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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION	Master MDL Docket No. 1347 VRW
THIS DOCUMENT RELATES TO: *Choe v. Nippon Steel Corporation, et al.*, N.D. Cal. No. CV-99-5309 *Kim v. Ishikawajima Harima Heavy Industries, Ltd, et al.*, N.D. Cal. No. CV-99-5303 *Oh v. Mitsui & Co., Ltd, et al.*, C.D. Cal. No. SACV 00716 DOC (ANx) *Sin v. Mitsui & Co., Ltd, et al.*, C.A. No. 8:00-436 *Su v. Mitsubishi Corporation, et al.*, C.D. Cal. No: 2:00-2796 *Sung, et al. v. Mitsubishi Corporation, et al.*, C.D. Cal. No. CV 00-3175 RSWL (AIJx)	**STATEMENT OF INTEREST OF UNITED STATES OF AMERICA** Judge: Hon. Vaughn R. Walker Date: December 13, 2000 Time: 10:00 a.m. Ctrm: Courtroom 6, 17th Floor

On September 21, 2000, this Court held that the claims of Allied prisoners of war ("POWs") against Japanese corporations for whom they were forced to perform slave labor were precluded by operation of the Allies' Treaty of Peace with Japan of September 8, 1951, 3 U.S.T. 3169 ("Peace Treaty" or "Treaty"). In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000) ("Order No. 4"). The Court ruled that such claims were waived pursuant to section 14(b) of the Treaty. Id. In its opinion, the Court stated that its September 21, 2000 Order did not apply to the claims of non-Allied prisoners of war. These non-Allied claims have been brought primarily by individuals who were Korean or Chinese nationals during the time of their capture and imprisonment by Japan.[1]/

PRELIMINARY STATEMENT

The United States acknowledges the horrific treatment that non-Allied civilians and soldiers taken as prisoners by Japan during World War II received at the hands of the Japanese Imperial forces. Like the Allied prisoners of war, these individuals were subjected to atrocious and unspeakable abuse. The United States Government condemns Japan's treatment of these innocent people in the strongest possible terms. Nevertheless, the difficulty with entertaining these claims in a U.S. court over 50 years later is that the post-war settlements – including the war crimes trials, the 1951 Peace Treaty and other international agreements – already took Japan's lawless conduct into consideration and held that nation and its leaders accountable. These agreements represent a framework that if disturbed now, after 50 years, could have far-

[1]/ There is also a pending motion to dismiss the claims of Filipino forced laborers. The United States has not submitted a separate Statement of Interest concerning these claims because it believes they are covered by the Court's Order No. 4. The Philippines was a signatory to the 1951 Treaty of Peace and therefore the Filipino claims should be treated identically to the Allied claims.

reaching consequences for U.S.-Japan relations and Japan's relations with other countries.

In the Peace Treaty, the Japanese Government recognized its obligations to pay reparations for the damage and suffering it caused during the war, and did so by providing reparations to an extent never before seen in modern times. Under the Treaty, Japan gave the Allied powers that became parties to Treaty, as well as non-signatory nations such as China and Korea, the right to seize and dispose of public and private Japanese assets located within their territories. In return, in Article 14 of the Treaty, the powers that became parties expressly waived – on behalf of themselves and their nationals – claims arising out of actions taken by Japan and its nationals during the war. At the strong urging of the United States, Japan subsequently entered into peace treaties and/or claims settlement agreements with, inter alia, South Korea, the Republic of China (Taiwan), Indonesia and Burma on terms that essentially mirrored those contained in the 1951 Treaty. The agreements with South Korea and Taiwan, moreover, were in fulfillment of specific legal obligations undertaken by Japan in the 1951 Treaty. The 1951 Treaty created a basic framework for the non-judicial resolution of war claims that, for nearly 50 years, has been adhered to by all states with war-related claims against Japan. The unambiguous policy purpose of this process was to put to rest once and for all the issue of Japan's legal liability for WWII damage claims in the greater interest of regional peace and security.

