

A New View on the “Legal Status of Taiwan is Undetermined” Argument - China Does Not Have a Legal Right of Possession of Taiwan -

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1 “Legal status of Taiwan undetermined” argument

The question of whether China will invade Taiwan and, if so, when, has recently been raised with a sense of urgency by the mass media. After the Russian invasion of Ukraine, the question of Taiwan has come under more intense scrutiny, with comparison between Taiwan and Ukraine.

A forced Chinese absorption of Taiwan, the so-called Taiwan issue, is the most significant issue in East Asia, as it has the potential to have a great impact, in terms of degree and extent, and will inevitably involve Japan as well as the US.

Did you know that one argument underlying the Taiwan issue is that the legal status of Taiwan has yet to be determined, or “undetermined”, which seems to be attracting attention?

The view that the “legal status of Taiwan is undetermined,” simply put, is that Japan renounced its possession of Formosa (Taiwan) and the Pescadores Islands after WWII but only renounced its right of possession and did not specify territorial jurisdiction. Even now, determination of who holds the right of possession of Taiwan and the Pescadores Islands is pending, which necessitates certain procedures, such as holding an international conference to determine who bears the right of possession. That is, the Treaty of Peace with Japan (San Francisco Peace Treaty), which was concluded on September 8, 1951, merely stated that “Japan renounces all right, title and claim to Formosa and the Pescadores” in Article 2 Section b and other provisions are not mentioned.

Both China and the Kuomintang (KMT), or the Chinese Nationalist Party of Taiwan, have rejected the “legal status of Taiwan is undetermined” view. At one time, during the KMT Ma Ying-jeou administration, the Chief Representative of the Interchange Association Taipei Office in Japan mentioned this “legal status of Taiwan undetermined” view and the relationship between Japan and Taiwan temporarily deteriorated.

However, the Democratic Progressive Party of Taiwan has not stated its attitude toward the “legal status of Taiwan is undetermined” view and, conversely, is presumed to embrace it from the perspective of Taiwanese independence. The US held the view that the “legal status of Taiwan is undetermined” up until US-China rapprochement. However, Henry Kissinger, then Special Assistant to President Nixon, promised verbally to then Premier Zhou Enlai that the US would subsequently cease to assert that the “legal status of Taiwan is undetermined”. The US has not raised this view ever since.

In Japan, those engaged in Taiwan-related affairs and research are aware of the “legal status of Taiwan is undetermined” view and nothing more. This is also true worldwide—awareness with no further discussion. Therefore, the meaning of Article 2 Section b of the San Francisco Peace Treaty, in the context of a special international situation remains

unexamined. Accordingly, the current paper intends to revisit this matter and make clear that China has no legal right of possession of Taiwan based on Article 2 Section b of the San Francisco Peace Treaty. I will point out that, after all, this issue boils down to a question of Taiwanese nationhood.

2 The Cairo Declaration and Potsdam Declaration

In terms of the right of possession of Taiwan and the Pescadores Islands, it is necessary to see how Taiwan and the Pescadores Islands were treated in the Cairo Declaration and the Potsdam Declaration before looking at the provision in the San Francisco Peace Treaty.

The first instance when the Allies took up the issue of Taiwan and the Pescadores Islands, which were in Japan's possession, was in the Cairo Declaration, issued on December 1, 1943. The signatories of the Cairo Declaration were the heads of the US, the UK and the Republic of China. The Declaration stated:

“It is their [the Allies'] purpose ... that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.”

This provision in the Cairo Declaration was assumed by the Potsdam Declaration, which was issued jointly by the US, the UK and Republic of China (and later joined by the USSR) on July 26, 1945. In the Potsdam Declaration, Article 8 stated:

“The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.”

As is well known, Japan accepted the Potsdam Declaration. Acceptance obliged Japan to carry out the provisions of the individual Articles in the Potsdam Declaration including the fulfillment of the Cairo Declaration. However, this does not immediately evoke legal transfer of the right of possession of Taiwan and the Pescadores Islands.

