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POWs Left in the Cold: Compensation Eludes American WWII Slave Laborers for Private Japanese Companies

I. INTRODUCTION

During World War II, thousands of American soldiers were taken as prisoners of war by the Japanese military and used as slave labor by private Japanese companies.[1] During their enslavement, the prisoners of war endured "barbaric conditions, which included routine beatings, starvation, and lack of medical care."[2] Furthermore, the POWs were "forced to work

1. *See* Mark Fritz, *Bill Could Hamper Investigation into U.S. Knowledge of Japanese Atrocities*, L.A. TIMES, Oct. 26, 2000, at A22. According to historians, the Japanese took approximately 50,000 United States soldiers as prisoners during the war. *U.S. House Urges President to Tackle Japan WWII Labor Suits*, JAPAN POL'Y & POL., Dec. 25, 2000, *available at* 2000 WL 29267740. About half were sent to Japan where they performed forced hard labor. *Id.* Linda Goetz-Holmes, a member of the historian advisory committee to the U.S. Interagency Working Group, said "some of the worst beatings and mistreatment of Allied POWs were carried out by civilians at big Japanese companies who used slave labor, such as . . . Kawasaki, the conglomerate that makes motorcycles, Jet Skis and subway cars for the New York City system." Fritz, *supra*, at A22. There are five Japanese companies that used the largest amount of American prisoners as slave labor between 1942 and 1945: Mitsubishi, Mitsui, Nippon Steel, Kawasaki Heavy Industries, and Showa Denko. *WWII Ex-POWs Send Slave Labor Book Supporting Their Claims to Japanese Companies*, PR NEWSWIRE, Jan. 12, 2001.

Japanese forces captured the American soldiers when the United States surrendered Bataan, in the Philippines, on April 9, 1942. Press Release, U.S. Congress, Hatch Gets Senate to Agree: U.S. Should Increase Efforts for Justice for Bataan Death March Victims (Nov. 1, 2000), *available at* 2000 WL 7981014 (hereinafter Justice for Bataan Death March Victims). General Douglas MacArthur chose to station troops in Bataan because he believed it was the key to holding Manila Bay, a crucial strategy against the Axis Powers in World War II. *See* Paul Reid, *Remembering Bataan*, PALM BEACH POST, Nov. 11, 2000, at 1A.

Approximately eighty-five percent of the men captured by the Japanese in Bataan died before the war ended in 1945. *Id.* The prisoners had endured three great miseries: the Bataan Death March, the "Hell Ships," and slave labor for private Japanese companies. Justice for Bataan Death March Victims, *supra*. The Bataan Death March was a trail of about sixty miles through the dangerous terrain in Bataan. *Id.* The "Hell Ships" were freighters that transported thousands of prisoners of war in "horrific conditions" to Japan. *Id.* And finally, those who survived the long journey were sent to private Japanese steel mills and forced into labor until the end of the war. *Id.*

2. *WWII Ex-POWs Send Slave Labor Book, supra* note 1.

under treacherous conditions in mines, factories, and shipyards."[3] Today, those same companies are worth multi-billion dollars and have extensive U.S. operations.[4] In July 1999, the California legislature passed a law enabling victims of slave labor, including former prisoners of war, to seek compensation from foreign companies in California courts.[5] Consequently, many of the surviving victims of the aforementioned slave labor recently filed claims in California courts against the private Japanese companies for whom they labored during the war.[6] Although California provided these plaintiffs with a cause of action, their cases were dismissed at the District Court level.[7] The court based its conclusion on the Multilateral Peace Treaty with Japan, signed by the United States in 1951.[8]

This Comment analyzes the court's response to a novel question of law: Can the Multilateral Peace Treaty with Japan bar private claims against private parties? This question is discussed as follows. Part II of this comment introduces the relevant Treaty articles pertaining to plaintiffs' claims and the court's interpretation of those provisions.[9] Part III analyzes the Treaty provisions under the Vienna Convention.[10] Part IV presents a historical review of the United States government's custom of waiving nationals' claims against foreign sovereigns.[11] Part V describes California's efforts to address plaintiffs' situation by enacting a statute that gave them a cause of action in the California courts.[12] Part VI describes the federal issues involved in plaintiffs' claims and the legal implications of applying the Treaty to bar plaintiffs' private action.[13] Part VII investigates the role of Congress as an alternative source of compensation.[14] Finally, Part VIII discusses the remaining factors that could influence a resolution.[15]

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3. *Id.*

4. *Id.*

5. CAL. CIV. PROC. CODE § 354.6 (West 2001).

6. *See In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 939-40 (N.D. Cal. 2000) (*Forced Labor Litig.*) (determining thirteen separate suits); *see also In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1164-65 (N.D. Cal. 2001) (*Forced Labor Litig. II*) (determining seven separate suits).

7. *Forced Labor Litig.*, 114 F. Supp. 2d at 949; *Forced Labor Litig. II*, 164 F. Supp. 2d at 1183.

8. *Id.*; *see also* Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

9. *See infra* notes 16 - 61 and accompanying text.

10. *See infra* notes 62 - 112 and accompanying text.

11. *See infra* notes 113 - 183 and accompanying text.

12. *See infra* notes 184 - 187and accompanying text.

13. *See infra* notes 188 - 217 and accompanying text.

14. *See infra* notes 218 - 259 and accompanying text.

15. *See infra* notes 260 - 276 and accompanying text.

II. THE MULTILATERAL TREATY OF PEACE WITH JAPAN

The United States, Japan, and forty-seven Allied Powers signed the Multilateral Treaty of Peace with Japan ("The Treaty") in 1951.[16] The Treaty became effective in the United States when President Truman signed it with the advice and consent of two-thirds of the Senate.[17]

A. Provisions of the Treaty

Chapter V of the Treaty pertains to "Claims and Property."[18] The chapter begins with article 14, which acknowledges that "Japan should pay reparations to the Allied Powers" for its conduct in the war.[19] However, in an effort to create a viable economy for Japan, the Allied Powers provided alternative measures to the reparations.[20] One of these provisions was to "seize, retain, liquidate or otherwise dispose of all property, rights and interests" of Japan, its nationals, or any entity acting in its or on their behalf.[21] In return, the Allied Powers provided a clause in the treaty waiving claims against Japan.[22]

Article 14(b) of the Treaty reads:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation. [23]

16. *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 944 (N.D. Cal. 2000).

17. *Id.*

18. Multilateral Treaty of Peace with Japan, *supra* note 8, 3 U.S.T. at 3180, 136 U.N.T.S. at 60-62.

19. *Id.*

20. *Id.*

21. *Id.* at art. 14(a), para. 2(I), 3 U.S.T. at 3181, 136 U.N.T.S. at 62. The exception to this provision was property belonging to Japanese persons residing in the territory of the Allied Powers during the war, property relating to diplomatic offices, property belonging to Japanese religious organizations, matters pertaining to subsequent trade relations, and property located in Japan. *Id.*

22. *Id.* at art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

23. *Id.*

As noted above, article 14(b) begins by stating "[e]xcept as otherwise provided," which clearly allows other provisions of the Treaty to serve as exceptions to article 14(b).[24]

Article 16 of the Treaty provides a mechanism to transfer Japanese funds to the International Committee of the Red Cross, intended to benefit former prisoners of Japan.[25] It states:

> As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable.[26]

In article 19 of the Treaty, Japan includes a waiver of the claims of its nationals against Allied Powers and their nationals.[27] Japan's waiver is extended to actions pertaining to the war effort and includes "any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers."[28]

The waiver clauses of the Allied Powers and Japan are not identical.[29] Article 14(b), waiving the Allied Powers' claims against Japan, is not as comprehensive as article 19, which waives the claims of the Japanese against the Allied Powers.[30] Most important, Japan's waiver explicitly waives the claims of prisoners of war held by the Allied Powers,[31] while the Allied Powers' waiver does not mention any waiver of prisoners of war claims.[32]

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24. *Id.*
25. *Id.* at art. 16, 3 U.S.T. at 3185, 136 U.N.T.S. at 68.
26. *Id.*
27. *Id.* at arts. 19(a)-(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70.
28. *Id.*
29. *Id.* at arts. 14 & 19, 3 U.S.T. at 3180-88, 136 U.N.T.S. at 60-72.
30. *See id.*
31. *See id.* at art. 19(a), 3 U.S.T. at 3187, 136 U.N.T.S. at 70.
32. *See id.* at art. 14(b), 3 U.S.T. at 3183, 136 U.N.T.S. at 64.

B. The Court's Interpretation of the Treaty

The court concluded that article 16 of the Treaty intended to bar the claims advanced by the plaintiffs.[33] Although the defendants have the financial ability at present to pay damages for having retained plaintiffs as slave labor in the early 1940s,[34] the court refuses to look at defendants' current financial capacity.[35] The court points out that, according to the Treaty, Japanese assets "resulting from the 'resumption of trade and financial relations subsequent to September 2, 1945'" are exempt from the reparations mechanism.[36]

The court does not point out, however, that the Treaty includes an exception to the provision cited by the court.[37] Property, rights, and interests that have come into Japan's jurisdiction as a result of "transactions contrary to the laws of the Allied Power concerned" are included in the collection of property, rights, and interests of which the Allied Powers "shall have the right to seize, retain, liquidate or otherwise dispose of."[38]

The court interprets the Treaty waiver of claims in article 14(b) to include the plaintiffs' current claims.[39] The court notes that "wholesale waiver" of future claims "is not unique."[40] Case law indicates that the United States may waive the claims of its nationals in a "wholesale" manner.[41] However, it is unclear whether this "wholesale waiver" could waive private law claims against private Japanese companies as well as United States government claims against the Japanese government. Harold G. Maier, professor of International Law at Vanderbilt University, claims: "It is unclear whether the United States government has the authority to

33. In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000). The court relies on certain recordings of the conference for the treaty in reaching this conclusion. *See id.*

34. *See* Plaintiff's First Amended Complaint For Damages and Injunctive Relief at 1-4, Alfano v. Mitsubishi Corp., Super. Ct. of the State of Cal., Feb. 22, 2000 (No. 00CC02420) (hereinafter Complaint, Alfano v. Mitsubishi Corp. (No. 00CC02420)) (on file with author).