Notwithstanding this delicate fabric of international agreements resolving the matter of claims between the warring nations, the State of California has attempted to create its own mechanism for dealing with these very same issues. It has instituted a cause of action that reaches back 50 years, by waiving the statute of limitations applicable to other state tort actions, and reopens the carefully considered and long-resolved issue of Japan's actions during World War II . Much as we can sympathize with the motives that animated the California legislature in enacting its statute, it is not for the State of California to intrude upon the difficult and sensitive foreign policy judgments made by the United States and other governments in the wake of World

War II. Nor, we believe, should U.S. courts be put in the position of judging the effects of agreements entered into between two foreign governments, such as Japan and China or Korea, on the rights of their citizens with respect to events occurring outside the United States. Any decision as to whether or not the United States should become involved in interpreting such agreements should be made by the Executive Branch after full consideration of the potential diplomatic and political impact on the United States. Moreover, given the express waiver of claims by the U.S. in Article 14, it would be inconsistent with the framework established by the Treaty if U.S. courts were to become a forum for the nationals of states that did not sign the 1951 Treaty to bring claims against Japan and/or its nationals stemming from actions taken in the course of WWII.

In addition, among the stated U.S. purposes for entering the Treaty were the achievement of finality and security and peace in the region. Allowing the claims by non-Allied nationals would be inconsistent with the Treaty's objective of achieving finality on the issue of war-related claims. It also could have serious implications for stability in the region. The Japanese Government has stated that its relationships with China and Korea are very delicate and that such lawsuits could disrupt relations and ongoing negotiations with those countries. See Diplomatic Note from the Embassy of Japan to the U.S. Department of State, dated November 17, 2000 ("Note Verbale") (Exhibit 1).

Finally, the United States must consider the equities involved. Surely the intent of the United States in entering the Treaty was not to block our own nationals from receiving compensation in U.S. courts, while creating a U.S. forum for non-nationals to obtain relief. Such a result would be totally anomalous, and would manifestly contradict the overarching purpose of the 1951 Treaty and its ancillary claims resolution processes.

Under the Treaty regime, these are matters to be decided through negotiation among the governments involved, not in a United States' courtroom on the basis of California law. Therefore, although we have great sympathy for the plaintiffs, the United States believes the

claims of non-Allied plaintiffs held as prisoners of war by Japan are precluded by the framework established by the Treaty of Peace with Japan of September 8, 1951, and the California statute on which they are based impermissibly intrudes on the foreign policy powers of the United States Government and is preempted by federal law. For these reasons, and the reasons explained more fully below, plaintiffs' claims should be dismissed.

BACKGROUND

The Allies were painfully aware of the nature and extent of Japanese war crimes committed against Chinese nationals. The Japanese occupation of Manchuria dated back to 1931, and the practice of the Japanese occupation forces repeatedly had been condemned by the Allies. See, e.g., John W. Dower, War Without Mercy: Race and Power in the Pacific War, 38 (1986) (discussing U.S. State Department condemnation of the bombing of civilian targets in China in 1930s). At the International Military Tribunal for the Far East (the "Tokyo trials"), prosecutors presented voluminous evidence concerning the use of opium trafficking in the 1930s to raise money for the Japanese war effort, the infamous "Rape of Nanking" of 1937, and the use of countless Chinese and other Asians as slave laborers before and during World War II. See The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, 386-438 (Dr. B.V.A. Röling & Dr. C.F. Ruter, eds. 1977). The Allies also were aware that approximately half of all Japanese-owned assets abroad were located in China. See Tetsuo Ito, Japan's Settlement of the Post-World War II Reparations and Claims, 37 Japanese Ann. of Int'l L. 38, 47 (1994). Thus, any meaningful settlement of the issue of Japanese reparations had to address the issue of Chinese war claims.

At the same time, it was China that presented the biggest obstacle to a comprehensive settlement, since by 1949 it had become impossible to determine which political entity legally represented China. By that time, the People's Republic of China had been established in Beijing, and Chiang Kai-Shek's Nationalist forces had retreated to the island of Taiwan, where it

established governance as the Republic of China. See Marius B. Jansen, Japan and China: From War to Peace, 1894-1972, 443-44 (1975); see also The China White Paper: August 1949 (originally issued as United States Relations with China With Special Reference to the Period 1944-1949), 311-23 (1967). The U.S. Government continued strongly to support the Chinese Nationalists, particularly after Chinese Communist forces launched a major offensive into North Korea in November 1950. See William Whitney Stueck, Jr., The Road to Confrontation: American Policy Toward China and Korea, 1947-1950, 3-5 (1981). Great Britain, by contrast, favored recognition of the People's Republic of China. See Memorandum of Conversation, by the Deputy Director of the British Commonwealth and Northern European Affairs (Satterthwaite), Washington, March 30, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 953-54 (Exhibit 2); Memorandum of Conversation, by the Deputy to the Consultant (Allison), Washington, April 5, 1951, reprinted in id. at 964-67 (Exhibit 3).

