

# The *Japan House Tax Case*, 1899-1905: Leases in Perpetuity and the Myth of International Equality

*Douglas Howland\**

Abstract	413
I. Leases in Perpetuity	416
II. The New Treaties and New Property Taxes	419
III. The <i>House Tax Case</i>	421
IV. The Dispute over the Judgment	427
V. Conclusion	430

## Abstract

The global spread of European mercantilism, conquest, and colonization, and the belated justifications for this process, international law and the notion of civilization, were closely linked in the nineteenth century through new institutions – spheres of influence and protectorates, as well as the peculiar form at issue in this essay: extraterritorial enclaves in which Europeans would be immune from local jurisdiction. Unlike extraterritorial agreements today, such as Status of Forces Agreements and those arranged by multinational corporations on behalf of their employees overseas, which grant immunity to the foreign soldier or civilian from local law and prosecution, extraterritorial arrangements in nineteenth-century east Asia established the institution of foreign settlements under the conditions of consular jurisdiction.

---

\* Professor of History at the University of Wisconsin-Milwaukee. He is, most recently, author of *Personal Liberty and Public Good: The Introduction of John Stuart Mill to Japan and China*, 2005, and co-editor (with *Luise White*) of *The State of Sovereignty: Territories, Laws, Populations*, 2009. He can be reached by e-mail at <dhowland@uwm.edu>. An earlier draft of this essay was presented at the workshop “Cultural Histories of Teleology”, sponsored by the University of Helsinki research project “Europe between 1815 and 1914” and the University of Zurich. For their comments, I thank *Adrian Brisku*, *Faisal Devji*, *Martti Koskenniemi*, *Liliana Obregón*, *Gabriel Piterberg*, *Bo Stråth*, *Henning Trüper*, and *Ralph Weber*. I remain grateful to *Teemu Ruskola* for his insightful reading of that essay. In addition, I thank *Peter Macalister-Smith* for help with materials at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, *Howard Kaplan* of the American Bar Association for assistance with SCOTUS cases, and the University of Chicago Center for East Asian Studies for support of my research.

ZaöRV 75 (2015), 413-434

The treaties imposed on Japan between 1858 and 1869, which Japanese in the nineteenth century referred to as the “unfair” treaties, created the arrangement of consular jurisdiction.<sup>1</sup> Because the Japanese state was allegedly unable to provide “civilized” legal procedures to manage the criminal or civil problems that foreign nationals might face in Japan, the Western treaty powers exempted their subjects from the jurisdiction of Japan, and demanded as an alternative that the foreign resident in Japan remain under the jurisdiction of his own consul. Were a foreigner arrested by Japanese authorities for a crime committed in Japan, he was to be tried by a consular court presided by his national consul. As the “system” evolved, civil actions undertaken against foreign residents in Japan were to be tried by the consular court of the defendant’s national consul in Japan. Although some foreign ministers in Japan maintained that foreigners were not obliged to obey Japanese laws, the Japanese government insisted that consular jurisdiction in Japan granted only judicial jurisdiction to foreign consuls. Japan reserved legislative jurisdiction, and foreign residents were obliged to obey Japanese laws. After a number of disputes in the 1870s – including the alleged rights of foreigners to hunt in Japan and to travel freely throughout Japan – the Law Officers of the Crown ruled in favor of Japan, and informed the British minister that he was obliged to instruct British residents in Japan of their duty to obey Japanese laws.<sup>2</sup> The unfair treaties provided a legal basis upon which Japan asserted territorial sovereignty and forced foreign residents to obey Japanese laws in Japan. As international legal agreements, the treaties enabled Japan to demonstrate its domestic jurisdictional equality with the west.<sup>3</sup>

---

<sup>1</sup> Scholars routinely refer to these treaties as “unequal” (*fubyōdō*) treaties, but they were usually called the “unfair” (*fukōhei*) treaties in the nineteenth century. Only in the twentieth century, with the Chinese denunciation of their treaties as unequal, was the term retroactively used in Japan. (The point has been noted by *Yobei Suda*, in his translation of *K. Nakabo*, *Judicial Reform and the State of Japan’s Attorney System*, *Pacific Rim Law and Policy Journal* 10 (2001), 623 et seq. (see p. 630 n 22).) Expressions other than *fukōhei* were sometimes used in the nineteenth century. For example, *Ishii Takashi* cites an 1874 opinion of the Justice Ministry regarding foreign travel into the interior that describes the treaties as *fuheikin* or “unbalanced”, see *Meiji shoki no kokusai kankei*, Tokyo, Yoshikawa kōbunkan, 1977, 151.

<sup>2</sup> *D. Howland*, *An Englishman’s Right to Hunt: Territorial Sovereignty and Extraterritorial Privilege in Japan*, *Monde(s): Histoire, Espaces, Relations*, 1 (2012), 193 et seq.

<sup>3</sup> On the matter of “unequal treaties” and state equality, see *A. Peters*, *Treaties, Unequal*, in: *R. Wolfrum* (ed.), *MPEPIL*, 2008, online edition <[www.mpepil.com](http://www.mpepil.com)>, March 2012; *G. Simpson*, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, 2004; *P. H. Kooijmans*, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*, 1964; and *E. DeWitt Dickinson*, *The Equality of States in International Law*, 1920.

This essay, by contrast, examines the promise of international equality that was anticipated when the revised treaties came into effect. Japan spent more than two decades in negotiations to revise the unfair treaties, which were successfully revised in 1894 and scheduled to go into effect in 1899. Contrary to expectations in Japan, equality was elusive. In negotiating the revised treaties, the Japanese government chose to maintain the institution of leases in perpetuity within the foreign settlements, and three treaty powers – Britain, France, and Germany – used that provision of the unfair treaties to preserve foreign privileges under the revised treaties. Contrary to what Japan and some of its allies had believed to be the principle of the revised treaties – the abolition of extraterritoriality – international law was used to legitimize permanent zones of privilege, spaces that were neither ceded territory nor wholly under Japanese jurisdiction. From this situation arose the *Japan House Tax Case* and a decades-long struggle to eliminate the privileged status of foreign residents in Japan.<sup>4</sup>

The privilege at issue in this essay arose from the principle of extraterritoriality and the contractual arrangements of Japan's international treaties. The unfair treaties of 1858-1869 created the foreign settlements that became extraterritorial enclaves. In a settlement such as Yokohama, foreign residents had a place to live and work under the jurisdiction of their own diplomatic representatives and, in return for their right to lease a piece of land, they paid a nominal land rent. The conflict that eventually arose upon the execution of the revised treaties and the dissolution of consular jurisdiction had to do with the nature of the lease, for, as an alternative to land ownership, the land remained leased to foreigners in perpetuity. At issue was the specific question as to whether the Japanese government had the authority to tax the buildings on the leased land. Were the buildings part of the original lease agreement, and did all aspects of the original conditions of the lease remain in perpetuity?

