Is China Under-Exploiting One Legal Avenue in the South China Sea?

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The tension over conflicting sovereignty claims in the South China Sea has seen substantial growth in the past decade. The People's Republic of China (PRC) as the largest claimant in the region has resorted to a wide range of means to justify and consolidate its claims in the disputed region, from the reclamation work on the features it occupies to the issuance of several official documents presenting evidence of its historical connections to the South China Sea. However, there is one legal avenue that seems to have been under-exploited for the PRC, and that is the 1952 Sino-Japanese Peace Treaty. Officially the PRC denies the validity of this treaty but to an ambiguous extent it still refers to the content of this treaty to justify its legitimacy in the South China Sea. The purpose of this article is to present the reasons why this treaty might be potentially helpful to the PRC's claim and explain why its attitude towards the treaty has largely been hesitant so far.

To understand the potential usefulness of the treaty and the reasons behind its seemingly under-exploitation, a brief look at the history between 1946 to 1952 is necessary because these tumultuous years formed the basis for such paradoxical situation. After the defeat of Japan in the Second World War, China was occupied by two main political parties respectively: the Chinese Communist Party (CCP) and the Kuomintang (KMT). The two parties fought a bloody civil war and the result was that the CCP dominated the mainland China while the remnants of the KMT moved its regime, the Republic of China (ROC), to the island of Taiwan. In the following years after 1949, both sides claimed to be the only legitimate government for the whole China, which four decades later led to a "92 Consensus" stipulating that there is only "One China" between the two sides of the Taiwan Strait. But diplomatically at that time some countries, for example the United States (US), continued to recognise the KMT as the legitimate government of the China, while others, for example the United Kingdom, moved its recognition from the KMT to the CCP.

Internationally, the San Francisco Peace Treaty was signed between Japan and 48 other countries on 8 September 1951. The purpose of this treaty was to officially end the Second World War between the Allies and Japan and to make post-war arrangements in the Asia-pacific region. The Article 2 of the San Francisco Peace Treatyincludes all the territories renounced by Japan, including Korea, Formosa (Taiwan) and the Pescadores (Penghu), the Kurile Islands, Pacific Islands formerly under mandate to Japan, any part of the Antarctic area, and the Spratlys and the Paracels. But the treaty was signed with neither the presence of the CCP or the KMT. The reason was that there was disagreement over which party could properly represent the central government of China.

In practice, the CCP and the KMT took very different approaches to the San Francisco Peace Treaty. The CCP denies the legitimacy of the San Francisco Peace Treaty outright on the ground that it was excluded from the negotiation process. On 18 September 1951, PRC Foreign Minister Zhou Enlai announced its rejection of this treaty. Zhou talked about the absence of the PRC delegates in the negotiation and criticized the US' intention to re-arm Japan. The conclusion was that the treaty was illegal, invalid and could not be recognized.

The KMT, in contrast, decided to sign a separate treaty with Japan that inherited the main ideas in the San Francisco Peace Treaty in 1952. It was believed that the motive behind this move was to avoid offending its key ally, the United States. The new treaty, which was made more applicable to the ROC's circumstances, became what was known as the Sino-Japanese Peace Treaty. Officially the CCP denied the legitimacy of this treaty as well. Zhou Enlai claimed

that the treaty "public insults and is hostile to the Chinese people."

But despite this, the 1952 Sino-Japanese Peace Treaty is strongly linked to the sovereignty status of the Spratlys and the Paracels in the South China Sea, which can favour China's interest if properly used. Taiwanese scholars have made attempts to present their cases which are plausible and reasonable to a certain extent. Chen Hurng-yu's "Territorial Disputes in the South China Sea under the San Francisco Peace Treaty" and Lin Man-houng's "A Neglected Treaty for the South China Sea" are two examples of such efforts. In both articles, two points are particularly highlighted.