Pro-China parties and scholars argue that the acceptance of the Potsdam Declaration evoked transfer of the right of possession of Taiwan and the Pescadores Islands and so there is no basis for a “legal status is undetermined” view—which is obviously not valid. Transfer of a right, based on international law, does not come into effect unless a treaty is signed by government representatives and ratified by its council. Acceptance of the Potsdam Declaration merely obligated Japan to carry out the obligations in it and does not evoke a legal transfer of the right of possession. The obligations in the Potsdam Declaration were in fact fulfilled, in all forms, by Article 2 Section b of the San Francisco Peace Treaty. If acceptance of the Potsdam Declaration induced transfer of the right of possession, the relevant provision in the San Francisco Peace Treaty would have been pointless and the provision should not have been made. The provision is there in the Treaty because Japan still had the right of possession at the time of the conclusion of the San Francisco Peace Treaty.

3 *Occupatio*

Now, let's go back to the discussion about the provision of Article 2 Section b of the Treaty of Peace with Japan. This Section provided that Japan renounces the right of possession of Taiwan and the Pescadores and the land of which the right of possession was renounced becomes *terra nullius*. The principle of law based on international law concerning *terra nullius* is *occupatio*, which means that a nation can acquire ownership of *terra nullius* as its territory by exercising control over it before other nations do. What "exercising control" means is arguable but let us say that it refers to the state in which sovereignty is peacefully and continuously exercised over *terra nullius* without objection from other nations.

Article 2 Section c of the San Francisco Peace Treaty prescribes renouncement of sovereignty over the Kurile Islands and Sakhalin and Article 2 Section f prescribes renouncement of sovereignty over the Spratly Islands and the Paracel Islands. However, there is no provision concerning their territorial jurisdiction. Of these lands, at present, the Kurile Islands and Sakhalin are possessed by Russia and possession of the Spratly Islands and the Paracel Islands are contested by six nations, a result of application of *occupatio*. That is, these lands were rendered *terra nullius* on April 28, 1952, the day that the Treaty of Peace with Japan took effect, but the Kuril Islands and Sakhalin was under control by the USSR at that point, and ever since, and no nation has raised an objection to the USSR possessing the Kurile Islands and Sakhalin. As for the Spratly Islands and the Paracel Islands, since these lands became *terra nullius*, no nation has exercised control over these lands without objection from other nations, leading to on-going dispute.

What about Taiwan and the Pescadores Islands? These lands were occupied by the Republic of China (the Government of Taiwan) when they became *terra nullius*. However, the People's Republic of China (the Government of China) claims to possess the lands. The current situation can hardly be said to be peaceful "exercising of control" and there is doubt of whether the Government of Taiwan possesses Taiwan and the Pescadores Islands.

At the same time, the Government of China does not even occupy Taiwan and the Pescadores Islands; the Government of China is not "exercising control" over Taiwan and the Pescadores Islands. Based on *occupatio*, the Government of China has no legal right of possession of Taiwan.

4 Conclusion

One could comment on my conclusion: This conclusion springs from the view that the Government of Taiwan and the Government of China are treated as separate nations. If there is one, unified China, of both mainland China and Taiwan, and the Government of China and the Government of Taiwan represent local governments of a unified China, then all lands can be regarded as territories of the unified China, which includes land

possessed by the Government of Taiwan. That is, the right of possession of Taiwan belongs to a unified China.

At the moment, however, the Government of Taiwan does not accept this view and the international community does not accept this view either. In the US's One China policy, the US acknowledges that the Government of China maintains there is "one China", which includes Taiwan, and there is no further debate. Japan has practically taken the same position as the US.

In the end, it should be clear that the issue boils down to a question of Taiwanese nationhood. If the Government of Taiwan is recognized as a nation, then the Government of Taiwan can claim the right of possession of Taiwan based on *occupatio* and furthermore, the Government of China has absolutely no right of possession. However, if Taiwan is not recognized as an individual nation, then there can only be "one China".

In the future, with increasingly strained relations between China and Taiwan, the question of Taiwanese nationhood will add even more tension. I hope that the current paper, which raises anew the "legal status of Taiwan is undetermined" view, will be a starting point for discussion concerning future diplomatic recognition of Taiwan.