A number of problems regarding international law in the nineteenth century became apparent in the *House Tax Case*. One issue, as *François Pietri* argued in a dissertation of 1895, was that extraterritoriality persisted in the face of legal contradictions because jurists tended to treat international law as concretely as possible in order to work with objectified facts and thereby

---

<sup>4</sup> Surveys of the House Tax Case include: "L'arbitrage des baux perpétuels au Japon", RGDIP 12 (1905), 492 et seq.; *Y. Ishimoto*, Meiji ki ni okeru chūsaisaiban, in his *Kokusaihō no kōzō tenkan*, 1998, 259 et seq.; *F. von Martitz*, Der Japan-Streit, in: W. Schücking (ed.), Das Werk vom Haag, Ser. II, Die gerichtlichen Entscheidungen, Bd. 1, Die Judikatur des Ständigen Schiedshofs von 1899-1913, Teil 1, 1917, 311 et seq.; *R. K. Reischauer*, Alien Land Tenure in Japan, 1936, 49 et seq.; and *S. Yamada*, Kaokuzei mondai to chūsaisaiban, *Kokusaihō zasshi* 1.3 (4/1902), 1 et seq.

reach some pragmatic result.<sup>5</sup> The *House Tax Case* annoyed the Japanese government because two important principles were brushed aside when arbitrators chose to limit their attention to concrete problems. First, although the revised treaties noted the overarching principle of an agreement to end extraterritoriality, the judgment in the case emphasized the concrete fact that Japan had agreed in the revised treaties to honor leases in perpetuity; hence, the earlier arrangements regarding the leaseholds would be maintained as specified in earlier treaties, regardless of any changes in the territory of the leaseholds, Japan's urban infrastructure, or conditions of society and taxation. From the point of view of foreign leaseholders and their obligations, it would always be the 1860s. And second, although the Japanese government particularly asked the arbitration tribunal to consider the principle of equity in its deliberations – for rents appropriate to the 1860s were quite inadequate for the 1900s – the tribunal ignored this abstraction, for it was not featured in the specific language of the treaties.

A second issue raised by the *House Tax Case* engaged the matter of conflict of laws. The *House Tax Case* very specifically turned around national differences within the international community regarding the concept of property and the practices of taxation thereon. Could land and buildings be differentiated, as the Japanese government claimed, or was “land-and-buildings” perceived to be one entity for purposes of property taxation? European state practices were not consistent among themselves, whether nationally or in the colonies. And although most authorities agreed on the principle of *lex loci rei sitae* (or *lex situs*) – that the law where the property in question is located should determine judgments – the arbitration tribunal inexplicably subverted Japanese local practices. One peculiar result, as some legal scholars noted, was that interstate treaties were invoked to preserve the leases of individual persons, which were more appropriately treated as private law arrangements.

## I. Leases in Perpetuity

Most matters of extraterritoriality were under-theorized in the nineteenth century and typically represented as exceptional – the sort of material either to omit from a treatise on international law or to relegate to a footnote. Leases in perpetuity, too, were treated with such disinterest. To begin with, they differed from international leases (sometimes referred to as “proper

---

<sup>5</sup> F. Pietri, *Étude critique sur la fiction d'extraterritorialité*, 1895, 308 et seq., 336, 391 et seq.

leases”). The more typical international lease was contracted between two states for the benefit of the lessee state. Jurists repeatedly cite the example of the leases signed by China with foreign states at the end of the nineteenth century. Russia, for example, leased parts of the Liaodong peninsula in order to have a naval station close to its eastern frontier. Britain leased Weihaiwei in order to have a naval base in the proximity of Beijing, Korea, and Japan.<sup>6</sup> By contrast, the leases in perpetuity set aside territory in Shanghai, Nagasaki, Yokohama, and elsewhere for the benefit of foreign residents in China and Japan. The great powers negotiated with China or Japan on behalf of their respective residents in order to establish a foreign settlement and, subsequently, the residents or their representatives dealt directly with the government of China or Japan in fulfillment of the rental agreements of the lease.

Jurists thus question the nature of such a lease as international law. Because the beneficiary of the lease is the foreign resident community, some jurists – following especially the argument of *Lauterpacht* – treated a lease in perpetuity as a “purely private law conception”. *Verzijl*, for example, rejects such a lease from consideration because it is not a “genuine international lease” and has something of a more “private law nature”. Hence, his examples stress these Chinese cases of Liaodong and Weihaiwei.<sup>7</sup> *C. Walter Young*, however, objected strongly to such an interpretation and faulted *Lauterpacht* for his “restrictive interpretation” of leases, insofar as *Lauterpacht* reduced them to such a general degree of commonality as to neglect important differences among the many systems of private law in the world. *Young* insisted that important questions be asked in differentiating among several conceptions of leases: Was subletting allowed? Did a lease cover both land and buildings? Did improvements automatically become the property of the landlord?<sup>8</sup> Because of the local variation within England itself, for example, English judges looked to the “custom of the country” –

---

<sup>6</sup> *J. H. W. Verzijl*, *International Law in Historical Perspective*, Vol. 3, State Territory, 1970, 400 et seq.; *C. W. Young*, *The International Legal Status of the Kwantung Leased Territory*, 1931, 97 et seq.

<sup>7</sup> *H. Lauterpacht*, *Private Law Sources and Analogies of International Law*, 1927, 181 et seq.; *L. Oppenheim*, *International Law: A Treatise*, 3<sup>rd</sup> ed. 1920, Vol. 1, Peace, 378 et seq.; *J. H. W. Verzijl* (note 6), 397.

<sup>8</sup> *C. W. Young* (note 6), 125 et seq. *Dickinson* argued that leases in perpetuity were a form of international servitude, in which one state sold or rented specific rights in territory to another state; *Young* objected to this analogy as well. Compare *E. DeWitt Dickinson* (note 3), 264 et seq.; and *C. W. Young* (note 6), 101 et seq.

what was felt to be the established good practice of the locality.<sup>9</sup> The fact of national differences among private law and custom contributed to the legal dispute in Japan, and *Young's* point was the need to consider international conflict of laws.

Whatever the legal nature of the lease, the rights transferred by the lease could only be specified in a treaty. Jurists were unanimous that the treaty determined all rights transferred by the lease – whether a lease in perpetuity or a proper international lease. The defining aspect of a lease was that it was not a cession of territory; it transferred not sovereignty but only aspects of jurisdiction. As *Oppenheim* argued, the lessee state might treat the leased territory as its own territory and a lease might resemble cession, but the territory legally remained the property of the leasing state. A lease was not a fictive or disguised cession, as some jurists argued, because a lease may end by virtue of a time limit or an act of rescission. And as to the question of whether states who were allegedly not full members of the family of nations could enter into such lease agreements – such as China or Japan – *Oppenheim* and the majority of jurists insisted that yes, they could and did make such agreements. This was a key point to the critics of *Lauterpacht's* analogy between private contract and international treaty in the matter of leases, because duress was generally not allowed in private contracts, although it was permitted in the signing of international treaties (especially because the victor so often imposed peace agreements upon the vanquished). Japan could not have argued that the foreign settlements were unfair because the lease agreement had been imposed upon its government in the 1860s.<sup>10</sup> In some measure, the opposite proved to be the case. When the problem of the leases in perpetuity went to arbitration, the Arbitration Tribunal treated the lease arrangement as though it had nothing to do with extraterritoriality or consular jurisdiction; rather, it was a simple contractual arrangement like those in private law, and the Tribunal noted the peculiar and potentially adverse circumstances to the lessee insofar as the government of Japan was both owner of the leased land and the sovereign power whose will was law.<sup>11</sup>

---

<sup>9</sup> *S. Anderson*, Leases, Mortgages, and Servitudes, in: W. Cornish/S. Anderson/R. Cocks/M. Lobban/P. Polden/K. Smith (eds.), *The Oxford History of the Laws of England*, Vol. 12, 1820-1914 – Private Law, 2010, 114.