Since there was no consensus among the Allies as to whether the People's Republic of China or the Republic of China properly should be a party to the 1951 Treaty, neither Chinese entity was invited to the San Francisco Peace Conference, with the understanding that Japan would be left to decide which government it would recognize. See Telegram from the Secretary of State to the United States Political Adviser to SCAP (Sebald), Washington, May 16, 1951, reprinted in id. at 1044-45 (Exhibit 4); Draft Joint Statement of the United Kingdom and United States Governments, June 19, 1951, reprinted in id. at 1134 (Exhibit 5). However, the Senate Foreign Relations Committee later would inform Japanese officials that the U.S. Senate's approval of the 1951 Treaty was conditioned on the understanding that the Japanese Government only would conduct diplomatic relations with the Republic of China. See Memorandum by the Consultant to the Secretary (Dulles) to the Secretary of State, Washington, Dec. 26, 1951, reprinted in id. at 1467-68 (Exhibit 6); see also Note Verbale (Ex. 1).

Korea presented a different but equally complicated set of problems. As Korea had been

under the colonial occupation of Japan since 1910, "the view of the United States and Japanese governments was that, as part of the Japanese empire, Korea had fought against the Allies during the Pacific War and therefore was not eligible for reparations." See Sung-Hwa Cheong, The Politics of Anti-Japanese Sentiment in Korea: Japanese-South Korean Relations under American Occupation, 1945-1952, 47 (1991); see also U.S. Dep't of State Publications, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan, 84 (1951) (Exhibit 7). Indeed, many of the claims of Koreans were not considered World War II claims, per se, but "losses associated with colonial rule." Cheong, supra, at 54

Korea nevertheless was recognized as having "a special claim on Allied consideration." Id. The United States realized that, as was the case with regard to all other Allied war claims, "any reparations which might be paid to the Koreans by the Japanese would in fact come from the United States taxpayers." Memorandum of Conversation, by the Officer in Charge of Korean Affairs (Emmons), Washington, Jan. 17, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VII, Korea and China, Part 1, at 97 (summarizing remarks of Dean Rusk, Assistant Secretary for Far Eastern Affairs) (Exhibit 8). Thus, it was crucial to resolve, to the greatest extent possible, the issue of Korean claims against Japan arising out of both the war and the colonial occupation; in fact, "[t]he American effort to open a dialogue between the two nations began even before the final draft of the [1951] Treaty was published." Cheong, supra, at 100. Dulles initially favored Korea's full participation as a signatory to the 1951 Treaty. See Memorandum of Conversation, by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, Tokyo, April 23, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1007 (1977) (Exhibit 9). However, the British Government so strongly opposed the idea that it eventually was abandoned. See generally Cheong, supra, at 77-98.

As a result of these complications, in the end no Chinese or Korean political entities signed the 1951 Treaty. In these circumstances, Article 14(b) of the Treaty, providing for waiver

of all Allied claims against Japan and its nationals, does not cover the PRC, Taiwan, or North or South Korea. However, the Allies inserted several provisions into the Treaty that provided for some form of compensation to these countries. More importantly, the Treaty obligated Japan to enter into bilateral agreements with these entities on terms similar to those provided in the Treaty.

Article 26 of the Treaty obligated Japan to enter into a war-claims settlement with a Chinese political entity within three years. Article 21 of the Treaty stated that China would be entitled to the benefits of Articles 10 and 14(a). In Article 10, Japan renounced all rights and interests in China, and Article 14(a) provided for the seizure and liquidation of assets located in Chinese territory. This was extremely significant because, as stated above, almost half of all Japanese-owned assets abroad were located in China.