First, they compare the differences between the San Francisco Peace Treaty and the 1952 Sino-Japanese Peace Treaty and find that the territorial issues mentioned in the latter must have indicated that these territories in the South China Sea were transferred to the ROC. The Article 2 of the San Francisco Peace Treaty includes all the territories renounced by Japan, including Korea, Formosa (Taiwan) and the Pescadores (Penghu), the Kurile Islands, Pacific Islands formerly under mandate to Japan, any part of the Antarctic area, and the Spratlys and the Paracels. However, the Sino-Japanese Peace Treaty does not mention as many. It only includes Taiwan and Penghu as well as the Spratly Islands and the Paracel Islands. Why does the Sino-Japanese Peace Treaty only mention these areas instead of all the areas renounced by Japan?

The most natural explanation is that these territories are highly relevant to the Republic of China, more than any military or geopolitical sense. Militarily and strategically, the Korean peninsula is relevant to China's interest, but it is not mentioned in the Sino-Japanese Peace Treaty. Therefore, the Spratlys and the Paracels must have been interpreted in a way with strong territorial implications to the ROC. Lin quotes a historical document which reveals that although the UK discouraged the ROC from participating in the San Francisco Conference, it insisted that the bilateral treaty's application scope should be limited to the territory that was then and would later be under the control of the ROC. Lin also discovers that on 27 May 1952 Eiji Wajima, Japanese Director-General of the Asian Affairs Bureau, explained at the Committee on Foreign Affairs in the Upper House that of the territories included in the San Francisco Peace Treaty, those closely related to the ROC were mentioned in the bilateral treaty again. Chen's article also focuses on this point. He refers to an explanation offered by Daniel Dzurek who argued that: "This shows that the ROC and Japan viewed the islands of Taiwan, the Pescadores, the Spratlys, and the Paracels as having similar status – that is, belonging to China."

Ma Ying-jeou became a professor in Soochow University after he stepped down as the President of the ROC and he supplemented the importance of the treaty with his evidence. He referred to the Exchange of Notes regarding the Sino-Japanese Peace Treaty and contended that it clearly contains the statement that the treaty shall "in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its Government". In other words, the treaty strongly indicated that the territories mentioned would be subject to the ROC government's control. Ma then criticized the CCP for dismissing the validity of the treaty which ended the humiliation to the Chinese people after Qing Dynasty's defeat to Japan in 1895.

The second point they present is related to the status of the Spratlys and the Paracels before the end of the Second World War. Lin argues that the San Francisco Peace Treatyand the Sino-Japanese Peace Treatyboth acknowledged that the Paracels and the Spratlys had been Japanese territory in the war, otherwise they could not have been renounced by Japan. This was consistent with the fact that they were administered by the Takao (Gaoxiong) of Taiwan since 1939, under the jurisdiction of the Taiwan Governor-General Government. Consequently, if Taiwan was transferred to the ROC with little international confusion, these two areas should also be transferred as a whole package. Chen's article attempts to strengthen this notion by invoking international law. He refers to the*principle of uti possidetis* to justify his point.

This principle means that the territory in question should keep its original form as it was owned by the previous owner. Accordingly, when the ROC took over Taiwan, it naturally also took over the territory under Taiwan. Chen also raises another possibility of treating the Paracels and the Spratlys as *terra nullius*, territory that does not belong to any country. Chen understands that because the two treaties did not specify which country the Spratlys and the Paracels were ceded to, this possibility remains. But even if this situation applies, the ROC should still possess these

two areas because “before and after the signing of the San Francisco Peace Treaty and Sino-Japan Peace Treaty, the Republic of China indeed governed the Paracel and Spratly Islands and included them in an official published map of Chinese territory.”

This means that both the San Francisco Peace Treaty and the Sino-Japanese Peace Treaty can be favourably utilised by Beijing. This is what it did. It is a bit ironical because Beijing denies the legitimacy of these two treaties. After the Filipino Arbitration, Beijing issued its China Adheres to the Position of Settling through Negotiation the Relevant Disputes between China and the Philippines in the South China Sea, in which cases for a Chinese sovereignty over the disputed territories were included. In Paragraph 46, it is stated that:

In 1951, it was decided at the San Francisco Peace Conference that Japan would renounce all right, title and claim to Nansha Qundao and Xisha Qundao. In 1952, the Japanese government officially stated that it had renounced all right, title, and claim to Taiwan, Penghu, as well as Nansha Qundao and Xisha Qundao.