<sup>10</sup> *H. Lauterpacht* (note 7), 161 et seq.; *L. Oppenheim* (note 7), 180 et seq., 309 et seq., 365, 377; *C. W. Young* (note 6), 4 et seq., 15; *E. DeWitt Dickinson* (note 3), 264 et seq.

<sup>11</sup> *J. B. Scott* (ed.), *The Hague Court Reports*, 1916, 82.

## II. The New Treaties and New Property Taxes

To the Japanese government, the issues that produced the *House Tax Case* had everything to do with extraterritorial infringements upon Japanese sovereignty set into place by the unfair treaties of 1858-1869. As the Japanese government argued in the case it presented to an international tribunal in 1902, the new treaties – the first of which was signed in 1894 and went into effect in July 1899 – were “based upon the principles of equity and mutual benefit” and represented a “restoration of her (Japan’s) administrative and judicial autonomy in respect of alien residents and sojourners”. As a consequence, the new treaties eliminated “the system of consular jurisdiction, or extra-territoriality”.<sup>12</sup> Feeling empowered with their restored jurisdiction over alien residents in Japan, Japanese authorities proceeded to enact a number of policies that distressed many foreign residents of the former settlements in Japan.

Pursuant to the new treaties, the foreign settlements were dissolved and incorporated within surrounding Japanese communes. However, as a concession to the European powers, foreigners who held perpetual leases under the former treaties were confirmed in their titles to the leases. In retrospect, Japan erred in negotiating such a concession. For, in disallowing foreigners the right to own land and thereby making an exception in the new Civil Code to the equality between foreign residents and Japanese subjects under Japanese law, the new treaties exempted foreign leaseholders from the duty to pay land taxes. Why the Japanese government chose this alternative is not fully clear, for it appeared with a change in foreign ministers and their draft treaties. Where Foreign Minister *Aoki Shūzō* in 1890 would have allowed foreigners to purchase and to own land in Japan, his successor *Mutsu Munemitsu* preferred instead to maintain the leases in perpetuity – and *Mutsu’s* 1893 draft proved a successful basis for the revised treaties.<sup>13</sup> *Aoki* wrote in his memoirs that the decision was motivated by a nationalistic propriety over Japanese land – what *Aoki* referred to as “political soil”. Where he thought that the prospect of foreigners buying and selling land in Japan would produce something like a market harmony between Japanese and

---

<sup>12</sup> Japan, The Case Presented by the Imperial Japanese Government to the Tribunal of Arbitration Constituted under Section I of the Protocol Concluded at Tokio, August 28, 1902, between Japan and Germany, France, and Great Britain, 1903, 1; see also 74, 87 et seq. Hereafter cited as “The Case”.

<sup>13</sup> *L. G. Perez*, *Japan Comes of Age: Mutsu Munemitsu and the Revision of the Unequal Treaties*, 1999, 96, 138, 154. Historians of treaty revision are strangely silent on the consequences of *Mutsu’s* decision, probably because their attention is focused on the diplomacy of reaching agreement on treaty revision.

foreigners, others disagreed – and they advised *Mutsu*.<sup>14</sup> Law professor *Yamada Saburō* understood the wish not to sell Japan's patrimony – its national territory – to foreigners, but he was uncomfortable that the Civil Code had been changed in order to accommodate foreign leaseholders. For he sensed that the commitment to “maintain the status quo” would undermine Japan's case.<sup>15</sup>

But at the time it was deemed preferable to the alternative of allowing foreigners to purchase and to own the land outright. Nonetheless, a foreigner who claimed a right to a perpetual lease under the new treaties was now required to register the lease, and this meant registering the land and any buildings on the land as separate properties, in keeping with the Japanese practice of differentiating land and buildings on land. Furthermore, foreign registrants of buildings were now expected to pay the same customary taxes on houses, warehouses, shops, and other buildings, which Japanese subjects paid annually. Income and business taxes were likewise levied against foreign residents – which, the Japanese government argued, was ordinary treatment among most countries in the world.<sup>16</sup> The point of this inclusion of foreigners within the taxation system of Japan was to demonstrate, in keeping with the new treaties, that the special privileges and exemptions for foreigners in Japan were a thing of the past: with consular jurisdiction abolished, foreigners in Japan were to be equal with Japanese subjects before the law – expected to obey the same Japanese laws and able to receive the same rights under Japanese law.<sup>17</sup>

But some holders of perpetual leases in Japan claimed immunity from such taxes – particularly the British, French, and German leaseholders. They argued that the terms of the new treaties required that they pay only the ground rent stipulated by the reconfirmed leases and that the language of the new treaties granted an immunity from any further “imposts, taxes, charges, contributions, or conditions whatsoever” upon the lease.<sup>18</sup> They also argued that the combined ground-rent and “house tax” was a sum significantly larger than the tax revenue required for the provision of municipal services to the property – including upkeep of sewers, roads, water, lighting, police protection, and so on. Because the ground rent required by

<sup>14</sup> S. *Aoki*, *Aoki Shūzō jiden*, Y. Sakane (ed.), 1970, 268, 271 et seq.

<sup>15</sup> S. *Yamada*, *Gaikokujin no shiken kyōyū ni tsuite*, *Kokusaihō zasshi* 1.9 (11/1902), 1 et seq.; S. *Yamada*, *Gaikokujin no chii o ronzu*, (part 4), *Kokusaihō zasshi* 1.6 (7/1902), 1 et seq.

<sup>16</sup> The Case, 70.

<sup>17</sup> The Case, 70 et seq. See also S. *Yamada*, *Gaikokujin no chii o ronzu*, (part 1), *Kokusaihō zasshi* 1.1 (2/1902), 7 et seq.; and R. *Masujima*, *Japanese Law in Relation to the Status of Foreigners*, *Proceedings of the New York State Bar Association* 26 (1903), 175 et seq.

<sup>18</sup> The Case, 2.

the lease had reportedly paid for municipal services in the former settlements, the leaseholders judged the new house tax both burdensome and discriminatory.<sup>19</sup> In the eyes of Japanese authorities, the foreign leaseholders were intent on maintaining the privileges that they had acquired under the old system of extraterritorial consular jurisdiction.

