Taiwan's Legal Status: An Overview of the San Francisco Peace Treaty

Article VI of the U.S. Constitution provides that:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . . . "

SFPT: Important Articles and Annotations

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| Article 2 |
| (a) Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.  (b) Japan renounces all right, title and claim to Formosa and the Pescadores.  (c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of 5 September 1905.  (d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of 2 April 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.  (e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.  (f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands. |

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| ANNOTATIONS to Article 2 |
| In this Article, Japan renounced all rights over Taiwan, but no "receiving country" was designated. Unquestionably, Taiwan was not given to "China." However, the question arises: "How is this Article to be interpreted?"  Some scholars go so far as to claim that according to the wording of this Article, Taiwan has become *terra derelicta* or *terra nullius*, available for any country to annex. However, such an interpretation totally ignores the “laws of war” of the post-Napoleonic period.  Notably, the U.S. Dept. of State made a clear statement in the 1961 Czyzak Memorandum and the 1971 Starr Memorandum, quoting from the Senate Committee on Foreign Relations Report on the Treaty, dated Feb. 14, 1952:    It is important to remember that Article 2 is a renunciatory article and makes no provision for the power or powers which are to succeed Japan in the possession of and sovereignty over the ceded territory.  While it is true that the treaty has made no “final disposition” of Taiwan, it has made a “temporary disposition.” In recognition of the United States' role as the conqueror of Taiwan, Article 4(b) has confirmed that Taiwan is under the jurisdiction of the military arm of the U.S. government. This is USMG.  For reference, also see definition of cede. |

cede: (1) to surrender possession of, especially by treaty, (2) to transfer control of or sovereignty over specific property or territory, especially by treaty, (3) to surrender or give up something such as land, rights, or power, (4) [noun] cession

Note: According to the dictionary definition of cede as given above, there is no strict requirement that a "receiving country" be designated in order to complete the act of *ceding*, or making a *cession*.

When territory is ceded without the specification of a "receiving country" it may simply be called a *limbo cession*.

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| Article 3 |
| Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. |

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| ANNOTATIONS to Article 3 |
| According to Article 4(b), the Article 3 territory which we may collectively call the "Ryukyu island group" and the Article 2(b) territory of "Formosa and the Pescadores" (aka "Taiwan") are both under the jurisdiction of the United States Military Government (USMG).  Article 3 territory is to be administered as a United Nations trusteeship under the jurisdiction of USMG.  However, under the terms of the treaty, with no formal trusteeship agreement in place by the UN, Taiwan is simply a quasi-trusteeship under USMG.  "Military government continues until legally supplanted."    After negotiations with Japan, the end of USMG in the Ryukyu island group” was announced by President Nixon to be May 15, 1972 – some twenty years after the coming into force of the SFPT itself.  Contrastingly, from 1952 to date, there has been no announcement of the end of USMG jurisdiction over Taiwan. |

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| Article 4 |
| (a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)  (b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.  (c) Japanese owned submarine cables connection Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities. |

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| ANNOTATIONS to Article 4 |
| *Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory.* In other words, military government is the government of occupied territory, and therefore it can be quickly seen that the Article 2(b) territory of Taiwan is occupied territory.  According to international law, Oct. 25, 1945 is the beginning of the military occupation of Taiwan, and certainly not "Taiwan Retrocession Day." A firm tenet of international law states that "Military occupation does not transfer sovereignty."  Due to an unfamiliarity with the laws of war, many researchers who read the SFPT completely fail to recognize an important point: After war, for territory separated from the "mother country" via the specifications of a peace treaty, the military government of the (principal) occupying power **does not end** with the coming into force of the peace treaty, but continues until legally supplanted (by a recognized civil government).  The territories as specified in Articles 2 and 3 of the treaty have been separated from the "motherland" of Japan, therefore the military governments exercising jurisdiction over these areas do not end with the coming into force of the peace treaty. Most civilian scholars, being unfamiliar with the subject of “military jurisdiction under international law,” have little understanding of such a concept. However such a “legal framework” has been verified by numerous rulings of the U.S. Supreme Court, and can be easily confirmed by examination of the precedent established in dealing with the territories acquired by the USA in the Mexican - American War and the Spanish - American War.  For a detailed chart which explains this principle, along with authoritative commentary, please see Areas Conquered by U.S. military forces and therefore under USMG jurisdiction, with later "new disposition" by peace treaty.  Article 4(b) should be read in conjunction with Article 23(a).  Article 23(a) confirms that the United States of America in the principal occupying power of all territories under the geographic scope of the treaty. In consideration of this along with the specifications of Article 4(b), it is clear that the United States Military Government (USMG) has jurisdiction over all the territories in Articles 2 and 3.  For reference, also see definition of property.  The question may be asked: What does USMG's jurisdiction include? To answer this question, we can refer to the United States' administration of the Ryukyu island group beginning in 1945, and thereby gain a full understanding. Of course, one important aspect of this jurisdiction was that the U.S. military authorities issued "Certificates of Identity" as travel documents for the native people of the Ryukyu islands.  Therefore it is fully reasonable under the terms of the SFPT to demand that the United States military authorities issue travel documents (aka “passports”) for the native people of Taiwan.  Contrastingly, there is no authorization in the Taiwan Relations Act, the Three Joint USA-PRC Communiques, any Executive Orders issued by the U.S. Commander in Chief, or the SFPT itself for an entity calling itself the “Republic of China” to issue passports to native Taiwanese people. |

property: (1) something, as land and assets, legally possessed, (2) a piece of real estate, (3) something tangible or intangible to which its owner has legal title, (4) the right of ownership; title.

Note: When speaking of territorial cession(s) between states, land area is certainly considered to be "property."