It does not explicitly mention the name the “San Francisco Peace Treaty” or the “Sino-Japanese Peace Treaty”. Probably Beijing had been trying to avoid embarrassing itself. But the content is from these two treaties. It certainly shows that Beijing wants to take advantage of the treaties that it does not recognize.

Moreover, in July 2016, Dong Jianhua, Vice Chairman of the National Committee of the Chinese People’s Political Consultative Conference, spoke at a two-day “Symposium on the International Law on the Settlement of Maritime Disputes” in Hong Kong. He pointed out that China’s sovereignty over the Spratlys could be proven by ample evidence including the “the Cairo Declaration of 1943, the Potsdam Proclamation of 1945, the San Francisco Peace Treaty of 1951, the Sino-Japanese Peace Treaty of 1952, United Nations General Assembly Resolution 2758 in 1971, and the 1972 Joint Statement of the Government of the People’s Republic of China and the Government of Japan”. Here, the names of the treaties were mentioned directly by a high-level official in the PRC. Although Dong spoke those words in Hong Kong instead of the mainland, his political status meant that words from his mouth were not casual, especially on a sensitive issue such as the South China Sea.

Therefore, the ambivalence of the PRC’s attitude towards the Sino-Japanese Peace Treaty and its preceding San Francisco Peace Treaty is apparent: on one hand it denies the legitimacy of these treaties; on another, its claim of the South China Sea partly relies on it. In my interview with Liu Fu-kuo (2019), Professor in Taiwanese National Chengchi University who often proposes cooperation between mainland China and Taiwan over the issue of the South China Sea, he expressed his wish that the mainland China could make better use of the Sino-Japanese Peace Treaty: “The mainland should see the efforts by the ROC objectively.[…] They rarely mention the ROC. They only talked about ‘since ancient time’…… If you talk about the Sino-Japanese Peace Treaty, you must talk about the San Francisco Peace Treaty. […]You can deny it in terms of cross-strait relationship, but as a starting point of the claim in the South China Sea, it is necessary to include it and make an official declaration.”

Indeed, ambiguity can hardly be helpful for Beijing because being self-contradictory will always detract from the justness of one’s own case. Additionally, more questions are raised than what Beijing tries to answer. Does Beijing imply the international arrangement set by the San Francisco Treaty will be acknowledged? Does Beijing hint that treaties signed by Taipei are valid? To what extent will Beijing really depend on these treaties to justify its claims, especially on international occasions where exchange of different opinions may happen? Right now, partially relying on this treaty can neither deny Taiwan’s de facto autonomy nor adding systematic support to Beijing’s sovereignty claims.

But it is not easy for the authorities in Beijing to make adjustments. This is because there is a legal quandary for Beijing. If Beijing denies the existence of the ROC and the treaty signed by it after 1949, the PRC’s evidence for its claim in the South China Sea is not at the maximum level. Without the historical agreement signed by the ROC, Beijing’s claim to the South China Sea is potentially more vulnerable to attack from other claimants. But at the same time, if Beijing takes advantage of the treaty, then there is at least some validity to the idea that the ROC, as a legal entity, continue to exist beyond 1949. This is something Beijing also rejects.

One neutralizing factor that might alleviate Beijing's concern is that the treaty was nullified in 1972, when the PRC established its diplomatic relationship with Japan. Japan moved its diplomatic recognition from the ROC to the PRC. This is important because on this basis the Sino-Japanese Peace Treaty is less likely to challenge Beijing's insistence that it is the only legitimate government for the whole China, including Taiwan. However, at the same time, according to the Article 63 in the 1969 Vienna Convention on the Law of Treaties, the effect of the treaty can be preserved:

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

This article has shown that the Sino-Japanese Peace Treaty can be potentially helpful to China's claim in the South China Sea. However, the official stance from the Chinese authorities displays a degree of ambiguity, which is not particularly helpful to itself. This is due to a legal quandary for Beijing as it faces a hard choice between tacitly admitting the continued ROC presence on Taiwan and not making full use of a legal avenue in the South China Sea. Nevertheless, the nullification of the treaty in 1972 might offer a slight assurance that better usage of the treaty will less likely challenge the CCP's political principle that it is the sole legal government for the entire China.

About the author:

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