### III. The *House Tax Case*

The new laws went into effect in July 1899, just as the new treaties went into effect. By September, residents of the former settlements had enlisted the help of their diplomatic ministers in Tokyo to negotiate with the Japanese Foreign Ministry over the residents' unwillingness to pay what they deemed to be additional and unlawful taxes and fees. The U.S. government, for example, informed U.S. missionaries that they had a duty to pay Japan's income taxes on their employment, but insisted that U.S. military personnel were not domiciled in Japan and therefore exempt from income taxes.<sup>20</sup> At the same time, the U.S. State Department generally agreed with Japan on the matter of the house tax – it was quite reasonable to assume that buildings added value to land and that a building would increase the property tax.<sup>21</sup> By contrast, British Minister *Satow* in Tokyo and his French and German counterparts refused to cooperate with the new arrangements.<sup>22</sup> Discussions ensued for nearly three years between the Japanese government and the governments of Great Britain, France, and Germany, to no one's satisfaction. Thus Japan offered, and the three powers agreed, in August 1902 to submit the case to the International Court of Arbitration in The Hague.<sup>23</sup>

In the diplomatic correspondence between summer 1899 and summer 1902, and in the formal cases, counter-cases, and final responses submitted by both the Japanese government and the governments of Britain, France, and Germany collectively, the primary question was whether or not the buildings on leased land were exempt from the house tax, insofar as the original lease defined "property" as the land and buildings on it. Were the original leases meant to be leases of land exclusively, or were future buildings on the land included in the lease? Key to the Japanese case was the

<sup>19</sup> The Case, 138 et seq., 186 et seq.

<sup>20</sup> See the several memos from *Buck* to *Hay* in May and June 1900, in: Foreign Relations of the United States (1900), 760 et seq. Cited hereafter "FRUS".

<sup>21</sup> *Hill* to *Wilson*, 7.2.1901, in: FRUS (1901), 345 et seq.

<sup>22</sup> See *Satow* to *Aoki*, 16.1.1900, repr. in: The Case, Appendix, 126 et seq.

<sup>23</sup> An English version of the Protocol is printed in: *Great Britain, France, and Germany v. Japan*, AJIL 2 (1908), 911 et seq.

practice in Japan of considering land and buildings as independent and separate pieces of property. Arguably in accord with this custom, title deeds from the early period of the leaseholds specify that the residents of the settlements are paying rent on a piece of land.<sup>24</sup> Some early leases also make the point that the Japanese government will be preparing land for rent – existing Japanese houses will be removed in order to ready the land for foreigners’ use.<sup>25</sup> As Japan put the issue in its final response, the leases specified lots of land, foreigners were given the right to occupy and use the land, and the lease referred only to land as marked on settlement maps – nothing more than land could be construed.<sup>26</sup> Hence, the 1869 Austria-Hungarian Treaty with Japan, which was used as the most representative treaty by virtue of the most-favored-nation clause granted to all Western powers, had allowed foreigners to lease land and to purchase buildings: that is, it too differentiated land and buildings in describing the settlements that were prepared for foreign residents.<sup>27</sup>

Accordingly, a subsidiary issue in the case was the question of different meanings of the terms used in the revised treaties: German *Grundstücke*, French *propriétés*, and English “property”.<sup>28</sup> *Grundstücke* refers clearly to land, but by virtue of the most-favored-nation clause, Germany could rely on the language of the British and French treaties. However, “property” is ambiguous: “real property” includes land or buildings, but in the English legal terminology of nineteenth-century lease agreements in England, real property – land and/or buildings – was that belonging to the owner of the property and any improvement added by a tenant – such as a building on

<sup>24</sup> The Case, 10, Notes to the Case, 48 et seq., Appendix, 245 et seq.

<sup>25</sup> The Case, Appendix, 329, 332 et seq., 346 et seq., 362.

<sup>26</sup> Japan, Replies of the Imperial Japanese Government to the Objections of the Governments of Germany, France, and Great Britain, 1905, 11 et seq. Hereafter cited as “Replies”.

<sup>27</sup> The Case, 13 et seq.; R. K. Reischauer (note 4), 18 et seq.; and S. Murase, The Most-Favored-Nation Treatment in Japan’s Treaty Practice during the Period 1854-1905, AJIL 70 (1976), 273 et seq. (esp. 292 et seq.). Art historian E. Lillehoj has noted the dismantling, moving, and reassembling of buildings from one site to another during the Tokugawa period; see her “Art and Palace Politics in Early Modern Japan, 1580s-1680s”, 2011, 132, 143, 161.

<sup>28</sup> The Case, 7; T. Senga, Kaokuzei mondai no chūsaisaiban (part 2), Kyōto hōgakkai zasshi 1.3 (1906), 20 et seq. (esp. 23 et seq.); K. Yokota, Nihon no kaokuzei ni kansuru jiken, in his Kokusaihō ronshu, Vol. 1, 209 et seq.; and H. Sasse, Japanischer Fremdensteuer-Fall, in: K. Strupp/H.-J. Schlochauer (eds.), Wörterbuch des Völkerrechts, 1961, Vol. 2, 168 et seq. See also “Les gouvernements d’Allemagne, de France et de Grande-Bretagne”, Baux perpétuels au Japon: Contre-mémoire, 1904, repr. in: Ian Nish (ed.), British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print, Part I, Ser. E, Vol. 7, Japan and Northeast Asia, 1898-1906, 1989, 360 et seq. Hereafter cited as “Contre-mémoire”; and Japan, The Counter-Case Presented by the Imperial Japanese Government to the Tribunal of Arbitration ... (1904), 121 et seq. Hereafter cited as “Counter-Case”.

leased land – was not property but a “fixture”. Upon the termination of the lease, a fixture became the property of the owner of the land.<sup>29</sup> Like the English language of the treaty, French terminology regarding *propriété* was also ambiguous. Article 21 of the Franco-Japanese treaty of 1896 stated that “*les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés*” and indicated that those properties would be free of all other imposts, taxes, charges, and so on. Did the “properties actually possessed by foreigners in the districts” refer to land or buildings or both? The French minister insisted that *propriétés* meant *biens-fonciers* – land, buildings, or other unmovables – but this only begged the question of the treaty’s lack of specificity.<sup>30</sup> Hence, the Japanese particularly asked the arbitration tribunal to look at the language of the treaties.

For their part, British and French authorities argued that the Japanese government had made a condition of the original lease the obligation to erect a building on the leased land, and that a fulfillment of that condition entitled the leaseholder to exemption from taxes. Thus, they argued, the buildings had been an intended development of the leased land and should be exempt from additional taxes.<sup>31</sup> But the Japanese government insisted that the object of this condition was to prevent “the speculative acquisition and holding of the settlement land”; all parties felt that the erection of a building on the land was a sign of serious intention and made a leaseholder a *bona fide* resident of the foreign settlement. British authorities had fully supported this condition for these reasons in 1860.<sup>32</sup> Moreover, at multiple points during the negotiations over revising the treaties, the British Foreign Office had acknowledged that the object of the leases was land, and that a separate article regarding the real property of buildings should perhaps be added to the treaty. Indeed, the British government had been aware of the Japanese practice of imposing separate land taxes and the house tax, as well as the fact that the house tax was the primary source of revenue for Japan’s local governments.<sup>33</sup> And foreign residents in the settlements had been

<sup>29</sup> S. Anderson (note 9), 117 et seq.; W. Geldart, Introduction to English Law, 11<sup>th</sup> ed. 1995, 86, 94 et seq.

<sup>30</sup> The Case, 173 et seq., and Appendix, 69 et seq., 75 et seq., 83 et seq., 151 et seq. (quote from treaty on p. 272).