In other words, Louisiana was originally the property of France, but was ceded to the USA in 1803. Florida was originally the property of Spain, but was ceded to the USA in 1821. Other examples are quite numerous, including :

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| Name of Cession | Date | Originally the property of |
| California | 1848 | Mexico |
| Gadsden Purchase | 1853 | Mexico |
| Alaska | 1867 | Russia |
| Guam | 1899 | Spain |
| Puerto Rico | 1899 | Spain |
| Virgin Islands | 1917 | Denmark |

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| Article 6 |
| (a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.  (b) The provisions of Article 9 of the Potsdam Proclamation of 26 July 1945, dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.  (c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement. |

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| ANNOTATIONS to Article 6 |
| In order to deny that Taiwan is under military occupation, many people make reference to Article 6(a) of the treaty.  However, with the coming into force of the SFPT on April 28, 1952, Taiwan immediately became separated from Japan. Hence, Article 6(a) has no relationship to Taiwan territory whatsoever.  Additional supporting analysis for this interpretation may be found by researching the historical record. Notably, with the end of USMG jurisdiction in California, Puerto Rico, Philippines, Guam, Cuba, the Ryukyus islands, etc. each has become either (a) a sovereign nation, or (b) "part" of another sovereign nation. Significantly, each area has a fully functioning and fully recognized "civil government," which of course has ***supplanted*** USMG jurisdiction, and thus ended the military occupation.  Taiwan is clearly the exception, and is often described as having an “undetermined political status.” Indeed, since the end of the WWII, it has been the official policy of the United States government that the status of Taiwan is "an unsettled question . . . . " In light of these facts, the only possible conclusion is that in the present day, under the Law of Nations, Taiwan remains as occupied territory after peace treaty cession. |

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| Article 21 |
| Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty. |

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| ANNOTATIONS to Article 21 |
| The Republic of China was not a signatory to the SFPT, and therefore cannot claim any rights, benefits, interest, etc. from the treaty (unless specifically stated therein).  Under the terms of Article 2(b) it is clear that Japan has renounced all rights over Taiwan, but no "receiving country" was specified. Article 21 specifies the benefits that China is to receive from the treaty, which are primarily in regard to the geographic delineation of certain territory in mainland China, and war reparations. Significantly, Article 21 makes no mention of Taiwan.  Accordingly, it is important to read Articles 2(b) and 21 together, in order to understand the full import of the treaty's specifications, and to clearly understand that Taiwan was not awarded to China (either the PRC or the ROC).  It is also important to recognize that as non-signatories to the SFPT, neither the ROC nor the PRC are included in the meaning of the term "Allied Powers." Such a determination arises directly from SFPT Article 25. |

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| Article 23 |
| (a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force of each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.  (b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification. |

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| ANNOTATIONS to Article 23 |
| The territories as specified in Articles 2 and 3 of the treaty have been separated from the "motherland" of Japan, therefore as explained in the ANNOTATIONS to Article 4(b) above, the military governments exercising jurisdiction over these areas do not end with the coming into force of the peace treaty.  More detailed explanations regarding this principle can be found in specific U.S. Supreme Court cases, beginning with Cross v. Harrison, 57 U.S. 164 (1853), and with reaffirmation in Dooley v. U.S., 182 U.S. 222 (1901), Santaigo v. Nogueras, 214 U.S. 260 (1909) , etc.  The above concepts regarding "conquest," "military government," "military occupation," etc. form an important part of the laws of occupation, which are included in the internationally recognized laws of war.  Anyone familiar with these legal concepts will recognize that the SFPT must designate "the (principal) occupying power" in order to ascertain which country bears the final responsibility for the military occupation of the areas specified in Articles 2 and 3.  Moreover, this Article’s designation of the United States of America as the “principal occupying power” indicates that all States which ratify the treaty are agreeing to the United States fulfilling this role.  The term "the principal occupying power" signifies that the military troops of other countries may be directed to undertake the military occupation of particular areas, thus forming a "principal - agent relationship." This is exactly what happened in the situation of Taiwan.  We must not forget that with the coming into force of the SFPT on April 28, 1952, the Allies have, for all effective purposes, disbanded. However, the jurisdiction of USMG continues. Such an interpretation flows naturally from Article 23(a) read in conjunction with Article 4(b).  At the most basic level, Taiwan is conquered territory of the United States of America, and in General Order No. 1 of Sept. 2, 1945, (Supreme Commander) General Douglas MacArthur directed the military troops of Chiang Kai-shek to come to Taiwan to handle the surrender ceremonies and subsequent administration.  Under international law, this “administration” of Taiwan beginning Oct. 25, 1945, can only be viewed as military occupation. A comparison may be made by saying that in the military occupation of Taiwan, the USA is the "Chairman of the Board," and the ROC (originally led by Chiang Kai-shek) is the "Executive Assistant." |

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| Article 25 |
| For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favour of a State which is not an Allied Power as so defined. |

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| ANNOTATIONS to Article 25 |
| As non-signatories to the SFPT, neither the ROC nor the PRC are included in the meaning of the term "Allied Powers."  Some compelling reasons why the ROC was not invited to sign this treaty may be found by examining the historical record. One notable point is to recognize that Taiwan was sovereign Japanese territory before the coming into force of the SFPT on April 28, 1952. Hence, when the Republic of China moved its central government to occupied Taiwan in early December 1949, it immediately became a government in exile.  In the early 1950s, the U.K., in particular, having already broken diplomatic relations with the ROC in Jan. 1950, could not agree that the ROC was still fulfilling the role of “the sole legitimate government of China.” As a leading member of the Allies, the U.K. strongly objected to the ROC being invited to participate in the San Francisco Peace Conference in Sept. 1951. Although the ROC officials spent much money lobbying with the officials of the major world nations to obtain an invitation to the Conference, in the end they were unsuccessful. |

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