . . ."

4 Preparation of the Joint US–UK Draft

The UK had been preparing its own draft of the Treaty of Peace with Japan separate from the US. The UK draft had a continuous line drawn on a map showing the range of Japanese territory: Takeshima was placed inside the line in the February 1951 draft, but was placed outside the line in the second draft of March 1951 and in the April 7, 1951 Provisional Draft of Japanese Peace Treaty (Article 1).¹⁰ The April 7 UK draft also prescribed the renunciation of Korea in Article 2.¹¹

The US Department of State and the UK Foreign Office held discussions in Washington D.C. from April through May 1951, and the Joint United States–United Kingdom Draft of Peace Treaty was prepared on May 3.¹² Article 2 of the joint US–UK draft reads, "Japan renounces all rights, titles and claims to Korea (including Quelpart, Port Hamilton and Dagelet), [Formosa and the Pescadores]. . . ." During the US–UK discussions, the US pointed out the psychological disadvantages of seeming to fence

3 Article 6 Paragraph 1 of the November 2, 1949 draft reads, "Japan hereby renounces in favor of Korea all rights and titles to the Korean mainland territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima), and all other islands and islets to which Japan has acquired title lying outside the line described in Article 3 and to the east of the meridian 124°15' E. longitude, north of the parallel 33° N. latitude, and west of a line from the seaward terminus of the boundary approximately three nautical miles from the mouth of the Tumen River to a point in 37°30' N. latitude, 132°40' E. longitude."

4 Telegram: The Acting Political Adviser in Japan (Sebald) to the Secretary of State, Foreign Relations of the United States 1949, Vol.7, pp.898-900; Commentary: NARA, RG59, 740.0011PW (PEACE)/11-1949. In the detailed commentary, Sebald stated that the method of delineating the range of Japan by connecting points specified by longitude and latitude and fencing in Japan "has serious psychological disadvantages," and he opposed this method.

5 *Foreign Relations of the United States 1950*, Vol.6, p.1267-.

6 *Foreign Relations of the United States 1950*, Vol.6, p.1297-.

7 *Foreign Relations of the United States 1950*, Vol.6, pp.1296-1297; Department of State Bulletin, Dec. 4, 1950, p.881.

8 *Foreign Relations of the United States 1950*, Vol.6, p.1328.

9 *Foreign Relations of the United States 1951*, Vol.6, p.944-.

10 Feb. draft: The National Archives (TNA) of the UK, PRO: Foreign Office Records, FO371/92532, FJ1022/97, p.58-; March draft: TNA, PRO: FO371/92535, FJ1022/171, p.70-; April draft: TNA, PRO: FO371/92538, FJ1022/222, p.14-.

11 "Japan hereby renounces any claim to sovereignty over, and all right, title and interest in Korea, and undertakes to recognise and respect all such arrangements as may be made by or under the auspices of the United Nations regarding the sovereignty and independence of Korea."

12 *Foreign Relations of the United States 1951*, Vol.6, p.1024-.

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Japan in by a continuous line around Japan, and the UK agreed to drop its proposal in Article 1 of the above-mentioned UK draft.¹³ Also during the discussions, both sides agreed it would be desirable to only list the territories to which Japan was renouncing sovereignty. In this connection, it became necessary to insert the three islands Quelpart, Port Hamilton and Dagelet into Article 3 of the US draft.¹⁴ Thus, the understanding that Takeshima is Japanese territory was maintained in the joint US–UK draft as well.

Following further coordination through Dulles’ visit to the UK in June 1951, the Revised United States–United Kingdom Draft of a Japanese Peace Treaty was prepared dated June 14, 1951.¹⁵ The clause regarding renunciation of Korea came to read: “Article 2 (a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.”

5 Request for Revisions from the ROK Government and US Denial

On July 19, 1951, Korean Ambassador to the US You Chan Yang visited Dulles and handed him a document addressed to US Secretary of State Dean G. Acheson requesting changes to the revised US–UK draft, as ordered by his government. Specifically, the ROK government requested that the word “renounces” in Article 2 Paragraph (a) should be replaced by “confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part of Korea prior to its annexation by Japan, including the islands Quelpart, Port Hamilton, Dagelet, Dokdo and Parangdo.”¹⁶

US Assistant Secretary of State Dean Rusk responded to this on behalf of the Secretary of State in a note dated August 10, 1951 which declined the ROK request as follows. “The United States Government regrets that it is unable to concur in this proposed amendment. The United States Government does not feel that the Treaty should adopt the theory that Japan’s acceptance of the Potsdam Declaration on August 9, 1945 constituted a formal or final renunciation of sovereignty by Japan over the areas dealt with in the Declaration. As regards the island of Dokdo, otherwise known as Takeshima or Liancourt Rocks, this normally uninhabited rock formation was according to our information never treated as part of Korea and, since about 1905, has been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan. The island does not appear ever before to have been claimed by Korea.”¹⁷

The provision in the revised US–UK draft was adopted as Article 2 (a) unchanged, and this determined that Takeshima’s status as Japanese territory remained unchanged after the war as well.