<sup>31</sup> The Case, 20; see also “Les gouvernements d’Allemagne, de France et de Grande-Bretagne”, Baux perpétuels au Japon: Mémoire présenté ... sur le sens et la portée des dispositions des traités et engagements visés par le protocole de Tokio du 28 août 1902, 1903, 27 et seq.

<sup>32</sup> The Case, 23.

<sup>33</sup> The Case, 82, 99, 183; and House of Commons, Japan, no. 1 (1884) Trade Report, 1884, 45 et seq., 63 et seq., 74.

made aware beforehand by the counsel of *Ludwig Lönholm*, a professor of law at Tokyo Imperial University, who explained both the Japanese differentiation of rights to land and *chijōken* or *superficies* – rights to buildings on the land – and the consequent taxation that would go in effect with the new treaties – taxes on both land and house.<sup>34</sup> Japanese practices and intentions had been clear to foreign residents all along.

And yet questions dogged the history of land taxes in Japan. Was there in fact a longstanding practice of separately taxing land and buildings? According to a 1904 memorandum by *J. H. Gubbins* of the British legation in Tokyo, in reference to a Japanese document “Land Tax Revision in 1885”, the land tax traditionally was levied on farmland, not on land in towns. The foreign leaseholds, the ground rents in the foreign settlements, and the house tax were all novel institutions, and *Gubbins* accused the Japanese government of anachronistically applying present facts to a very different situation in earlier decades. In spite of the change initiated fifteen years earlier, he maintained that the land tax and the ground rent were different institutions.<sup>35</sup> That said, another advisor to the Foreign Office acknowledged that at the inception of the foreign settlements, British authorities had refused the Japanese government’s request to insert into every lease a clause committing the lessee to conform to the land regulations of Japan. The British rationale was of course that only the British Consular Court had authority over British subjects in Japan. If British residents subsequently had their way with the land and buildings on the leased land, this was appropriate, since the applicable law was that of the leaseholder’s nationality.<sup>36</sup> The force of these arguments was to historicize the leaseholds as an exception to Japanese land and taxation regulations and to treat Japan’s initial acquiescence in extraterritorial arrangements as evidence that her intention was never to tax foreigners in any way that conformed to Japanese law. Minimal ground rents were the normal and permanent practice of the leases in perpetuity.

Yet in its *Counter-Case*, the Japanese government marshaled even more evidence in support of its claim that European practices were not so different from those of Japan. Prussian building-tax laws of the 1860s, French house-tax laws in parts of colonial Madagascar, and building taxes on leased

<sup>34</sup> The Case, 162; and *L. Lönholm*, *The Condition of Foreigners under the New Treaties: A Digest Written for the International Committee of Yokohama*, 1898, 3 et seq., 40, 43 et seq. On *Lönholm*’s work in Japan, see *P.-C. Schenck*, *Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens*, 1997, 260 et seq.

<sup>35</sup> *J. H. Gubbins*, Memorandum, 18.1.1904, British Foreign Office Archives (National Archives, Kew) file F.O. 46/611, 260 et seq.; and *Gubbins to MacDonald*, Notes on Mr. MacIvor’s Memorandum, 4.2.1904, F.O. 46/611, 392 et seq. Archive hereafter cited “F.O.”.

<sup>36</sup> *Hall to Lansdowne*, 22.12.1904, F.O. 46/613, 964 et seq.

land in British India all differentiated land and buildings in the taxes upon real property.<sup>37</sup> Moreover, Japanese authorities insisted, the language of the former treaties had been motivated particularly by the Dutch wish not to be restricted to merely renting buildings. During the Tokugawa period, Dutch traders in Deshima had been allowed to rent land and buildings; hence the former treaty with Holland had specified that Dutch residents could rent land *and own buildings* on that land.<sup>38</sup> Among the many variations in practice within the Japanese foreign settlements, Japan emphasized that some leaseholds in Kobe were renegotiated in 1888 to include house taxes in addition to the land rents.<sup>39</sup> There was ample evidence that foreigners inside and outside Japan were familiar with the practice of differentiating land and buildings. In any case, the Japanese government argued, European practice in matters of property rights conformed to the principle of *lex loci rei sitae* (or *lex situs*): the law of the place where the property is located is the appropriate law. Hence, Japanese law rightly applies because the property at issue is in Japan.<sup>40</sup>

At the same time, the Japanese government advocated the principle of equity, arguing that it had experienced a real decrease in rent. The depreciation of silver since 1859 had reduced rents to one-half of what they had been when the original leases were made. In response to the three powers' argument that the land tax had adequately compensated Japanese authorities for their maintenance of municipal services, Japan pointed out that, to the contrary, costs had grown considerably since the 1860s and, as a result, the ground-rent on leased land was less than current land taxes. Furthermore, the development represented by the buildings erected on leased land had already increased the costs of municipal services that were not at all compensated by the land rents.<sup>41</sup> Some Japanese officials, with an ill humor that reflected their exasperation, suggested that they return to the open sewers and dirt roads of the 1860s in order to keep to the letter of the law that the foreigners arguably wished kept – the municipal services standard at the

---

<sup>37</sup> Counter-Case, 67 et seq., 140.

<sup>38</sup> The Case, 39 et seq.; Counter-Case, 62 et seq., 71 et seq. See also “Les gouvernements d’Allemagne, de France et de Grande-Bretagne”, Baux perpétuels au Japon: Réponse . . . aux objections du gouvernement japonais, 1905, repr. in Ian Nish (note 28), 402 et seq., 414. Hereafter cited as “Réponse”.

<sup>39</sup> The Case, Appendix, 225 et seq.; and A. Ōyama, *Kyū jōyaku ka ni okeru kaishi kaikō no kenkyū*, 1967, 243 et seq.

<sup>40</sup> Counter-Case, 50. On the development of property law in Japan, with reference to the separation of land and buildings, see H. P. Marutshke, *Property Law – Real Rights*, in: W. Röhl (ed.), *History of Law in Japan since 1868*, 2005, 205 et seq.

<sup>41</sup> The Case, 16, 138 et seq., 155. The three powers disputed Japanese calculations in their *Contre-mémoire*, 376 et seq.

time of the original treaties and contracts.<sup>42</sup> Hence, the Japanese government also asked the Tribunal especially to consider the matter of equity.

In both of its requests, to examine the meaning of property terminology and to consider the equity of rents, the Japanese government was sorely disappointed, for the Arbitration Tribunal decided in favor of the three powers. It found that property was meant to include land and buildings, both because of the obligation to erect a building on the leased land and because of the condition that buildings became the property of the Japanese government if the lessee failed to fulfill his engagement. It also found that at the inception of the leaseholds, only annual rents were negotiated; it cited the longstanding absence of special taxes on buildings in Japan; and it found that in negotiating the revised treaties, Japan intended to maintain the status quo, in spite of the treaty claim to put Japanese and foreigners on an equal footing. Most convincing to the Tribunal was Article 21 of the French treaty, which explicitly indicated no additional charges.<sup>43</sup> Contrary to Japan's assumption that extraterritoriality had ended, the Tribunal judged that Japan's original intention to accommodate foreigners with extraterritorial privileges was reconfirmed by the new treaties: the original leases in perpetuity had exempted foreigners from any change in Japanese law.