35. *See Forced Labor Litigation*, 114 F. Supp. 2d at 946-48.

36. *Id.* (quoting Multilateral Treaty of Peace with Japan, *supra* note 8, at art. 14(a), para. 2(II), cl. (iv), 3 U.S.T. at 3182, 136 U.N.T.S. at 62-64).

37. *See id*; *see also* Multilateral Treaty of Peace with Japan, *supra* note 8, at art. 14(a), para. 2(II), cl. (iv), 3 U.S.T. at 3182, 136 U.N.T.S. at 62-64.

38. Multilateral Treaty of Peace with Japan, *supra* note 8, at art. 14(a), para. 2(II), cl. (iv), 3 U.S.T. at 3182, 136 U.N.T.S. at 62-64.

39. *In re Forced Labor Litig.*, 114 F. Supp. 2d at 945.

40. *Id.*

41. *Id.*; *see also, e.g.*, Neri v. United States, 204 F.2d 867 (2d Cir. 1953) (Italian resident's claims against United States are barred under treaty between Italy and U.S.).

waive private law claims by the former POWs against private Japanese entities as part of a government-to-government settlement. Normally a party cannot waive claims that it does not own."[42]

The court cites *Neri v. United States*[43] to support its proposition that "wholesale waiver[s]" are "not unique."[44] In *Neri*, an Italian salvage company brought suit against the United States for salvage services rendered during World War II.[45] The United States argued that it was not liable for salvage services rendered as a result of the Treaty of Peace with Italy.[46] The court agreed, finding that the Treaty with Italy specifically provided for all claims stemming from the war.[47] The Treaty stated:

> Italy waives all claims of any description against the Allied and Associated Powers on behalf of the Italian Government or Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after September 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including . . . (b) [c]laims arising from the presence, operations, or actions of forces or authorities of Allied or Associated Powers in Italian territory . . . .[48]

Although *Neri* determined that the Treaty barred the plaintiff's claims, there are important differences between *Neri* and the present case.[49] First, the Treaty of Peace with Italy and the Multilateral Treaty of Peace with Japan differ in breadth.[50] Second, in *Neri* the plaintiff was suing a government, not a private party.[51]

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42. Interview with Harold G. Maier, Professor of Int'l Law, Vanderbilt University, in Malibu, California. (Oct. 2000); *see also Compensation for Bataan POWs: Hearing Before the Senate Judiciary Comm.*, 106th Cong. (June 28, 2000) (statement of Professor Harold G. Maier on the Japanese slave labor cases), *available at* 2000 WL 23831069. *But see* Belk v. United States, 858 F.2d 706 (Fed. Cir. 1988) (holding that Algiers Accords did not constitute a taking of plaintiffs' property rights); Dames & Moore v. Regan, 453 U.S. 654 (1981) (refusing to hold that President lacks power to settle such claims); Abrahim-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997) (holding that government settlement of claims for less than full amount was not a compensable taking).

43. 204 F.2d 867 (2d Cir. 1953).

44. *Forced Labor Litig.*, 114 F. Supp. 2d at 945.

45. *Neri*, 204 F.2d at 867-68.

46. *Id.* at 868.

47. *Id.*

48. Multilateral Treaty of Peace with Italy, Feb. 10, 1947, art. 76, 61 Stat. 1245, 1401, 49 U.N.T.S. 3, 158-59. The Treaty provides a means of settling non-combat damage claims of Italian nationals against the Allied or Associated Powers by agreeing to make equitable compensation to those who furnished services at the request of these Powers in Italian territory. *See id.*

49. *See Neri*, 204 F.2d at 869.

50. *See id.* at 868.

51. *See id.* at 867.

In 1947, the United States and Italy issued a Memorandum of Understanding confirming that Italy "discharges and agrees to save harmless the Government of the United States of America from any responsibility and liability for the processing, settlement and satisfaction of any such claims."[52] The Treaty of Peace with Italy was broader than the Multilateral Peace Treaty with Japan: it waived Italian claims against both Allied and Associated Powers for any conduct during the war.[53] The Treaty of Peace with Italy also stated that the Italian government would become responsible for the Italian nationals' claims against Allied or Associated Powers.[54] By assuming the claims of the foreign powers, Italy did not purport to strip its nationals of the right to bring forth a claim.[55]

The Multilateral Treaty of Peace with Japan, as it pertains to the United States, was interpreted by the California court as having the effect of leaving the former slave laborers deprived of the right to bring forth a claim for their forced slave labor.[56]

The second important difference between *Neri* and the Japanese slave labor cases is that in *Neri*, the plaintiff sued a government, while in the latter, plaintiffs sued private foreign companies.[57] This distinction puts the two cases in completely separate categories of analysis.[58] An international treaty is presumed to apply to the governments of the participating treaty signatories.[59] History and legal theory clearly supports this application of international law.[60] In contrast, when viewed in domestic courts dealing with disputes between private parties, international treaties are generally not applied.[61]

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52. *Id.* at 869 (quoting Memorandum of Understanding Regarding Settlement of Certain Wartime Claims and Related Matters, Aug. 14, 1947, U.S.-Italy, art. I, 36 U.N.T.S. 53, 62.)

53. *See id.* at 868.

54. Multilateral Treaty of Peace with Italy, *supra* note 48, at art. 76, 61 Stat. 1245, 1401-02, 49 U.N.T.S. 3, 158-59.

55. *See id.*.

56. *See In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945-46 (N.D. Cal. 2000).

57. *See id.* at 942; *see also Neri*, 204 F.2d at 868.

58. *See infra* Parts III-IV and accompanying notes.

59. *See id.*

60. *See id.*

61. *See id.*

III. TREATY INTERPRETATION UNDER INTERNATIONAL LAW

Plaintiffs argue that the treaty cannot serve as a waiver of their individual, private claims against private parties in Japan,[62] because to do so would be a violation of international law.[63] Traditionally, international laws such as treaties are public laws, which means that they pertain to states, not individuals.[64]

A. International Treaties Signed By the President with Consent of the Senate

An agreement signed by the President and another sovereign is international law in the form of an executive agreement.[65] If the Senate consents to the agreement, it becomes international law in the form of a treaty.[66] Because a treaty is ratified by Congress, it has more validity and thus is more difficult to oppose.[67] The Multilateral Treaty with Japan was signed by the President and ratified by the Senate.[68]

B. Treaty Interpretation Under the Vienna Convention

Article 31 of the Vienna Convention states that treaties shall be interpreted in good faith based on their plain meaning.[69] This includes taking into consideration the following contexts: (1) agreements or instruments relating to the treaty; (2) subsequent agreements regarding the treaty's interpretation; (3) subsequent practice of the parties to the treaty; and (4)

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62. Complaint, Alfano v. Mitsubishi Corp. (No. 00CC02420), *supra* note 34.

63. The scope of this Comment does not extend to analysis of the American plaintiffs' rights to pursue the private Japanese corporations under various other sources, such as the Hague Convention of 1907, the Geneva Convention of 1929, the Nuremberg Tribunals of 1945, the Geneva Convention of 1949, the Thirteenth Amendment to the United States Constitution, the Alien Tort Claims Act, the Torture Victim Protection Act, and the International Labor Organization ("ILO") Treaty of 1930. *See* Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss at 29, Jackfert v. Kawasaki Heavy Indus., Ltd., U. S. Dist. Ct. (D.N.M.), Dec. 9, 1999 (No. CIV 991019 JP KBM-ACE) (on file with author).

64. *See* M.N. SHAW, INTERNATIONAL LAW 137-66 (3d ed. 1991) (explaining the orthodox positivist view that only states can be subjects of international law); *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 236 (2d ed. 1993) (reviewing judicial treatment of individuals under international law).

65. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

66. SHAW, *supra* note 64, at 564.

67. *See Youngstown*, 343 U.S. at 635-38 (Jackson, J., stating: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

68. Multilateral Treaty of Peace with Japan, *supra* note 8, 3 U.S.T. at 3169, 136 U.N.T.S. at 45.

69. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, S. EXEC. DOC. L, 92-1, p.20, 1155 U.N.T.S. 331, 340.

relevant rules of international law.[70] Also mentioned is the ability to respect "special meanings" of words.[71]

Article 32 of the Vienna Convention, titled "Supplementary Means of Interpretation," states that the preparatory work for a treaty and the circumstances of its conclusion may also be considered as supplementary means of treaty interpretation.[72]

C. Interpreting the Treaty as per Article 31 of the Vienna Convention: "Special Meanings"

A vital step in the treaty interpretation process is understanding the meaning of the treaty as it was understood by the parties to the treaty, who are usually from diverse cultures and speak different languages.[73] The word "reparations," in relation to post-war financial responsibilities, was born in the Versailles Peace Treaty in 1919, when the drafters used the term instead of "war indemnity," which was previously customary.[74] The custom of receiving indemnities originated as a tribute to the victors of a war.[75] The indemnity was a means for the victors to be reimbursed for their costs in defeating their enemies.[76] After World War I, along with replacing the term "indemnity" with "reparations," the meaning of the term was altered and it came to represent "payment for the damages caused to a victorious country and its nationals by both lawful and unlawful acts of war by a defeated country."[77] The post-World War I treaties conveyed a "unilateral nature of reparations," even though it was clear that the victors had also "caused losses and violated international law."[78]

After World War I, "the Allies . . . developed the idea of making the vanquished countries compensate only for the damage caused to the nationals of the Allied Powers."[79] This change came about with the advent of more advanced technology, which increased the damages of warfare,

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70. *Id.*

71. *Id.*

72. *Id.* at art. 32, S. Exec. Doc. L, 92-1 at 20, 1155 U.N.T.S. at 340.

73. *See id.*

74. Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, JAPANESE ANN. INT'L L., No. 37, at 43 (1994). Tetsuo Ito was the Director-General of the Treaties Bureau, Ministry of Foreign Affairs of Japan during the Treaty negotiations. *Id.* at 38.

75. *Id.* at 43.

76. *Id.* The notion of fulfilling a state's responsibility for international law violations was not a part of the indemnity concept. *See id.*

77. *Id.* at 44.

78. *Id.* at 44 (citing Keishiro Irie, STUDY OF THE PEACE TREATY WITH JAPAN 217-21 (1951)).