Article 26 was inserted in the Treaty because of the deadlock between the British and U.S. Governments over the issue of Chinese participation. This provision was designed to obligate Japan to enter into a comprehensive war claims settlement with a Chinese political entity, without specifying either the People's Republic of China or the Republic of China. See Telegram from the Secretary of State to the Embassy in the Republic of China, Washington, June 21, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1135-36 (1977) (Ex. 5). Under the provision, Japan was expected to "conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty."[1]/ Treaty,

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[2]/ Significantly, all of Japan's post-1951 bilateral settlement agreements have adhered to the same basic framework established in the 1951 Treaty: a comprehensive non-judicial resolution of all war claims, using the proceeds of liquidated Japanese assets located abroad, with substantial foreign aid packages provided to the developing Asian nations formerly occupied by Japan. Even some of the Allies that attended the San Francisco Conference but did not sign or ratify the Peace Treaty due to then-existing domestic political pressures, most notably Burma, eventually reached bilateral settlement agreements with Japan that contained these same

Article 26 (emphasis added). This obligation was to expire within three years of the entry into force of the 1951 Treaty. Within those three years, Japan did in fact conclude a bilateral treaty of peace with the Republic of China (Taiwan), on substantially the same terms as are provided for in the 1951 Treaty. Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38 (Exhibit 13). The situation with regard to the People's Republic of China is slightly different for reasons explained in detail in the Government of Japan's Note Verbale. As noted above, any similar resolution with the People's Republic of China was rendered virtually impossible by U.S. insistence that Japan not deal with Chinese Communists. Nonetheless, both the People's Republic of China and the Government of Japan have made several public statements to the effect that the issue of war claims was set aside as part of the normalization of relations between the two nations. See Note Verbale (Ex. 1).

Article 2 of the Treaty required Japan to recognize Korea's independence and renounce all claim to Korea. Article 21 specifically stated that Korea would be entitled to certain benefits under the Treaty. Article 4(a) obligated Japan to resolve all claims between Korea and Japan through "special arrangements between the two governments," and Article 4(b) provided for the Korean Government's seizure of all Japanese-owned assets in Korea. See Statement of U.S. Position on Interpretation of Article 4 of the Japanese Peace Treaty With Respect to Korean-Japanese Claims Settlement, reprinted in Documents on Korean-American Relations 1943-1976, at 146-147 (1976) (Exhibit 14) ("Documents on Korean-American Relations"). This was a

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basic attributes. See, e.g., Treaty of Peace Between the Union of Burma and Japan, Nov. 5, 1954, Art. 5, 3542 U.N.T.S. 202 (Exhibit 10); see also Treaty of Peace Between Japan and the Republic of Indonesia, Jan. 20, 1958, Art. 4, 4688 U.N.T.S. 235 (Exhibit 11). Nearly all such agreements were brought about in large part with the active involvement of the U.S. Government. See, e.g., Memorandum of Discussion at the 214th Meeting of the National Security Council Held on Sunday, September 12, 1954, reprinted in Foreign Relations of the United States 1952-1954, Vol. XII, East Asia and the Pacific, Part 1, at 907 (1977) (Dulles reporting to the National Security Council his efforts to convince the Japanese Government to accept Burma's proposal for a war claims settlement) (Exhibit 12).

significant step towards the resolution of Korean claims as these assets were, by all accounts, substantial. By the end of World War II, Japan and its nationals had acquired 5 billion dollars' worth of assets in Korea, almost 85 percent of all property in Korea. Cheong, supra, at 48. When Japanese nationals were repatriated from Korea by U.S. forces in 1945, they were allowed to take with them only 1000 yen each and whatever they could carry. Id. The remainder of the Japanese assets were frozen by U.S. authorities until October 12, 1948, when about 90 percent of all such vested property was transferred to the newly-established Republic of Korea. Id. at 48-54.

Japan and the Republic of Korea (South Korea) entered into an agreement as contemplated in Article 4(a) of the Treaty in 1965 following years of protracted negotiations in which the United States heavily was involved. See Agreement on the Settlement of Problems Concerning Property and Claims and On Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, 8473 U.N.T.S. 258 (Exhibit 15); see also generally Cheong, supra, at 99-118 (discussing U.S. role in the negotiations). The terms of this agreement were greatly influenced by the fact that Korea already had received substantial compensation under Article 4(b) of the 1951 Treaty, as discussed above. Cheong, supra, at 117; see also Documents on Korean-American Relations (Ex. 14). The Japan-ROK agreement is part and parcel of the framework created by the United States in 1951. A similar agreement between Japan and North Korea is currently under negotiation, in furtherance of Japan's obligations under Article 4(a) of the 1951 Treaty.[1]/

DISCUSSION

THE CLAIMS OF THE NON-ALLIED PLAINTIFFS ARE PREEMPTED BY THE TREATY OF PEACE AND THE FEDERAL GOVERNMENT'S POWER TO MAKE FOREIGN POLICY

1. The Claims Of The Non-Allied Plaintiffs Are Preempted By

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[3]/ Japan's obligations under Article 4(a) runs independently of its Article 26 obligations, and is not subject to the three-year limitation.