The Japanese government was stunned by the decision, even though a few Japanese legal authorities had drawn attention to the fact that the new treaties did grant a new privilege to foreign leaseholders: they exempted foreign leaseholders from the duty to pay land taxes. In disallowing foreigners the right to own land, the treaties made an exception in the new Civil Code to the equality between foreign residents and Japanese subjects under Japanese law. Law professors *Yamada Saburō* and *Senga Tsurutarō* regretted the contradiction in Japan's position. In order to prevent the sale of Japan's national territory to foreigners, the Civil Code had been changed and this accommodation of foreign leaseholders had undermined Japan's case.<sup>44</sup>

Japanese jurists had been optimistic going into arbitration – indeed, the leading professor of law at Tokyo Imperial University, *Ariga Nagao*, judged it a fair procedure. Likewise, his colleague *Matsubara Kazuo* noted that arbitration, as the best alternative to war, represented the ideals of world

<sup>42</sup> R. K. Reischauer (note 4), 85.

<sup>43</sup> The Hague Permanent Court of Arbitration, *Recueil des actes et protocoles concernant le litige entre l'Allemagne, la France, et la Grande Bretagne, d'une part, et le Japon, d'autre part*, 1905, 35 et seq.; J. B. Scott (note 11), 77 et seq.; and "Decision of the Permanent Court of Arbitration in the Matter of Perpetual Leases, May 22, 1905," *AJIL* 2 (1908), 915 et seq.

<sup>44</sup> S. Yamada, *Gaikokujin no shiken* (note 15); S. Yamada, *Gaikokujin no chii* (note 15); T. Senga (note 28), (part 1), *Kyōto hōgakkai zasshi* 1.2 (1906), 15 et seq.

peace, civilization, and federation at the dawn of the twentieth century. This meant, however, that state sovereignty was subject to the international tribunal. A nation was expected to honor the arbitration agreement and, moreover, had a duty to abide by the judgment that the tribunal rendered. Even if it were a seemingly unfair judgment, like that which Britain had received in the *Alabama* arbitration, Japan was nonetheless obliged to obey.<sup>45</sup>

#### IV. The Dispute over the Judgment

But *Matsubara* raised another concern that proved more critical, particularly in light of the outcome of the case: Whose law guided the arbitration process? European authorities differed in their opinions; *Matsubara* noted that *Bulmerincq* advocated equity, national law, and international law; *Hall* mentioned Roman law and civil law; and *Mérignhac* recommended international law in combination with equity and private law. To *Matsubara*, customary international law surely should have played a role in the decision.<sup>46</sup>

In fact, many of the rebuttals in the case revolved around this issue of which law applied, and Japanese authorities found the three powers' argument galling, for it was a return to the specious arguments of the 1870s. Ignoring the developments of three decades, the three powers argued that Japanese law did not apply to the leaseholds or leaseholders, it had never applied, and in spite of the revised treaties and the fact that foreigners were after July 1899 under the jurisdiction of Japanese law, it still did not apply. Until July 1899, they argued, Japan had been outside of European civilization and the international community; hence, neither Japanese law nor international law applied to the leaseholds, which were quite like European colonies. The only relevant "law" was Japan's treaty obligations.<sup>47</sup> The three powers went further and restated the old justification for consular jurisdiction. Because of Japan's outlier status, it had agreed to consular jurisdiction and placed foreign residents and their property outside of both Japanese authority and Japan's territorial laws. Rent on the leasehold was the sole obligation of foreign residents, and in light of Japan's decision to "maintain the status quo", that rent remained the only obligation which those foreign-

<sup>45</sup> *N. Ariga*, *Moto gaikokujin kyōryūchi no tatemono kazei mondai no chūsaisaiban*, *Kokusaihō zasshi* 1.8 (10/1902), 1 et seq.; *K. Matsubara*, *Chūsaisaiban no hōri* (part 2), *Kokusaihō zasshi* 1.10 (12/1902), 4 et seq. (esp. 9 et seq.). See also *K. Matsubara*, *Chūsaisaiban no hōri* (part 1), *Kokusaihō zasshi* 1.9 (11/1902), 7 et seq., which is generally optimistic but raises the issue that state sovereignty is subject to the arbitration tribunal (p. 12).

<sup>46</sup> *K. Matsubara*, *Chūsaisaiban* (part 2) (note 45), 8 et seq.

<sup>47</sup> *Contre-mémoire*, 334 et seq.; *Réponse*, 395 et seq., 418.

ers owed Japan. As for Japan's argument that immunity from taxes or other Japanese laws had to do with consular jurisdiction and the unwillingness of consuls to enforce Japanese law among their nationals, the three powers argued to the contrary that foreign residents' immunities were an implicit condition of the treaties: the principle of extraterritoriality prevailed. The personal exemptions which the Tokugawa shogunate had once granted to foreign leaseholders remained in force as personal economic privileges. Japan could have renegotiated these arrangements at any time, but they had chosen not to. This, the three powers concluded, satisfied Japan's appeal to equity.<sup>48</sup>

In response, Japanese authorities focused on the absence of any particular law informing the three powers' argument. As had been argued in the 1870s disputes over hunting in Japan or travel to the interior, if each foreign resident were bound by his respective national law, what law governed the foreign settlements as a whole and foreigners outside of the settlements?<sup>49</sup> This was an especially keen question in light of, first, the multiple arrangements from one settlement to another and, second, Japan's contention that there were no personal rights at issue – that this was a matter that concerned only land. That the three powers postulated a *sui generis* right of leaseholders based on a “loi étrangère” or a “droit international spécial” different from German, French, or English national law was unhelpful – no such law existed. The only law that could apply was that customarily recognized in Europe: *lex situs*, or here, the Japanese law where the property in question was located.<sup>50</sup>

It was extraordinary for the three powers to claim that the former treaties granted personal immunities to foreign residents, in the absence of any such clause, and that their case was grounded in a nonexistent law. Aside from Japanese outrage over the decision, international jurists also found the Tribunal's judgment inadequate. *Lauterpacht* regretted that the Tribunal favored the intentions of the parties over the private law rights associated with the lease arrangements. Since the Tribunal treated the private-law terms of the lease as a part of international law, *Lauterpacht* believed that the Tribunal had an obligation to consider local law, local custom and equity in framing its judgment – which it did not. He too cited examples of British and French international leases in which land and buildings were differ-

---

<sup>48</sup> Contre-mémoire, 367 et seq.; Réponse, 419 et seq.

<sup>49</sup> *D. Howland* (note 2).