79. Ito, *supra* note 74, at 45.

which in turn increased the cost of reparations to the point where a defeated nation could not bear the cost of reparations.[80] After World War II, the Allied Powers continued to decrease reparations.[81] The post-World War II peace treaty reparations provision was based on the notion that Japan should pay reparations "determined by its capacity to pay."[82] The term "reparations," as related to the Second World War treaties, was "generally understood as a compensation for the loss and damage caused to the Allied Powers by military actions of the Axises."[83] The Japanese understood the term "reparations" to be a "'financial burden that a victorious nation imposed on a defeated nation when they re-established the relations of peace by concluding a peace treaty after the end of the war.'"[84]

D. Interpreting the Treaty as per Article 32 of the Vienna Convention- Circumstances of the Treaty Conclusion: the Yamashita Trial, Economic Despair, and the Korean War

In December 1945, a Military Commission, appointed by General Douglas MacArthur and convened by the United States Army Forces of the Western Pacific, prosecuted Japanese military leaders (among them Ministers, Ambassadors, Admirals and Generals) for crimes against humanity, including their cruel treatment of American prisoners of war.[85] Benjamin B. Ferencz, a former Prosecutor at the Nuremburg war crimes trials, described the trial of the Japanese leaders before the International Military Tribunal as "the biggest trial in recorded history."[86] During these trials, all of the accused were found guilty.[87] After these tribunals the American government was clearly aware of the American slave labor that took place in Japan.

The Treaty was signed six years later, in 1951.[88] The United States was aware of the slave labor that took place in Japan, and did not expressly

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 45 (quoting House of Councilors, 12th Extraordinary Session of the National Diet, Minutes of Special Committee for the Peace Treaty, No. 15 (Nov. 10, 1951), p.1.); *see also* Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 415-16 (1999) (stating that the Japanese Constitution is interpreted and applied so as not to acknowledge human rights or war crimes reparations).

85. *In re* Application of Yamashita, 327 U.S. 1 (1946); *see also* Benjamin B. Ferencz, *Blain Sloan Lecture, International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 216 (1998) (presentation of international criminal courts spanning from before WWI to the International Criminal Court of Rwanda).

86. *Id.*

87. *Id.*

88. Multilateral Treaty of Peace with Japan, *supra* note 8, 3 U.S.T. at 3169, 136 U.N.T.S. at 45.

waive the claims of its former prisoners of war.[89] Japan, on the other hand, expressly waived claims of their prisoners of war in article 19 of the Treaty.[90]

The Treaty negotiations lasted eleven months, during a difficult international setting.[91] After the war, Japan's economic crisis was so severe that it was unable to produce enough food for its people to live.[92] The United States, which had occupied Japanese territory for six years during the war, was certain that "Japan's financial condition would render any aggressive reparations plan an exercise in futility."[93]

Tetsuo Ito, former Director of the Legal Affairs Division, Treaties Bureau, Ministry of Foreign Affairs of Japan, currently Counselor at the Embassy of Japan in London, stated that "the chaotic international conditions in the midst of the Cold War eventually favored Japan in terms of the treaty contents."[94] Ito maintained that the co-drafters of the treaty were "obviously" generous to Japan in terms of limiting Japan's reparations, because Japan's rapid economic recovery would serve the United States and United Kingdom "by helping to strengthen the Western Camp in their defense of freedom against the Communism about to infiltrate Asia."[95] Many believed that, due to Japan's frail economic situation, mere reparations would not be feasible.[96] As Senator Mike Mansfield stated in his Report to the Committee on Foreign Relations, "[t]he relatively new and feeble root structure of these [Japanese] institutions . . . leaves them prone to abuse by the vestiges of indigenous totalitarianism as well as by the postwar

89. *See supra* Part II.A-B and accompanying notes.

90. Multilateral Treaty of Peace with Japan, *supra* note 8, at art. 19(b), 3 U.S.T. at 3187, 136 U.N.T.S. at 70.

91. *See* Ito, *supra* note 74, at 41.

92. *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000) (citing U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951)).

93. *Id.* Today, the Japanese corporations sued by the American nationals are financially capable of sustaining the Americans' claims. *WWII Ex-POWs Send Slave Labor Book, supra* note 1 (stating that the companies that used American POWs as slave labor are now worth billions of dollars and have extensive business in the United States); *see also* M. Diana Helweg, *Japan: A Rising Sun?*, FOREIGN AFF., July-Aug. 2000, at 26 (providing information regarding Japan's current economic standing).

94. Ito, *supra* note 74, at 41.

95. *Id.* Allied Peace Treaties formed after World War II with Bulgaria, Finland, Hungary, Italy and Romania reveal that the Treaty signed with Japan was very generous. *See id.* at 43. Generally, the post-war treaties called for specific figures of reparations, but this was not so in the Japanese treaty. *See id.* For example, the Allied Powers allowed Japan to negotiate with each claimant country regarding reparations. *See id.*

96. Hamano, *supra* note 80, at 12.

importations of new totalitarian concepts from the Asian mainland."[97] The idea of a democratic ally, coupled with Japan's frail financial condition, made for a forgiving Treaty of Peace.[98]

E. Preparatory Work: Treaty negotiations and Legislative History[99]

When the court is not clear as to the meaning of a treaty, it may resolve such ambiguities by reference "'beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[100] The record of negotiations reveals that the Treaty was intended "to settle the reparations issue once and for all."[101] The court points out that John Foster Dulles, the chief United States negotiator for the Treaty, believed that future claims would hinder a lasting peace between the United States and Japan.[102] However, it is not clear whether Mr. Dulles was referring to private as well as public claims.[103]

In a hearing on the Japanese Peace Treaty, held in 1952 before the Senate Committee on Foreign Relations, Roy G. Allman, a Washington, D.C. based attorney, warned that the Treaty as written prevented citizens who had lost property in Japan "from filing a claim against the Japanese Government or its nationals."[104] Mr. Allman pleaded with the Senate to reconsider the waiver clause on the grounds that it was a violation of the Fifth Amendment to the Constitution of the United States, depriving

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97. SEN. MIKE MANSFIELD, S. COMM. ON FOREIGN RELATIONS, 86th CONG., REPORT ON THE FAR EAST 1-2 (Comm. Print 1960).

98. *See* Complaint, Alfano v. Mitsubishi Corp. (No. 00CC02420), *supra* note 34.

99. *See generally,* S. COMM. ON FOREIGN RELATIONS, 82nd CONG., REPORT ON JAPANESE PEACE TREATY AND OTHER TREATIES RELATING TO SECURITY IN THE PACIFIC (Comm. Print 1951) (report including a copy of the Treaty of Peace with Japan, the Security Treaty Between the United States of America and Japan, and a report on the political and economic situation in the Far East); *see also* EXCHANGE OF AMERICAN CITIZENS INTERNED OR HELD PRISONERS OF WAR BY THE JAPANESE (Comm. Print 1951) (report of subcommittee commissioned to examine available methods of exchanging American citizens interned or held prisoners of war in Japan); *see also Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the Senate Committee on Foreign Relations*, 82nd Cong., (1952) (hearing concerning the United States' positions regarding the Japanese Peace Treaty and the American interests in the Pacific); *see also War Claims Commission: Hearings Before a Subcomm. on the Judiciary*, 80th Cong. (1948) (the act creating a commission to make an inquiry and report regarding war claims).

100. In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945-46 (N.D. Cal. 2000) (quoting Air France v. Saks, 470 U.S. 392 (1985)).

101. *Id.* at 946.

102. *Id.*

103. *See id.* The only term referring to the type of claims targeted by the treaty is "future claims." *Id.* Respecting the fact that international treaties typically pertain to public law, the logical assumption would be that the claims targeted by the treaty should be public claims, not private ones. *See supra* Part III and accompanying notes.

104. *Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the S. Comm. On Foreign Relations*, 82nd Cong., at 134 (1952).

Americans of their property without due process of the law.[105] During the hearing, Senator Hickenlooper asked Mr. Allman, "[D]o you know of any provision . . . whereby our soldiers or their estates could recover or receive the money they lost through Japanese seizure, . . . during the period of the capture of the Philippines by the Japanese?"[106] Mr. Allman responded, "They most certainly cannot recover because this treaty shuts them off."[107]

Senator Hicklooper's question revealed that he was suspicious of the Treaty's waiver clause, but because Mr. Allman raised his objection to the clause after the Treaty had already been concluded, there was nothing left to be done about the issue "except reopen all negotiations."[108] The Senator claimed that the inclusion of the waiver was a "failure to take care in some manner [for] the rights of American citizens."[109] The Senator concluded: "We were not completely aware of all [the Treaty's] implications until some time after it had been completed and signed and agreed to by the various drafting powers."[110]

Allman's argument departs slightly from the case in question, in that it relates to Americans who had owned property in Japan that was taken during the war, not to the claims of former prisoners of war.[111] Therefore, it is still unclear whether the waiver clause was intended to bar POWs' claims against private Japanese corporations.

IV. U.S. GOVERNMENT ESPOUSING CLAIMS OF ITS NATIONALS

A. Claim Espousal

When a government asserts the private claims of its nationals against another sovereign it is "espousal."[112] The doctrine of espousal is based on the traditional view that "only states are subject to international law."[113]

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105. *Id.*

106. *Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the S. Comm. on Foreign Relations*, 82nd Cong., at 142 (1952).

107. *Id.*

108. *Id.*

109. *Id.* at 142-43.

110. *Id.* at 143.

111. *See id.* Gabrielle Kirk McDonald, a former leader of the international Criminal Tribunal for the Former Yugoslavia, views the treaty as "designed to resolve property issues." Howard W. French, *Japanese Veteran Testifies in War Atrocity Lawsuit*, N.Y. TIMES, Dec. 21, 2000, at A3.

112. 45 AM. JUR. 2d *Int'l Law* § 162 (1999).