6 Present ROK Claims and Their Propriety

Although the above are historical facts, and fundamentally cannot be refuted, the ROK has recently been making the following type of claim.¹⁸

The General Headquarters applied SCAPIN-677 (January 29, 1946), which provides that Dokdo, along with Ulleungdo, belongs to the area that is excluded from Japan’s governmental or administrative authority. The Allied Powers’ decision to exclude Dokdo from Japan’s territory was part of postwar measures to implement the results from the Cairo Declaration (1943) and the Potsdam Declaration (1945), which obligated Japan to renounce territories it had taken by “violence and greed.” Thus, Dokdo was rightly included as an area Japan should relinquish because it was Korea’s territory, which Japan usurped through violence and greed during the Russo-Japanese War.

These measures taken by the Allied Powers were succeeded in the San Francisco Peace Treaty signed in September of 1951. Even though Dokdo was not explicitly mentioned in the treaty, it is only natural to see Dokdo as having been included in the Korean territory that Japan should relinquish. Even islands larger than Dokdo were not all referred to in the treaty, because it was impossible to mention all the islands of the Republic of Korea.

Also the “Rusk Note,” upon which Japan bases its claim for sovereignty over Dokdo, has no legal effect in determining the holder of sovereignty over the island, as this note only reflected the opinion of the United States, not the opinion of the Allied Powers as a whole.

This claim does not hold either in terms of the facts or from a legal perspective. First, SCAPIN-677 of January 1946 removed Takeshima from the jurisdiction of the Japanese government under the Occupation, but this was a measure for occupation and not a disposition of territory. SCAPIN-677 itself includes the proviso (paragraph 6) that “Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.” The disposition of territory was conducted by the Peace Treaty. To begin with, Takeshima was never Korean territory. There is little evidence for the ROK claim that “Usando” which appears in ancient Korean books and maps is Takeshima and that Takeshima was historically Korean territory, and so on.¹⁹ The ROK has also not presented any evidence of effective occupation of Takeshima. The claim that Japan took

13 Department of State commentary in response to the opinion of New Zealand regarding Article 2 in the May 3 draft, in Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State (June 1, 1951), Foreign Relations of the United States 1951, Vol.6, p.1061.

14 TUnited States Chapter III, in Anglo-American Meetings of Japanese Peace Treaty, Summary Record of Seventh Meeting held at 10.30 a.m. on the 2nd May, in Washington, TNA, PRO: FO371/92547, FJ1022/376, p.66.

15 *Foreign Relations of the United States 1951*, Vol.6, p.1119-.

16 NARA, RG59, Lot54 D423, Japanese Peace Treaty Files of John Foster Dulles, Box 8, Korea. Also, *Foreign Relations of the United States 1951*, Vol.6, p.1206.

17 NARA, RG59, Lot54 D423, Japanese Peace Treaty Files of John Foster Dulles, Box 8, Korea. Also, *Foreign Relations of the United States 1951*, Vol.6, p.1203, f.n.3.

18 Northeast Asian History Foundation, ed., “Truth 7,” *Ten Truths about Dokdo not known in Japan*, 2012.

19 For details, see Takashi Tsukamoto, Takashi Tsukamoto, “Examining the Korean Government’s Claims with Regard to Sovereignty over Takeshima: A point-by-point analysis of the official publicity pamphlet ‘Dokdo, Beautiful Island of Korea’”, The Japan Institute of International Affairs, Japan’s Territories Series, Japan Digital Library (March 2017), http://www2.jiia.or.jp/en/digital_library/japan_s_territories.php

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Takeshima lacks the premise (that Takeshima was Korean territory).²⁰

Next, the Peace Treaty is interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its object and purpose (see Article 31 of the Vienna Convention on the Law of Treaties). Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of this method, or to determine the meaning when the interpretation through this method leaves the meaning ambiguous

or obscure (Article 32 of the Convention). The “ordinary meaning . . . in its context and in light of its object and purpose” of Korea in Article 2 (a) of the Treaty of Peace with Japan is the Korea that was annexed to Japan in 1910, and does not include Takeshima. If additionally necessary, the meaning of this term “Korea” is confirmed and determined by the “preparatory work” presented in sections 2 through 5 above. The “islands larger than Dokdo” were not all referred to because they are included in the term Korea. The Rusk note has great significance as the preparatory work of the treaty (and it is not the opinion of the US alone).

20 SCAPIN-677 may have influenced the exclusion of Takeshima in the early Department of State drafts and UK drafts. In turn, SCAPIN-677 may have been influenced by the September 27, 1945 US Fifth Fleet Commander Memorandum No. 80, which was the predecessor of the MacArthur Line. (The text of the Memorandum is reprinted in Kenzo Kawakami, *Sengo no kokusai gyogyo seido* [The postwar international fisheries regime] (Dainippon Suisankai, 1972), 54–55.) This memorandum gives comprehensive permission for fishing operations within certain water areas in response to a September 26 request from the government of Japan. In setting the water areas in the Sea of Japan, as a result of drawing a straight line from the northern tip of Tsushima to 40N, 135E in the middle of the Sea of Japan, the line ran through Takeshima. Because this response was given one day after the request, it is clear this line was just drawn mechanically. The exclusion of Takeshima in SCAPIN-677 does not result from any judgment by the Allies that Takeshima is a territory that was taken by Japan.