The 1951 Treaty Of Peace

State law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress and the President. Crosby v. National Foreign Trade Council, 120 S. Ct. 2288, 2294 (2000) (citing Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941)). Although Article 14(b) of the Treaty did not extinguish claims of nationals of countries not party to the Treaty, the United States national policy evidenced by the text and negotiating history of the Treaty demonstrates an intent on the part of the U.S. Government to occupy, in the United States, the entire field of war claims against Japan and its nationals. Tenney v. Mitsui & Co., Ltd., Case No. CV-99-11545, slip op. at 5 (C.D. Cal. Feb. 24, 2000) (J. Marshall) (Exhibit 16). Litigation of these war claims under the California statute would frustrate the manifest intent of the Executive Branch and Congress to settle once and for all the issue of war claims against Japan and its nationals, regardless of the nationality of the claimant. For that reason, Cal. Civ. Proc. Code §354.6 is preempted by operation of the Supremacy Clause. See Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); National Foreign Trade Council, 120 S. Ct. at 2294 (citing California v. ARC America Corp., 490 U.S. 93, 101 (1989)).[1]/

The United States, specifically John Foster Dulles, the lead U.S. negotiator, was the driving force behind the decision to waive all Allied claims against Japan in the 1951 Treaty. The United States Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. The comprehensive scope of the Peace Treaty's waiver of claims, as well as the remedial scheme created by the War Claims Act, the mechanism the United States created to compensate American POWs, demonstrates that the federal government has occupied the field with respect to prisoner of war claims against the Japanese and has left no room for the States to

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[4]/ An international treaty to which the United States is a party is the "supreme law of the land" and may preempt state law claims as fully as an act of Congress. U.S. Const. Art. VI, ¶2; see also Air France v. Saks, 470 U.S. 392, 406 (1985); Missouri v. Holland, 252 U.S. 416, 434-35 (1920); In re Aircrash in Bali, Indonesia, 684 F.2d 1301, 1307-08 (9th Cir. 1982).

supplement it. United States v. Locke, 120 S. Ct. 1135, 1149 (2000); Worth v. Universal Pictures, Inc., 5 F. Supp. 2d 816, 820 (C.D. Cal. 1997).

The 1951 Treaty created the framework for bringing closure to World War II claims against Japan and its nationals. In drafting the Treaty, the Allies took pains not only to address settlement of their own war-related claims with Japan, but those of non-signatory nations as well. As discussed above, the Allies inserted several provisions into the Treaty that provided for some form of compensation to these countries. See Treaty, Articles 2, 4, 10 , 14 and 21. In addition, the Treaty obligated Japan to enter into bilateral agreements with these entities on terms similar to those provided in the Treaty. Id., Articles 4 and 26. The Allies' intent was to effect as complete and lasting a peace with Japan as possible in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia. See Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S. Exec. Rep. No. 82-2, at 2-3 (Exhibit 17); Aldrich v. Mitsui & Co. (USA), Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20, 1988) (Exhibit 18). To that end, the United States actively facilitated and encouraged Japan's efforts to enter into peace treaties and/or claims settlement agreements with non-signatory nations such as China, Korea, Burma and Indonesia.

However, the international community, led by the United States, recognized that full payment for all damages was impossible if a "viable economy" were to be created in Japan. See Treaty, Article 14(a); S. Exec. Rep. No. 82-2, at 12 (Ex. 17). It therefore was understood and accepted that it would be "the duty and responsibility of each government to provide such compensation for persons under its protection as that government deem[ed] fair and equitable." S. Exec. Rep. No. 82-2, at 13 (Ex. 17). Although the Treaty unequivocally required Japan to compensate signatory as well as non-signatory nations for war losses, the Treaty's waiver provisions placed the burden of ensuring that individual claimants were compensated back on the home governments of those citizens. The United States responded to this call by seizing Japanese assets, placing them into the War Claims Fund established pursuant to the War Claims

Act, 28 U.S.C. §§ 2001-2017, and distributing them through the War Claims Commission. Congress rejected an alternative proposal that would have allowed federal courts to adjudicate war compensation claims. 94 Cong. Rec. at 564 (1948) (Exhibit 19). Congress even barred judicial review of the War Claims Commission's decisions "by mandamus or otherwise." 50 U.S.C. App. § 2010 (1994). It was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan and Japanese nationals in U.S. courts, but allow federal or state courts to serve as a venue for the litigation of similar claims between third-parties. Such a result would be at odds with the overarching purpose and application of the Treaty.