113. Shlomo Cohen et al., *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 861 (1981).

Normally, when a government espouses its nationals' private claims it does so through statutes and treaties.[114] This creates a procedure whereby these claims are submitted to an alternative system for adjudication, such as a commission or tribunal, which determines the validity and damages of the claims.[115] However, when the President espouses nationals' claims he is not required to do anything in particular with the claims, for "the individual's claim no longer has an independent existence."[116] If a government wants to use such claims as a means of settling a dispute, the government must first espouse the claims of its nationals against the foreign state.[117] If the government does not espouse a nationals' claim against a foreign sovereign, the nationals' options for filing suit are limited to domestic courts in their state or the foreign state.[118]

It is established international practice to settle the "claims by nationals of one state against the government of another" in international agreements.[119] However, legal authority does not state that the government has the ability to espouse the private law claims of its nationals against private foreign parties.[120] In fact, the President's ability to waive these claims has not been extended to private law claims against private foreign parties.[121] As John F. Murphy, Professor of Law at Villanova University, states, "[I]mposing civil liability against individuals differs greatly from imposing it against governments."[122]

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114. 45 AM. JUR. 2d *Int'l Law* § 162 (1999).

115. *Id.*

116. Cohen et al., *supra* note 114, at 861.

117. *Id.* at 860.

118. *Id.* at 861.

119. 45 AM. JUR. 2d *Int'l Law* § 162 (1999); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 213 (Supp. 2000); *see also* Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (1985) (explaining that the United States settled claims of its nationals against China after the Communist Revolution. Plaintiff power company, whose plant was seized by the Chinese government, sued the United States to recover the difference between the total amount of its claim and the amount it would receive under the settlement. The court held that Plaintiff could not prove that the United States had taken its property under the just compensation clause of the Fifth Amendment because, without the President's exercise of his power to espouse claims, Plaintiff would not have received any compensation at all from the Chinese government).

120. *See* 45 AM. JUR. 2d *Int'l Law* § 162 (1999).

121. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (holding that the President can suspend claims of U.S. nationals against Iran); Abrahim-Youri v. United States, 139 F.3d. 1462 (Fed. Cir. 1997); Belk v. United States, 858 F.2d 706 (Fed. Cir. 1988) (affirming the district court's summary judgment against U.S. nationals' claims against the United States based on U.S.-Iran negotiations which in part suspended U.S. nationals' claims against Iran); Chas. T. Main Int'l v. Khuzestan Water and Power Auth., 651 F.2d 800 (1st Cir. 1981) (affirming district court's dismissal of engineering firm's claims against the U.S. because the President had the authority to block U.S. nationals' claims against Iran); *Shanghai Power*, 4 Cl. Ct. at 237; Sec. Pac. Nat'l Bank v. Gov't and State of Iran, 513 F. Supp. 864 (C.D. Cal. 1981) (holding that the President had the authority to nullify U.S. nationals' interests in property located in Iran by executing an executive agreement with Iran).

122. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 28 (1999).

When dealing with the issue of claim espousal and the ability of a national to bring forth claims in the judiciary system, Justice Frankfurter noted in *United States v. Pink*:

> [W]e are not dealing here with physical property—whether chattels or realty. We are dealing with intangible rights, with choses in action. The fact that these claims were reduced to money does not change the character of the claims, and certainly is too tenuous a thread on which to determine issues affecting the relation between nations.[123]

When Justice Frankfurter described the President's authority to settle the claims of its nationals, he emphasized that this authority is utilized to remove "areas of friction" between the United States and other nations.[124] He explained that areas of friction "are removed by the adjustment of claims pressed by [the United States] on behalf of its nationals against a new regime."[125]

B. Precedent: International Treaties Waiving Nationals' Claims Against Foreign Sovereigns

The Supreme Court established that a government can relinquish its nationals' claims against a foreign sovereign in *Dames & Moore v. Regan*.[126] The case is set amidst the Iran Hostage Crisis[127] and the Algiers Accords.[128] The Iran Hostage Crisis began on November 4, 1979, when a group of American diplomats were seized from the United States Embassy in Iran.[129] In an effort to recover the hostages, President Carter negotiated an agreement with the Iranian government, known as the Algiers Accords.[130] As part of this agreement, the President, acting under the authority of the International Emergency Economic Powers Act, agreed to nullify pending

123. 315 U.S. 203, 239 (1942) (Frankfurter, J., concurring) (holding that the United States was allowed to recover assets of a Russian company against a New York bank's claim that the assets were not assignable to the United States by Russia).

124. *Id.* at 240-41.

125. *Id.* at 241.

126. 453 U.S. 654, 669-74 (1981).

127. *Id.* at 654.

128. *See* David J. Bederman & John W. Borchert, *Abrahim-Youri v. United States. 139 F.3D 1462.*, 92 AM. J. INT'L L. 533 (1998) (overview of the Iran Hostage Crisis and Algiers Accords).

129. *Id.*

130. *Id.*

claims in the United States courts against Iranian assets.[131] Meanwhile, Dames & Moore had already obtained a prejudgment attachment of certain Iranian assets in a suit against the Government of Iran, the Atomic Energy Organization of Iran and several Iranian banks.[132] Rather than being permitted to proceed with their case according to the Algiers Accords, Dames & Moore was forced to transfer to an Iran-United States Claims Tribunal, similar to all others with pending United States claims.[133]

Dames & Moore filed suit against the United States to prevent enforcement of the Executive orders.[134] The Supreme Court held that the President had the authority to nullify Dames & Moore's claims in the United States courts.[135] The Court held that the President had legally suspended the United States nationals' claims against Iran based on two grounds.[136] First, the settlement of the claims was a necessary incident to resolving a major foreign policy dispute between the United States and another sovereign.[137] Second, because the President's acts followed a continued executive practice of renouncing or extinguishing claims of American nationals against foreign governments in return for lump sum payments or establishing arbitration tribunals, his acts raised a presumption of having received Congressional support.[138]

The President's espousal of nationals' claims against Iran, upheld in *Dames & Moore*, is not similar to the President's alleged waiver of nationals' claims against private Japanese companies, as upheld in the slave labor cases. The President's actions, which were the basis for the litigation of *Dames & Moore,* were an executive response to a crisis situation.[139] In *Dames & Moore*, the Court upholds the President's actions as a necessary provision to settle the international dispute.[140] In contrast, the President's act of allegedly waiving the claims of American nationals against private Japanese companies, executed in the Multilateral Treaty as understood by the court in the slave labor cases, was during post-war settlement negotiations in which the United States was the victorious party.[141] Unlike the Hostage Crisis (where the President desperately pleaded for the return of American diplomats to the United States), in the Multilateral Peace Treaty

131. *Dames & Moore*, 453 U.S. at 670-71.
132. *Id.* at 663-64.
133. *Id.* at 664-65.
134. *Id.* at 666-67.
135. *Id.* at 688.
136. *Id.*
137. *Id.*
138. *Id.* at 686.
139. *See id.* at 654.
140. *See id.* at 688.
141. *See* In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 946-47 (N.D. Cal. 2000); *see also supra* Part III.D and accompanying text.

with Japan the United States was not at a foreign sovereign's mercy.[142] The return of the American nationals held by the Japanese was not bargained for in exchange for a waiver of claims against the Japanese.[143] In effect, a waiver of private American nationals' claims against private Japanese companies was not a necessary incident to the resolution of an international dispute.[144]

In the Algiers Accords, the President espoused the claims of American nationals against the Iranian *government.*[145] However, in the slave labor cases, the court interprets the Treaty to waive claims of American nationals against *private companies.*[146] To allow *Dames & Moore* to legitimize the Presidential espousal of private law claims would be a gross extension of the Supreme Court's holding.[147]

Belk v. United States[148] is another case relating to the Iranian Hostage crisis and the Algiers Accords.[149] In *Belk*, the plaintiffs were diplomats formerly taken hostage from the American Embassy in Iran claiming that the United States' waiver of their claims against Iran was a compensable "taking" of their private claims.[150] The Court ruled that the government action did not constitute a compensable taking under the Fifth Amendment.[151] In negotiating the release of the hostages, President Carter signed the Algerian Accords prohibiting United States nationals from bringing suit against Iran, including suits related to their seizure and detention, in exchange for the hostages' release.[152] In effect, the treaty "extinguished plaintiffs' valid causes of action."[153]

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142. *See* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1154-55 (Oct. 1982). During the Iran Hostage Crisis, Iran threatened to withdraw all its funds located in United States banks, which would constitute "'nothing less than an attack on the stability of the world economy and the international monetary system.'" *Id.* at 1155 (quoting Dep't St. Bull., May 1980, at 56).

143. *See generally* Multilateral Treaty of Peace with Japan, *supra* note 8.

144. *Compare Dames & Moore and* D'Amato, *supra* note 143, at 1154-55, *with In re* Forced Labor Litig., 114 F. Supp. 2d at 947-48, *and* Multilateral Treaty of Peace with Japan, *supra* note 8.

145. *Dames & Moore*, 453 U.S. at 654.

146. *See Forced Labor Litig.*, 114 F. Supp. 2d at 939.

147. *See Dames & Moore*, 453 U.S. at 654. In *Dames & Moore*, the Supreme Court only contemplated the President's espousal of private claims against a government; it did not discuss private claims against private parties. *See id.*

148. 858 F.2d 706 (Fed. Cir. 1988).

149. *Id.*

150. *Id.* at 707-08. Plaintiffs claimed a property right to their cause of action; they claimed that forced waiver of this property right was a compensable "taking" by the government. *Id.*

151. *Id.* at 708.

152. *Id.* at 707.

153. *Id.* at 708.

In making its determination, the court focused on the fact that the government's action was intended to benefit the hostages: "Where a governmental action is intended to primarily benefit particular individuals, a taking has not occurred, even though there is an incidental benefit to the public."[154] The court also recognized that "'the president's power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well-established aspect of international law.'"[155]

In order to qualify for just compensation under the Fifth Amendment, a plaintiff must show "taking of private property for a public use."[156] In determining whether there has been a taking requiring just compensation, "the court must weigh all the relevant factors and decide whether compensation is required in the interest of 'justice and fairness.'"[157] Factors to consider include:

> [T]he degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed.[158]

Applying the above factors to the facts in *Belk*, it is clear that the American government's action was a direct response to the hostage situation, implemented for the benefit of the hostages.[159] The former-hostage plaintiffs in *Belk* were the direct beneficiaries of the Algiers Accords, in that saving their lives was the ultimate goal of the Accords; by contrast, the plaintiffs in the slave labor cases were not the direct beneficiaries of the Multilateral Treaty.[160]

The Multilateral Treaty was negotiated as a post-war settlement to promote "common welfare" and "maintain international peace and security."[161] Using the above-noted factors, the Treaty, as interpreted by the court, arguably affected a taking of private property for a public use. Under this interpretation, the plaintiffs' ability to bring forth a claim was

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154. *Id.* (quoting Belk v. United States, 12 Cl. Ct. 732, 734 (1987)).