<sup>50</sup> Counter-Case, 14 et seq., 47 et seq.; Replies, 6 et seq., 38 et seq.. See Contre-mémoire, 338 for “loi étrangère.”

entiated.<sup>51</sup> English procedure, recall from above, was to prioritize local practice in judging disputes over leases.<sup>52</sup> *Quincy Wright* objected that the judgment sanctioned the persisting confusions of jurisdiction within the former foreign settlements and the lingering tax exemptions that perpetuated extraterritorial privilege.<sup>53</sup>

Nonetheless, the judgment did give Japanese and other legal authorities pause. *Tomizu Hirono* suggested that, having chosen a European proceedings, Japan might have anticipated that the arbitration would privilege European understandings of property. *Senga Tsurutarō* noted in 1906 that Japanese expectations about ending extraterritoriality and joining the international community had been thwarted; government officials feared that they had “failed” in their pursuit of treaty revision and international policy. And to *Yokota Kisaburō* writing in the 1930s, the judgment was a shock and a blow to the confidence of Japanese leaders.<sup>54</sup> Practically, however, two changes occurred. Internationally, arbitration panels were changed. Many international jurists deplored the split decision in the *House Tax Case*, as two of the three judges confirmed the decision while the one Japanese judge, *Motono Ichirō*, dissented. Accordingly, the structure of the panels was revised at the 1907 Hague Conference so that arbitration panels expanded to five members; each side would choose two members, but nationals of either party to the case were forbidden from serving.<sup>55</sup> Nationally, Japan became wary of compulsory arbitration clauses in its treaties, and declined to include them. It ratified the 1907 Hague Convention on arbitration, but with reservations on the articles regarding the composition of tribunals and the general commitment to arbitration.<sup>56</sup> As *Sakamoto Shigeki* and *Owada Hisashi* more recently argued, Japanese leaders came to believe that international law was the law of the strong, and they took better care that Japan’s treaties served to expand its powers and support its interests.<sup>57</sup>

<sup>51</sup> *H. Lauterpacht* (note 7), 181 n1, 181 n3, 183 et seq., 262 et seq.

<sup>52</sup> *S. Anderson* (note 9), 114.

<sup>53</sup> *Q. Wright*, *The Existing Legal Situation as It Relates to the Conflict in the Far East*, 1939, 47, 67 et seq.

<sup>54</sup> *T. Senga* (note 28), 30 et seq.; *H. Tomizu*, *Kaokuzei ni kansuru chūsaisaiban*, *Gaikō jihō* no. 91 (1906), 83 et seq.; and *K. Yokota*, *Kokusai saiban to Nihon*, in his *Kokusaihō ronshu*, 1976, Vol. 1, 180 et seq. (esp. 183 et seq.).

<sup>55</sup> *J. H. Ralston*, *The Law and Procedures of International Tribunals*, rev. ed., 1926, 35; *F. von Martitz* (note 4), 333 et seq.; and *H. Sasse* (note 28), 169 et seq.

<sup>56</sup> *J. B. Scott* (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3<sup>rd</sup> ed. 1918, 62, 65 et seq., 86.

<sup>57</sup> *S. Sakamoto*, *Meiji sanjūhachinen no hikari to kage*, in: *Kokusai hōgakkai* (ed.), *Nihon to kokusaihō no hyakunen*, Vol. 1, *Kokusai shakai no hō to seiji*, 2001, 182 et seq. (esp. 190 et

For its part, the Japanese government simply rejected the judgment of the Tribunal. It continued to levy local land taxes and the house tax on the foreign leaseholds, and to insist that the income, business, and other taxes imposed on all persons in Japan were to be paid by foreign residents.<sup>58</sup> Where *Arnulf Becker Lorca*, in a recent essay, has seen the Tribunal's judgment as evidence of bias against semi-peripheral states in international law, I view the outcome of the case somewhat differently.<sup>59</sup> Japan was becoming a world power and, like other world powers, it could and did impose its state will in the matter: it flatly refused to implement the Tribunal's decision. Not until 1937 was the standoff resolved. In that year, after prolonged and intermittent negotiations by the foreign ministers of Britain on behalf of British leaseholders in Japan, the outstanding individual debts were rescinded in exchange for the termination of the leases. Extraterritorial privileges in Japan were finally eliminated.<sup>60</sup> Five years later, the 1942 reform of the Civil Code reversed the last-minute change of 1898: leases in perpetuity were struck from the law and foreigners henceforth were permitted to own land in Japan.<sup>61</sup>

## V. Conclusion

This essay offers evidence for what others have called the “myth” of equality in international law. On the one hand, the equality of nations was an accepted principle within the natural law of the eighteenth century, and the equality of states was reflected in the notion and practices of conflict of laws as it developed in the nineteenth century. When two states differed as

---

seq.); *H. Owada*, Japan, International Law, and the International Community, in: N. Ando (ed.), *Japan and International Law: Past, Present and Future*, 1999, 347 et seq. (esp. 355).

<sup>58</sup> The matter of income and business taxes, which was not part of the arbitration, went unresolved for several years, as the Japanese government instituted a host of alternative taxes effecting foreigners. See *Y. Ishimoto* (note 4), 290 et seq.; and *R. K. Reischauer* (note 4), 65 et seq., 82 et seq.

<sup>59</sup> *A. Becker Lorca*, Sovereignty beyond the West: The End of Classical International Law, *J. History Int'l L.* 13 (2011), 7 et seq. (esp. 38 et seq.).

<sup>60</sup> British Dominions Office Archives, D.O. 35//155/3 (including 1601D/1, 1601D/2, and 1601D/3), and the final agreement of 25.3.1937, D.O. 35//550/16, 6 et seq., 9 et seq. See also *M. O. Hudson*, The Liquidation of Perpetual Leases in Japan, *AJIL* 32 (1938), 113 et seq. The German leaseholds were eliminated with the Versailles Treaty in 1919, but I have not yet ascertained when the French leaseholds were terminated.

<sup>61</sup> *S. Aoki* (note 14), 74 n4; and *S. Miyazaki*, Japan House Tax Arbitration, in: R. Bernhardt (ed.), *EPIL*, part 2, Decisions of International Courts and Tribunals and International Arbitrations, 1981, 154 et seq.

to their definitions of marriage or citizenship or inheritance, a state tended to defer to the state to which the individual in question was attached. On the other hand, however, international affairs and international law in particular were subject to a power politics that intruded upon the interpretation of international law. The three powers' commitment to resurrect extraterritorial privilege on the same grounds that had been already dismissed was a shock to both Japan and many international legal scholars. While the Japanese government imagined that it had achieved a right to equal treatment in the international arena with the ratification of the revised treaties, it would continue to be shocked with reminders of the contempt in which some of the great powers held Japan. These include not only the *House Tax Case*, but also the Triple Intervention at the end of the Sino-Japanese War (when Russia, France and Germany denied Japan its object of conquest, the Liaodong peninsula) and the unwillingness of the powers to support Japan's effort to insert a racial equality clause into the charter of the League of Nations. Parity in command of international law was not the same as the equality of states.