155. *Id.* (citing *Belk*, 12 Cl. Ct. at 734 (quoting Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 246 (1983))).

156. *Id.*

157. *Id.* at 709 (citing Deltona Corp. v. United States, 657 F.2d 1184, 228 Ct. Cl. 1184 (1981)).

158. *Id.* (citing *Belk*, 12 Cl. Ct. at 734 (quoting *Shanghai Power Co.*, 4 Cl. Ct. at 242-43).

159. *Id.* The court suggests that the hostages' ability to bring forth the claims was taken away in an effort to save their lives. *See id.*

160. Multilateral Treaty of Peace with Japan, *supra* note 8.

161. *Id.* at Proclamation, 3 U.S.T. at 3169, 136 U.N.T.S. at 45.

completely impaired.[162] The plaintiffs were incidental beneficiaries of the government's action, in that they would have been returned to the United States with or without a waiver of their claims.[163] It is of public interest to ensure that private claims against private companies committing slave labor be preserved.[164] The waiver, as interpreted by the court, does not substitute any rights or remedies for those that it destroyed.[165] Most importantly, *Belk* used "justice and fairness" as its last trump card in determining whether plaintiffs had a cause of action against the government.[166] Using "justice and fairness" as factors in judging the slave labor cases, the plaintiffs deserve to be able to bring forth their claim because the notion of slave labor gone unrequited is against common beliefs of fairness and justice.[167]

Abrahim-Youri v. United States[168] is another case related to the Algiers Accords challenging the President's espousal of nationals' claims against Iran.[169] The Algiers Accords set a tribunal for the "small claims" (up to $25,000) of United States nationals against Iran.[170] The United States agreed with Iran on a lump-sum payment of $105 million dollars for the settlement of these "small claims."[171] In 1995, the tribunal concluded its adjudication of the small claims to find that there was not enough money to pay both the principal amounts and interest accrued on the claims.[172] As a result, the claimants were granted the principal amounts for their claims, but on

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162. *See* In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 946-48 (N.D. Cal. 2000).

163. *See* Reid, *supra* note 1, at 1A. Japanese forces surrendered in August 1945. *Id.* The soldiers were returned to America long before the Treaty existed - the Treaty negotiations began after the war was over, lasting six years until 1951 when the Treaty was signed. *See id.*; *see also supra* Parts I & III.D and accompanying notes.

164. *See generally* Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), *available at* http://www.un.org/Overview/rights.html (last visited Dec. 4, 2001).

165. *See Forced Labor Litig.*, 114 F. Supp. 2d at 947.

166. Belk v. United States, 858 F.2d 706, 709 (Fed. Cir. 1988) (citing Deltona Corp. v. United States, 657 F.2d 1184 (1981)).

167. *See generally* Universal Declaration of Human Rights, *supra* note 165. When the court dismissed the slave labor cases, it noted that "the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world" should service the debt owed to the former POWs for their slave labor. *Forced Labor Litig.*, 114 F. Supp. 2d at 949. It is outrageous that a United States court could belittle plaintiffs' search for justice and basically tell plaintiffs to "be content with being alive and free;" the fact that we live in a free and peaceful world does not provide the former prisoners of war any compensation for their horrific experiences. *See generally* Complaint at 1-4, Alfano v. Mitsubishi Corp., (No. 00CC02420).

168. 139 F.3d 1462 (Fed. Cir. 1997).

169. *Id.* at 1463.

170. Bederman & Borchert, *supra* note 129, at 535.

171. *Abrahim-Youri*, 139 F.3d at 1464.

172. *Id.*

average only 34.5% of the interest they were owed.[173] Plaintiff, a group of twenty-two small claimants, sued the United States government for a Fifth Amendment "taking" requiring "just compensation."[174] Plaintiff claimed that the government's espousing and settling their claims was a "taking" because the government failed to pay the full amount of the claims.[175] The court held that the government's conduct did not amount to a compensable taking based on the just compensation clause of the Fifth Amendment.[176]

In determining whether the government's act constituted a taking, the court's test was whether the government attempted "to obtain a governmental or public benefit at the expense of a private party."[177] The Court claimed that if such a taking occurred, compensation would be warranted as a matter of "fairness and justice."[178]

According to the *Abrahim-Youri* test, as applied in court, the Multilateral Treaty constitutes a taking of plaintiffs' claims.[179] The United States government benefits from preventing plaintiffs' claims against private Japanese companies in that the government maintains its friendly relations with Japan.[180] The United States government has also benefited in the past from using its espousal power in an attempt to provide Japan with a sense of security; this in turn provided the United States with more liberty to shape the post-war settlement.[181] Finally, in addition to other provisions, by denying plaintiffs' claims against Japanese companies, at the time of the Treaty's formation, the United States created a "free society" and "more peaceful world," which is surely considered a public benefit.[182]

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173. *Id.* at 1464-64.

174. *Id.* at 1465.

175. *Id.* at 1463.

176. *Id.* at 1468.

177. *Id.* at 1464.

178. *Id.*

179. *See* In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 948 (N.D. Cal. 2000) (denying former prisoners of war who suffered as slave laborers the ability to bring forth claims against their former oppressors, the private Japanese companies, as a result of the court's interpretation of the Peace Treaty); *see also Abrahim-Youri*, 139 F.3d 1462 (recognizing a compensable taking as when the government or the public derive a benefit at the expense of a private party).

180. *See Forced Labor Litig.*, 114 F. Supp. 2d at 948 (noting that United States submitted an Amicus Curiae brief supporting an interpretation of the Multilateral Treaty as a complete waiver of claims, including plaintiffs' claims against private companies).

181. *See supra* Part III.D and accompanying text. Japan was financially and militarily devastated after World War II. *See id.* In negotiating the Treaty of Peace, the United States wanted to ensure a peaceful future with Japan, which the United States thought could not be accomplished if lawsuits were permitted against Japan. *See id.* Hiroshi Tanaka, a history professor at Ryukoku University, claimed: "During the cold war situation, Japan just didn't have to face the issues of the past .... We could always get by just ignoring it. Japan was under the umbrella of the United States, and America settled Japan's Asian issues." French, *supra* note 107, at A3.

182. *Forced Labor Litig.*, 114 F. Supp. 2d at 949.

V. STATE EFFORTS TO ADDRESS SLAVE LABOR—THE STATE STATUTE[183]

The California statute attempts to provide a means of compensation for World War II slave and forced labor, although it was held unconstitutional by the U.S. District Court for the Northern District of California.[184] Specifically, the California statute provides that:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced 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. [185]

In passing this law, the state legislature put forth moral and public policy interests of the state "in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor."[186]

VI. FEDERAL JURISDICTION

Despite the fact that plaintiffs' causes of action arose under California law, the District Court allowed removal by the defendants and dismissed the cases based on federal jurisdiction.[187] According to the court, the claims

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183. CAL. CIV. PROC. CODE § 354.6 (West 2001); *see also* 1999 California Senate Bill No. 1245, California 1999-00 Regular Session Legislative Counsel's Digest (Hearing July 28, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing July 15, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing July 7, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing June 29, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing May 27, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing May 18, 1999); Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session (Hearing May 11, 1999).

184. *In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160, 1168-78 (N.D. Cal. 2001); *see also* 1999 California Senate Bill No. 1245, California 1999-00 Regular Session Legislative Counsel's Digest (Hearing July 28, 1999). The bill also deals with Statute of Limitation extensions. *Id.* However, that is not relevant for this analysis. Interestingly, the bill was opposed only in terms of its Statute of Limitations issue. *Id.* Opposition did not mention federal law as a potential problem for the bill's enforcement. *Id.*

185. CAL. CIV. PROC. CODE § 354.6(b) (West 2001).

186. 1999 California Senate Bill No, 1245, California 1999-00 Regular Session (Full Text - State Net) July 28, 1999.

187. *See id.* at 942-44. This Comment does not analyze whether the cases can be barred by

brought by plaintiffs are essentially "substantial issues of federal common law dealing with foreign policy and relations."[188] After establishing federal jurisdiction over the case, the court concluded that "the 1951 treaty constitute[d] a waiver of such claims."[189]

A. Predominantly Federal Issue

In claiming jurisdiction over the case, the court relied on defendants' line of cases "committing to federal common law questions implicating the foreign relations of the United States."[190] The court justified its jurisdiction by claiming that "[p]laintiffs' claims arise out of world war and are enmeshed with the momentous policy choices that arose in the war's aftermath."[191]

B. Federal Law Trumps State Law

Article II, section 2 of the United States Constitution gives the President the exclusive power to make treaties with the Senate's consent.[192] In the twentieth century, the Supreme Court has determined "that a general foreign affairs power resided in the national Government, no part of which was reserved to the states under the Tenth Amendment."[193] Because the federal

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political question, non-justiciability, the War Claims Act of 1948, or the Foreign Sovereign Immunities Act.

188. *Id.* at 944.

189. *Id.* at 942.

190. *Id.* at 943-44 (citing Banco Nacional de Cuba v. Sabbotino, 376 U.S. 398 (1964); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997)). In addition, the United States submitted an Amicus Curiae brief, arguing that the case had the potential to disrupt fifty years of diplomacy. *Id.*

191. *Id.* The court distinguished between the World War II-related claims against private German and Swiss parties, which were recently settled, and the claims against private Japanese parties. *See infra* Part VIII.A and accompanying notes.

192. U.S. CONST. art. II, § 2, cl. 2.

193. Harold G. Maier, *Preemption of the State Law: A Recommended Analysis, Special Issue: The United States Constitution in its Third Century: Foreign Affairs Distribution of Constitutional Authority*, 83 AM. J. INT'L L. 832 (1989); *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316 (1936) ("As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."); *and* Missouri v. Holland, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."). Justice Douglas emphasized that States have limited sovereignty. United States v. Pink 315 U.S. 203, 233 (1942) (Douglas, J., stating: "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."). *But see* Clark v. Allen, 331 U.S. 503, 517 (1947) (Douglas, J., upholding a California statute which was facially challenged as it differed from an international treaty, reasoning that while a state could not interfere with acts of the national government concerning foreign policy, state acts that had only an "incidental and indirect" effect on foreign

government is directly empowered to control foreign affairs,[194] state laws attempting to infringe upon this explicitly federal area of the law will prove useless in court proceedings.[195] The court dismissed the consolidated California cases, claiming that the matters presented in the cases fell under federal common law.[196]

The court claimed that because "the plaintiff's claims necessarily require determinations that will directly and significantly affect United States foreign relations, [the] plaintiff's state law claims should be removed."[197] This argument does not apply to the case at hand. While the ability to settle private claims against foreign states is "pivotal" in resolving international disputes, the option of settling private claims against private parties has not surfaced as a matter of international concern.[198]

C. Private Parties Included Under International Treaty

Plaintiffs responded to the argument that federal law applied to their claims by pointing out that *private* parties suing *private* companies should be able to use *state* laws, rather than public law, to govern their claims.[199] However, the court found reason to dismiss plaintiffs' argument.[200]

The court said that when a dispute occurs between private parties, implicating "'vital economic and sovereign interests' of the nation where the parties' dispute arose," the dispute falls under the doctrine of foreign relations.[201] Furthermore, the court claimed that because the cases' foreign element could potentially "unsettle half a century of diplomacy," the cases should be dismissed.[202]

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policy are not invalid).

194. U.S. CONST. art. I, § 8, cl. 8.

195. *See* Maier, *supra* note 195, at 833 ("[I]t is now understood that direct conflicts between state actions and the exercise of the national Government's foreign affairs powers are resolved in favor of national authority under the Supremacy Clause.").

196. *In re Forced Labor Litig.*, 114 F. Supp. 2d at 943. The court also references *Texas Indus, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) in support of federal common law governing the cases. *Id.*

197. *Id.* (citing Republic of Philippines v. Marcos, 806 F.2d. 344, 352 (2d Cir. 1986)).

198. Cohen, *supra* note 114, at 862.

199. *Forced Labor Litig.*, 114 F. Supp. 2d at 948 (claiming that the claims do not arise out of the "prosecution of the war" as that phrase is used in the Treaty).

200. *See id.* It should also be noted that the United States filed a Statement of Interest strongly urging the court to apply the Treaty to plaintiffs' claims. Statement of Interest of the United States of America, *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (No. MDL - 1347).

201. *Forced Labor Litig.*, 114 F. Supp. 2d at 943.

202. *Id.* at 943.

The court placed little value on the fact that the parties involved are private.[203] Rather, the court focused on the nature of the parties' claims, which according to the court fall under the Treaty because it pertains to claims "arising out of the 'prosecution of the war.'"[204] In response, plaintiffs argued that the Treaty should not apply to their dispute because it is a private matter between private parties.[205] The court rejected this argument, calling it "far-fetched" and stating that the private Japanese companies are virtually indistinguishable from the Japanese government.[206]

However, the court's argument is disputable. The same international agreements clearly do not apply to a private company doing business with the government as to the government for which it works.[207] For example, there are several large companies in the United States that manufacture equipment for governmental use, yet are not considered state actors.[208] In the slave labor cases, the court decided that because the Japanese companies were furthering the Japanese government's war efforts, their actions fell under the "prosecution of the war" qualification of the Treaty.[209]

The court did not distinguish between the *employment* relationship that arose during the war between the Japanese companies and American nationals, on one hand, and the *commercial* relationship between the Japanese companies and Japanese government, on the other.[210] The commercial relationship arose out of the prosecution of the war, and was thus immune to private claims under the Treaty.[211] However, the employment relationship arose out of the illegal use of prisoners of war, not

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203. *Id.* at 948.

204. *Id.*

205. *Id.*

206. *Id.* (explaining that it is "far-fetched" to distinguish the conduct of Imperial Japan during WWII from the industry that was the "engine of its war machine"). In the 1950s, when Japan had the highly nationalistic *Keiretsu* system, its corporate structures were very different from those of Western businesses. *See* Helweg, *supra* note 94, at 26. While the *keiretsu* organizations had strong ties to the Japanese government, they were independent entities. *See id.*

207. *See, e.g.*, Andrews v. Fed. Home Loan Bank of Atlanta, 998 F.2d 214 (1993) (holding that regional banks set up by Congress to provide services to members of Federal Home Loan Bank Act were not state actors).

208. *E.g.*, Teledyne Brown Engineering, *at* http://www.tbe.com (last visited Dec. 4, 2001) (providing systems engineering, software development, and hardware fabrication services to the military); Gemini Electronics, *at* http://www.geminielec.com (last visited Dec. 4, 2001) (providing products and services for the military); Cowan Manufacturing, *at* http://www.cowanmfg.com.au/ (last visited Dec. 4, 2001) (designing and building transportable recompression chambers for the United States Navy); Northrop Grumman Corporation, *at* http://www.northgrum.com (last visited Dec. 4, 2001) (providing high technology products to the military); AMCOMP Corporation, *at* http://www.amcomp.org (last visited Dec. 4, 2001) (providing high technology engineering systems to the military); General Dynamics, *at* http://www.generaldynamics.com (last visited Dec. 4, 2001) (providing defense systems and services to military).

209. *Forced Labor Litig.*, 114 F. Supp. 2d at 948.

210. *See id.*

211. *See* Complaint at 1-4, Alfano v. Mitsubishi Corp. (No. 00CC02420).

the prosecution of the war, and was thus outside the scope of the Treaty.[212]

The court avoided the issue that plaintiffs had brought forth private claims against private companies by classifying the type of work involved as falling within the guidelines of the Treaty, which bars further action.[213] Yet, traditional international law holds that a treaty can waive a national's claims against a sovereign state, not private parties, irrespective of the nature of the claim involved.[214] When the court barred plaintiffs' claims, based on its classification of defendants' role in the war as falling within the boundaries of the Treaty, the court in effect created a new process of classifying subjects of a treaty in international law.[215]

VII. CONGRESS—THE ALTERNATIVE SOURCE OF COMPENSATION

A. Providing a Means of Compensation for Its Nationals

The State Department stated that "United States nationals, whose claims are not covered by the treaty provisions must look for relief to the Congress of the United States."[216] Thus, the United States' official position, motivated by political considerations, has been to favor the Japanese companies by interpreting the Treaty as barring the American claims.[217]

As a constitutional matter, one does not have a property interest in an unadjudicated claim.[218] Because there is no property interest in an unadjudicated claim, and because plaintiffs are being denied the opportunity

212. *See Forced Labor Litig.*, 114 F. Supp. 2d at 948-49.

213. *See id.*

214. *See supra* Part IV.A-B and accompanying notes.

215. *See id.*

216. *Id.* at 947 (quoting Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S. REP. NO. 82-2, at 12 (1952)).

217. *See id.* at 948.

218. Interview with Harold G. Maier, Professor of International Law, Vanderbilt University, in Malibu, Cal. (Oct. 2000). When an international agreement violates individual rights under the Constitution, such as a constitutionally protected property interest, the Supreme Court has upheld the Constitution rather than the international agreement. Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility,* 61 ALB. L. REV. 1207, 1211 (1998): *see also, e.g.,* Reid v. Covert, 354 U.S. 1 (1957) (ruling that murder convictions by court martial, conducted according to an agreement between the United States and Great Britain, were invalid because they violated defendants' constitutional right to a jury trial).

to bring claims against the Japanese companies at issue, plaintiffs might lose the ability to assert their claims against the private Japanese companies.[219]

B. Peace Treaty Tribunal

Under article 16 of the Treaty, Japan was to transfer its assets that were located in neutral and Axis countries to the International Committee of the Red Cross ("ICRC") for indemnification of its war prisoners.[220] The ICRC distributed $15.1 million dollars to former Japanese prisoners of war from 1956 to 1961, but the United States waived its claim to such compensation.[221]

C. Senate Bill 1261

In 1947, the United States Congress held hearings to determine an effective means for providing relief to Americans captured by the Japanese during the war.[222] Senator McGrath proposed Senate Bill 1261 to provide emergency relief to Americans who were captured by the Japanese.[223] Section 12 of the bill, which addressed the needs of the former prisoners of war, suggested that one or more Claims Commissions, made up of military personnel, would be established to "consider, ascertain, and determine the amount of compensation to be awarded due to [the POW's] maltreatment by Germany and Japan."[224] However, section 6 of the bill made it clear that the bill was aimed at reparations for the atrocities committed by the Japanese government, not private Japanese companies.[225] The bill's goal was to compensate for damages suffered by Americans at the hands of "Japanese forces."[226]

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219. Interview with Harold G. Maier, Professor of International Law, Vanderbilt University, in Malibu, Cal. (Oct. 2000).

220. Ito, *supra* note 74, at 48. Neutral countries were Ireland, Poland, Spain, Sweden, Switzerland, Afghanistan, Nepal, Yemen, and the Vatican. *Id.* Axis countries were Germany, Italy, Bulgaria, Finland, Hungary, Romania, and Thailand. *Id.*

221. *Id.* at 59. The ICRC distributed funds to the following numbers of former prisoners of war from the following countries: England, 58,175; Philippines, 44,055; Netherlands, 42,233; Australia, 22,415; Pakistan, 19,872; France, 10,442; Vietnam, 4,500; Canada, 1,737; New Zealand, 119; Cambodia, 42; Norway, 4; Belgium, 3; Syria, 1; and Chile, 1. *Id.* Each former prisoner of war received an average of $75-85. *See id.*

222. *See Relief for American Citizens Captured on American Sovereign Territory by the Armed Forces of Japan: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 80th Cong. (July 16, 1947). The relief was needed for the American soldiers and civilians who were taken as prisoners of war in the Philippines when United States forces surrendered to the Japanese. *Id.*

223. *Id.* at 4.

224. *Id.* at 3.

225. *See id.* at 2.