The extraterritorial regimes in Asia ended at the time of the Second World War. The principle of territorial sovereignty was more or less in place with the founding of the League of Nations, and the participating states would no longer tolerate the extraterritorial arrangement. More importantly, the naturalist legal principle upon which Japan had insisted – the sovereign equality of states in the international arena – replaced the standard of civilization under the domination of the great powers and served to guide the twentieth century.<sup>62</sup> The modern state of Turkey, for example, demanded an end to the Ottoman capitulations and grants of extraterritorial privileges, to which the great powers agreed with the Lausanne Treaty in 1923. Likewise, the Republic of China threatened to abrogate in 1943 the treaties it had inherited from the Qing imperial state unless extraterritoriality were eliminated, and the great powers agreed, both because China was an ally in

---

<sup>62</sup> On the “standard of civilization,” see *L. Obregón*, *The Civilized and the Uncivilized*, in: B. Fassbender/A. Peters (eds.), *The Oxford Handbook of the History of International Law*, 2012, 917 et seq.; *B. Bowden*, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, *J. History Int'l L.* 7 (2005), 1 et seq.; *G. W. Gong*, *The Standard of “Civilization” in International Society*, 1984, and *G. Schwarzenberger*, *The Standard of Civilization in International Law*, *Current Legal Probs* 8 (1955), 212 et seq.

the fight against fascism and because western extraterritorial privileges had ceased to matter in a China under Japanese occupation.<sup>63</sup>

But this essay has examined extraterritoriality in the nineteenth century from Japan's point of view – a betrayal of what the Japanese government took to be the international norm of territorial sovereignty. The opposite perspective is also available. A U.S. citizen, for example, cannot be confident that his rights as an American citizen are fully protected overseas in an extraterritorial domicile. As *Eileen Scully* has argued, the landmark U.S. Supreme Court decision in 1891 in *Ross v. United States* ruled that the U.S. Constitution had no application beyond the territory of the United States, particularly as to a right to trial by jury. Similarly, *David Bederman* observed that the peculiar Cold War enclave of “Greater Berlin” under the occupation of U.S. forces went a step further and subjected citizens there to the actions of the Executive; when the Executive acted alone, without Congress – which it could with Berlin's occupation – the Constitution was not in force.<sup>64</sup> The U.S. Supreme Court, however, in recent decisions prompted by U.S. treatment of “enemy combatants” captured in the “war on terror”, has asserted the right of U.S. citizens held in Guantanamo Bay and Iraq to challenge their detention by virtue of the U.S. *habeas corpus* statute. In an extraterritorial setting, a U.S. citizen under the jurisdiction of the U.S. military is nonetheless protected by *habeas corpus*.<sup>65</sup>

In other words, in spite of the difficulties and injustices that extraterritorial regimes had created, and in spite of the zeal with which Japan and other nations had sought to eliminate extraterritorial privileges within their states, the system was revived after the war in other parts of the world, and is reasserted today in new ways. The practice of extraterritoriality has expanded. The Status of Forces Agreements contracted in the wake of the Second World War resemble the Japanese case discussed in this essay, for these agreements exempt military troops, civilian workers, and their dependents from local jurisdiction, and create an extraterritorial regime mimicking the capitulations of earlier centuries and laying the ground for similar charges

---

<sup>63</sup> *T. Kayaoğlu*, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China, 2010, 182 et seq.; and *Z. Li*, International Law in China: Legal Aspect of the Chinese Perspective of World Order, 1995, 273 et seq.

<sup>64</sup> *E. P. Scully*, Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942, 2001, 87 et seq.; *D. J. Bederman*, Extraterritorial Domicile and the Constitution, Va. J. Int'l L. 28 (1988), 451 et seq. (esp. 485 et seq.). See also *K. Raustiala*, Does the Constitution Follow the Flag? – The Evolution of Territoriality in American Law, 2009, Chapter 4.

<sup>65</sup> See *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) and *Munaf v. Geren* 553 U.S. 674 (2008); the right of *habeas corpus* for foreign citizens has also been confirmed in *Rasul v. Bush* 542 U.S. 466 (2004).

of injustice and privilege that challenged their nineteenth-century predecessors.<sup>66</sup> The arrangements under which U.S. forces remain in Okinawa and elsewhere in Japan – not to mention Iraq – exemplify the worst abuses of extraterritoriality. To *Gerry Simpson*, such an agreement constitutes a “separate legal regime”.<sup>67</sup>

Perhaps the most striking development in recent decades has been the growth of “effects-based” extraterritorial jurisdiction. International law generally prohibits the exercise of extraterritorial enforcement unless such action is specifically permitted. The “effects principle” claims that a state may assert jurisdiction “when foreign conduct produces substantial effects on its territory”. The vast majority of these instances concern commercial matters, especially what is perceived as unfair economic competition, and they remain quite controversial for several reasons. Such a use of domestic law to displace, in effect, multilateral treaties or international law invites clashes among inconsistent rulings and retaliation on the part of foreign states. Moreover, the effects principle arguably fails to “provide a coherent and straightforward model by which it can be authoritatively determined whether in a given situation the exercise of extraterritorial jurisdiction by way of prescription of adjudication is lawful or not”.<sup>68</sup> Indeed, uncertainty colors future cases regarding the effects principle within the U.S. as a result of recent U.S. Supreme Court decisions. Arguably overturning thirty years of precedent regarding the U.S. Alien Tort Statute, the Court decided in *Morrison v. National Australia Bank* and *Kiobel v. Royal Dutch Petroleum Co.* that any future case must have some significant connexion to the U.S. in order to be actionable under the Alien Tort Statute. Extraterritoriality, the Court has ruled, pertains to the location of the relevant conduct rather than the citizenship of the defendant.<sup>69</sup>

Writing at the turn of the last century, *Lassa Oppenheim* celebrated the success of Japan in shedding foreign privileges. Japan was proof that the powers live up to their word – consenting to withdraw consular jurisdiction as soon as a state had reached a required level of civilization.<sup>70</sup> But *Oppen-*

---

<sup>66</sup> *K. Raustiala* (note 64), 21 et seq., 138 et seq.; *B. Simma/A. Müller*, Exercise and Limits of Jurisdiction, in: J. Crawford/M. Koskenniemi (eds.), *The Cambridge Companion to International Law*, 2012, 134 et seq. (esp. 154 et seq.).

<sup>67</sup> *G. Simpson* (note 3), 345 et seq. See also *A. Peters* (note 3), 11 et seq.

<sup>68</sup> *M. T. Kamminga*, Extraterritoriality, in: R. Wolfrum (note 3), (quotes on p. 3); and *A. L. Parrish*, Reclaiming International Law from Extraterritoriality, *Minn. L. Rev.* 93 (2009), 815 et seq. (esp. 842 et seq.).

<sup>69</sup> *Morrison v. National Australia Bank* 561 U.S. 247 (2010); and *Kiobel v. Royal Dutch Petroleum Co.* 133 U.S. 1659 (2013).

<sup>70</sup> *L. Oppenheim* (note 7), 604 et seq.

*heim* failed to grasp the full meaning of “civilization”. Japan had not only revised its legal codes so as to inspire the confidence of foreign governments concerned to protect their citizens abroad; Japan had also developed sufficient diplomatic expertise and military force in order to enforce its will abroad: an important aspect of “civilization” in the nineteenth century was the power to colonize lands overseas. If anything, these recent developments in extraterritoriality show that the nineteenth century is still with us, as a world where privilege trumps equality.

Meanwhile, the growth of international organizations and regulations has diversified the content of international law. The international law that informs the sovereign equality of states has become both more complex and yet less universally supported by the states that once promoted the model – giving these nominally legal developments a profoundly contingent and political nature. For the standard of civilization has remained a factor in international politics – from “progress” and the “three worlds” of the 1950s and 1960s to the revival of “civilization” in the 1980s as a criterion by which to distinguish ranks among the nations and states.