226. *Id.*

Senator McGowan, representing the American Internees Committee, spoke in favor of reparations at the congressional hearing.[227] He claimed that reparations were necessary for the rehabilitation of the American citizens who suffered at the hands of the "foreign governments," namely Germany and Japan.[228] Senate Bill 1261 proposed to establish a fund from which veterans could receive a payment of five thousand dollars upon proving a meritorious case.[229]

D. War Claims Act of 1948

In 1948, Congress amended the War Claims Act of 1942, which established a system of compensation for World War II prisoners of war.[230] The War Claims Commission, established under the 1948 Act, paid claimants who were prisoners of war in Japan one dollar per day for each day they were deprived of food.[231] Claimants who were used as slave labor received an additional $1.50 per day for each day they were enslaved.[232] Thus, a claimant who was captured in Bataan and remained a prisoner of war in Japan received, at best, approximately $3,103.50.[233]

E. Congressional Reaction After the POWs File Suit in California Courts

In 2000, the American victims of Japanese slave labor became a topic of discussion in the Senate once again.[234] The Judiciary Committee Chair Orrin Hatch (R-Utah) and Senator Dianne Feinstein (D-California) requested that the United States government "open dialogue" to encourage a resolution to the dispute between the former prisoners of war and the private Japanese

227. *Id.* at 23. "The American Internees Committee is a voluntary nonprofit organization composed of [Americans] who were captured by the Japanese in the Philippine[s]." *Id.*

228. *Id.* at 24. McGowan warned that if inadequate reparation payments were made, Japan would escape financial liability for their wartime aggression. *Id.* McGowan focused his plea for reparation solely on the wrongs committed by the government of Japan, not its corporate entities. *Id.*

229. *Id.* at 27. The fund was to be worth $35 million dollars, consisting of the assets of the Alien Property Custodian. *Id.* The Alien Property Custodian consisted of German and Japanese assets. *Id.*

230. War Claims Act of 1948, ch. 826, 62 Stat. 1240 (1948); *see also* Sean D. Murphy, *World War II Era Claims Against Japanese Companies*, 95 AM. J. INT'L L. 139, 142 (2001) (citing Statement of Interest of United States of America, *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000)).

231. War Claims Act of 1948, 62 Stat. at 1240-43. The Geneva Convention established that even prisoners of war were entitled to certain modicums of decency. Murphy, *supra* note 233, at 142.

232. *Id.*

233. *Id.*

234. *See* Justice for Bataan Death March Victims, *supra* note 1.

companies.[235] As Senator Hatch noted, the claims at issue were: "private claims against the private Japanese companies that profited from the slave labor of our American soldiers who they held as prisoners. These are the same types of claims raised by survivors of the Holocaust against the private German corporations who forced them into labor."[236] In November of that year, the United States Senate adopted a resolution encouraging dialogue between the former slave labor POWs and the Japanese companies that profited from them.[237]

On December 18, 2000, the U.S. House of Representatives unanimously adopted a non-binding resolution calling for "efforts to open a dialogue between the plaintiffs and the Japanese companies to settle the lawsuits."[238] The House resolution, like the Senate resolution, was intended to facilitate discussions toward the eventual resolution of the disputes between the former American POWs and the Japanese companies who profited from slave labor.[239]

1. POW Assistance Act of 2001

On July 31, 2001, the Senate introduced a bill "[t]o assist United States veterans who were treated as slave laborers while held as prisoners of war by Japan during World War II."[240] The bill, introduced by Senators Orrin Hatch and Dianne Feinstein,[241] speaks directly to the issues that were raised by the federal court when it dismissed the civil actions filed by the former prisoners of war. First, the bill states that the prisoners of war were forced to perform slave labor "for Japanese privately owned corporations in functions *unrelated to the prosecution of the war.*"[242] Second, it states that the Japanese corporations "did not comply with the standards required under

235. *Id.*

236. *Id.* Senator Hatch made it clear that he was not suggesting that the American soldiers who were held in Japan as prisoners of war and used as slave labor suffered a similar persecution to that of the millions of victims of the Nazis in Germany, as clearly they did not. *See id.*

237. *See U.S. House Urges President to Tackle Japan WWII Labor Suits*, *supra* note 1; *see also Former U.S. World War II POW's: A Struggle for Justice, Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 47 (2000) (detailing responses by the Department of Justice to questions posed by Senator Hatch).

238. *U.S. House Urges President to Tackle Japan WWII Labor Suits*, *supra* note 1.

239. *Id.*

240. POW Assistance Act of 2001, S. 1272, 107th Cong. (2001).

241. *Id.*

242. *Id.* (emphasis added); *see also supra* note 201 and accompanying text. In rejecting the POWs' claims, the Federal Court said that plaintiffs' slave labor was enmeshed with the war. *Supra* note 188. The bill rejects this conclusion and consequently removes the POWs' slave labor from under the umbrella of the Treaty. *See supra* Part II.A. The Senate's conclusion that the POWs' slave labor was not related to the prosecution of the war conflicts with Congress' finding that the Japanese military transported these POWs to Japan (as well as Taiwan, Manchuria, and Korea) "to support their war industries." Gratuity To Members of the Armed Forces and Civilian Employees of the United States, S. 1302, 107th Cong. (2001).

international conventions relating to the protection of prisoners of war."[243] Third, contrary to the previously filed statements of the United States opposing the Japanese slave labor litigations, the bill states:

"The pursuit of justice by the United States POWs, who were forced to perform slave labor under inhumane conditions, through lawsuits filed in the courts of the United States, where otherwise supported by applicable Federal, State, or international law, is consistent with the interests of the United States."[244]

Furthermore, the bill finds:

> In any action pending in or removed to a Federal court which was brought by any United States POW against a Japanese person seeking money damages for mistreatment or failure to pay wages in connection with labor performed for the Japanese person by the United States POW during World War II, the Federal court shall apply the applicable statute of limitations of the State in which the action was brought.[245]

The bill radically alters the Treaty's applicability to the Americans' claims against the Japanese corporations. Where the courts previously used the Treaty in barring plaintiffs' claims, now they might put pressure on the Japanese corporations to pay for their historical acts of injustice.

2. United States Government Authorizes Monetary Compensation

On August 2, 2001, the Senate introduced a bill to authorize governmental monetary compensation to the "members of the Armed Forces and civilian employees of the United States who performed slave labor for Japan during World War II."[246] The bill states that the compensation given

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243. POW Assistance Act of 2001, S. 1272, 107th Cong. (2001).

244. *Id.*; *see also* In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 943 (N.D. Cal. 2000).

245. POW Assistance Act of 2001, S. 1272, § 2, 107th Cong. (2001). The bill clarifies that this provision applies to *persons*, not the Government of Japan. *Id.* The bill defines a "Japanese person" as the following:

> (A) any national of Japan; (B) any corporation, company, association, partnership, or sole proprietorship having its principal place of business within Japan or organized or incorporated under the laws of Japan or any political subdivision thereof; and (C) any foreign subsidiary or affiliate of a national or entity of Japan under subparagraph (A) or (B) if controlled in fact by the national or entity.

Id. at § 4.

246. Gratuity To Members of the Armed Forces and Civilian Employees of the United States, S. 1302, 107th Cong. (2001).

to the POWs at the War Claims Commission "do[es] not begin to fully compensate [the] ex-prisoners of war."[247] Influenced by other nations that have authorized payment of gratuities to surviving veterans who were similarly captured by the Japanese during World War II, the American POWs were granted $20,000.00 each.[248]

Although the bill states that the government's payment does not "fully compensate" the former prisoners of war and expressly preserves the POWs' ability to seek further compensation, hopefully it will not serve as an impetus for the courts to disparage plaintiffs' civil actions.[249] By giving the former prisoners of war compensation, the United States strengthens the Department of Justice's assertion that the Americans' claims are waived by the Treaty. Pressured by diplomatic and economic interests, the Department of State endorsed the Treaty as a bar to the plaintiff's claims.[250] Specifically,

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247. *Id.* at § 1(4).

248. *Id.* at § 5(a), (c). The Secretary of Veterans Affairs was authorized to pay covered veterans or civilian internees, or surviving spouses of either. *Id.* at § 5(c). The Americans were not the only people taken as prisoners of war by the Japanese and used as slave labor for private companies. *See Veterans Win Payout Battle POWs Get Promise From Blair*, GLOUCESTERSHIRE ECHO, Oct. 26, 2000, at People 1. For example, the Japanese took thousands of British servicemen when Japan invaded Hong Kong, Malaysia, and Singapore in 1942. Robert Verkaik, *So Many Lives Wasted. For What?* INDEPENDENT (London), Oct. 10, 2000, at Features 10. Many of the British servicemen were then put to work on the Burma-Siam railway. *Id.* On October 25, 2000, England's Prime Minister, Tony Blair, stated that the Second World War veterans who suffered as prisoners of war and slave laborers in Japan will get ten thousand pounds each. *Veterans Win Payout Battle POWs Get Promise From Blair, supra.* One particular former English prisoner, Mr. Tavender, conducted a 55-year battle for compensation from the English government. *Id.* The Society of Labour Lawyers in England viewed the matter as a "moral rather than a legal argument." Verkaik, *supra.* Canada and the Isle of Man have also agreed to pay their former prisoners of war ten thousand pounds each. *Id.* The American claimants used the fact that other governments compensated former prisoners of war in efforts to persuade the United States to compensate them. *See CBS Evening News: Britain Gives Damages Awards to War POWs, While American POWs Sit and Watch* (CBS News Transcripts, Nov. 12, 2000). Major Richard Gordon, retired, former American POW, explained that there are only about 1,000 survivors left from the group that was captured in Bataan, "and soon they'll be gone." *Id.* Gordon lamented that his fellow former POWs might die before "receiving the same recognition as the British," a situation he found "very hurtful." *Id.*

249. Gratuity to Members of the Armed Forces and Civilian Employees of the United States, S. 1302 at § 1(4), 1(5)(e). The bill expressly states that "[a]ny amount paid [to] a person under this section . . . is in addition to any other amount paid [to] such person . . . under any other provision of law." *Id.* at § 1(5)(e).

250. Justice for Bataan Death March Victims, *supra* note 1. The State Department opposed the claims, even though it actively facilitated settlements for German slave labor cases and Holocaust victims. *Congress Tells State Department: Support WWII POWs Seeking Justice from Japanese Companies*, PR NEWSWIRE, Dec. 16, 2000; *see also The Cost of Japan's Murky Past Catches Up: The Pressure on Japanese Companies to Compensate Victims of Wartime Slave Labour Will Continue to Grow*, ECONOMIST, July 8, 2000 (noting the United States government's insistence that the Treaty permanently settled all claims); Miwa Suzuki, *Japanese Firms Reject Slavery Claims*, AGENCE FRANCE-PRESSE, Feb. 23, 2000 (noting that Mitsubishi Corp. understood all war-related claims to be barred by the Treaty).

the United States filed two Statements of Interest against the claims of the POWs, holding that the War Claims Act and the Treaty barred the POWs' claims.[251]

Senator Orrin Hatch wrote to the State Department requesting that the United States take action to bring justice for the former prisoners of war.[252] He received the following reply: "[I]t was impossible when the Treaty was negotiated—and it remains impossible today, 50 years later—to compensate fully for the suffering visited upon the victims of the war."[253]

Clearly it is impossible to fully compensate someone for slave labor. However, Senator Hatch's plea was to bring justice to these former prisoners, not to fully compensate them. Bringing justice to the former POWs requires their receiving due compensation *from those who injured them.*

Historically the term "justice" referred to "judicial cognizance of causes or offenses."[254] Fortunately, Congress clarified that the Treaty did not waive the claims of American nationals against private Japanese corporations, which should permit the Americans to receive judicial cognizance of their causes.[255] Yet the issue has not been settled thus far, for the court holds the ultimate power of judicial review, which includes determining whether Congress acted constitutionally.[256]

VIII. REMAINING FACTORS

A. Other WWII-Related Cases

Other private World War II-era claims, against private Swiss parties, have recently been settled.[257] Although the Swiss cases share similarities

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251. Justice for Bataan Death March Victims, *supra* note 1. As Ronald J. Bettauer, deputy legal advisor, said in Congressional testimony, "The 1951 Treaty of Peace with Japan settles all war-related claims of the U.S. and its nationals, and precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals—including Japanese commercial enterprises." *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 947 (N.D. Cal. 2000) (quoting *Former U.S. World War II POW's: A Struggle for Justice: Hearing Before the S. Comm. on the Judiciary* (June 28, 2000)).

252. *Forced Labor Litig.*, 114 F. Supp. 2d at 947.

253. *Id.* (quoting Letter of Jan. 18, 2000 from U.S. Dept. of State to The Hon. Orrin Hatch at 2).

254. BLACK'S LAW DICTIONARY 869 (7th ed. 2000). This Comment does not attempt to delve into the various definitions for the term "justice."

255. *See* POW Assistance Act of 2001, S. 1272, 107th Cong. (2001).

256. U.S. CONST. art. III, § 2.

257. *See* Judge Korman, *In re Holocaust Victims Assets Litigation*, NEW YORK LAW JOURNAL 36 (July 2000) (discussing settlement of Swiss Bank claims); and Jeffrey Gold, *Warren Christopher*

with the Japanese cases, the treaties that applied to those cases do not apply to the Japanese cases.[258] These settlements and their social ramifications suggest that if the private Japanese companies were to agree to settle the WWII POW claims, regardless of these companies' legal obligations, they would gain tremendous positive sentiment.[259] The dependence of Japan's economy on foreign investments suggests that the Japanese companies also have economic incentive to settle these claims.[260]

B. Political Factors

In a statement published by Japan's Ministry of Foreign Affairs, Prime Minister Tomiichi Murayama spoke of the "horrors" of the war.[261] He said "[i]t is all the more essential in this time of peace and abundance that we reflect on the errors in our history . . . ."[262] Although the United States government provided compensation to the citizens of Japanese descent who were wrongfully interned in the United States after Japan attacked Pearl Harbor, the Japanese government has failed to provide compensation to the American victims of Japanese persecution during WWII.[263] If Japan wishes to face up to the errors of its past, it should encourage the Japanese corporations to acknowledge and compensate their former slave laborers.

Urges Judge to Dismiss Slave-Labor Suit Against Ford, ASSOCIATED PRESS NEWSWIRES, (Aug. 5, 1999) (describing former Secretary of State, Warren Christopher's, view that the claims against German manufactures should be dismissed). *But see* Burger-Fischer v. Degussa, 65 F. Supp. 2d 248 (D.N.J. 1999) (class action against German corporations for Nazi era war crimes dismissed based on political question doctrine); Iwanowa v. Ford, 67 F. Supp. 2d 424 (D.N.J. 1999) (action against German manufacturer for forced labor during WWII dismissed due to political question doctrine, statute of limitations, comity, and treaty preemption); *see also* French, *supra* note 107. In Germany, the post-war government provided more than one hundred billion Deutch marks as a gesture of indemnification for the victims of Nazi persecutions. Benjamin B. Ferencz, *supra* note 85, at 217.

258. After the war, the United States conducted in-depth reparations treaties with Germany, mapping out a prolonged economic strategy. In contrast, the Multilateral Treaty of Peace with Japan is the single document dealing with Japan's reparations responsibilities. *See supra* Part III.D and accompanying notes.

259. *See* French, *supra* note 107. French suggests that the compensation settlements in the German and Swiss cases have increased the pressure for the Japanese companies to follow suit. *Id.*

260. *See generally* Helweg, *supra* note 94, at 26 (explaining that Japan's dependence on foreign investment is growing as a result of its most recent stock market crash).

261. Statement by Prime Minister Tomiichi Murayama, The Ministry of Foreign Affairs of Japan (Aug. 31, 1994), *available at* http://www.mofa.go.jp/announce/press/pm/murayama/state9408.html (last visited December 4, 2001).

262. *Id.*

263. *Id.* Some may claim that the Japanese post-war obligations have been satisfied, others disagree. Tetsuo Ito claims:

> [A]s a matter of policy debate, one may insist that the amounts of reparations and related economic cooperation were set rather low as a result of the generous treatment by the Allied Powers . . . , and that Japan should now pay more for settling individual claims, especially given the enormous economic capacity it now possesses.

Testuo Ito, *supra* note 74, at 70.

C. Other Japanese Slave Labor Claims

Private Japanese companies have settled WWII-related claims with other Asian nationals.[264] For example, in July 2000 the Fujikoshi Corporation, a Japanese bearings manufacturer, agreed to an out-of-court settlement to compensate South Korean slave laborers from the war.[265] Fujikoshi was the first Japanese company to settle a slave labor claim.[266]

In December 2000 Japanese construction giant Kajima Corporation settled a slave labor claim with former Chinese slave laborers.[267] Kajima apologized and admitted "corporate responsibility" for the use of slave labor.[268] The settlement involved distributing $4.5 million to the 986 victims through a fund.[269] Although NKK, Mitsubishi, and Kajima reported negotiations with Asian slave laborers, no Japanese corporations are negotiating settlements with former American slave laborers.[270]

D. Most Favored Nation Clause

Article 26 of the Treaty states: "Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty."[271] This "Most Favored Nation" provision unconditionally extends the right to every Treaty signatory to be treated equally, irrespective of particular provisions limiting any signatory's rights.[272]

There are at least eight treaties "in which the Japanese government has extended 'more' favorable treatment to other nations than it did to the

264. *See generally Japan Welcomes US Verdict Against POW Lawsuit*, AGENCE FRANCE PRESSE, Sept. 27, 2000; Verkaik, *supra* note 251; *Closing a Wartime Account*, ASIAWEEK, Dec. 15, 2000, at 22; *WWII Ex-POWs Send Slave Labor Book, supra* note 1.

265. Verkaik, *supra* note 251.

266. *Id.*

267. *Closing a Wartime Account, supra* note 267, at 22.

268. *Id.*

269. *Id.* For the victims who are no longer alive, the fund, administered by the Chinese Red Cross, will pay the victims' families. *Id.*

270. *WWII Ex-POWs Send Slave Labor Book, supra* note 1. American former prisoners of war labored for over fifty Japanese companies during the war. *Id.*

271. Multilateral Treaty of Peace with Japan, *supra* note 8, at art. 26, 3 U.S.T. at 3192, 136 U.N.T.S. at 76.

272. *See Compensation for Bataan POWs: Hearing Before the Senate Judiciary Comm.*, 106th Cong. (June 28, 2000) (reporting statements made by Professor Harold G. Maier on the Japanese slave labor cases); *see also* Charles Burress, *Bill Would Open WWII Treaty for POW Suits*, S.F. CHRON., March 22, 2001.

United States with respect to United States claims on behalf of its injured nationals."[273] Thus, according to the Treaty, Japan is obligated to extend the same favorable treatment to the United States. Should the courts continue to use the Treaty to waive plaintiffs' claims, Japan would at the very least be required to extend to the American former POWs the same legal treatment that their Asian counterparts had received.

IX. CONCLUSION

During the Congressional Hearings on Senate Bill 1261, Senator McGrath stated: "I do not believe . . . that any responsible officer of our Government denies the moral obligation of our Government to do something for [the Americans who were captured by the Japanese] and do it quickly."[274] Fifty-four years after Senator McGrath's statement, and fifty-nine years after tens of thousands of Americans were enslaved by the Japanese, those who suffered are now due their compensation. While preliminary steps have been made to provide such compensation, they fail to address the central goal of the entire compensation effort - that those who are to blame for these WWII atrocities - the flourishing Japanese corporations - should be made to pay. Until actions are taken to ensure that these corporations take responsibility for their past, the statements and promises made by both the United States and Japanese representatives cannot make it the case that justice has been served.

Jennifer Joseph[275]

273. *Compensation for Bataan POWs: Hearing Before the Senate Judiciary Comm.*, 106th Cong. (June 28, 2000).

274. *Relief for American Citizens Captured and Interned by Japanese: Hearing on S. 1261 Before a Subcomm. of the S. Comm. on the Judiciary*, 80th Cong., 28 (July 16, 1947).

275. J.D. Candidate, Pepperdine University School of Law, 2002. This note would not have been possible without the help of Professor Maier and Professor Alford, who both provided insight and support throughout the writing process. I would also like to thank the staff of Pepperdine's Law Review for their dedication and effort to publish this paper. Lastly, I would like to express my deep appreciation to my family and loved ones, who are the source of my inspiration and happiness.