The federal government, "in the exercise of its superior authority in [the field of foreign relations], has enacted a complete scheme of regulation" to address World War II related claims against Japan and its nationals. Hines, 312 U.S. at 66. California cannot now "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, [that] federal law." Id.; see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983); Beveridge v. Lewis, 939 F.2d 859, 862 (9th Cir. 1991). Because Cal. Civ. Proc. Code §354.6 interferes with long-standing foreign policy judgements centering around the 1951 Peace Treaty, it necessarily is preempted. United States v. Pink, 315 U.S. 203, 230-31 (1942) ("state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"); Hines, 312 U.S. at 66; Bethlehem Steel Corp. v. Board of Comm'rs of the Dep't of Water and Power of the City of Los Angeles., 276 Cal. App. 2d 221, 225-26 (1969). If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted, and there would be "great potential for disruption or embarrassment" of the United States in the international arena. Zschernig v. Miller, 389 U.S. 429, 435 (1968). In this instance, it goes beyond the "potential" for embarrassment. The Government of Japan affirmatively has stated that it could disrupt U.S. relations with Japan. See Note Verbale (Ex. 1).

B. The California Statute Impermissibly Intrudes On The Foreign Policy Powers Of The United States Government

The Supreme Court long has recognized that the Constitution generally entrusts the Federal Government "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." Hines v. Davidowitz, 312 U.S. 52, 63 (1941). As the Supreme Court has made clear, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." United States v. Pink, 315 U.S. 203, 233 (1942); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-25 (1964); United States v. Belmont, 301 U.S. 324, 331-32 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936); Chae Chan Ping v. United States, 130 U.S. 581, 604-05 (1889); Bethlehem Steel Corp. v. Board of Comm'rs of the Dep't of Water and Power of the City of Los Angeles, 276 Cal. App. 2d 221, 225 (1969).

The Framers of the Constitution recognized that the actions of a State could embroil the entire nation in conflict with another country. Recognition that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," caused the Framers to propose a Constitution that provided for a single national voice over foreign political and commercial affairs, in order to preserve "[t]he peace of the whole." The Federalist No. 80, at 476 (Alexander Hamilton); see also The Federalist No. 42, at 264 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"); Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1875).

In light of the "imperative[] . . . that federal power in the field affecting foreign relations be left entirely free from local interference," Hines, 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." Zschernig v. Miller, 389 U.S. 429, 440 (1968). The question is not simply whether federal law affirmatively and explicitly has preempted a state regulation: a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. Id.

at 441. Nor is it a question of "balanc[ing] the nation's interest in a unified foreign policy against the particular interests of an individual state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." National Foreign Trade Council v. Natsios, 181 F.3d 38, 52 (1st Cir. 1999), aff'd on other grounds, 120 S. Ct. 2288, 2296 (2000).

In many ways, Cal. Civ. Proc. Code § 354.6 is similar to the California's Holocaust Victim Insurance Relief Act ("HVIRA"), the constitutionality of which successfully was challenged in Gerling Global Reins. Corp. of Am. v. Quakenbush, 2000 WL 777978 (E.D. Cal. June 9, 2000), appeal pending, in part on the basis of Zschernig. The court found, in issuing a preliminary injunction, that the HVIRA affected international relations, conflicted with the national government's policies, and had the potential for disruption or embarrassment. Id. at *8 (citing Zschernig, 389 U.S. at 443). According to the Gerling court, it is not necessary for there to be a formally stated federal policy for a state to impermissibly interfere with foreign affairs, a state statute that affects foreign relations in a "persistent and subtle way" is enough. Id. at *9 (quoting Zschernig, 389 U.S. at 440). The court also held that the fact that the statute purported to affect foreign companies, not foreign governments, was immaterial. Id.

Similarly, Cal. Civ. Proc. Code § 354.6 is an unconstitutional intrusion into the federal government's foreign affairs powers. First, the California forced labor statute explicitly admits to a foreign policy objective.[1]/ It was not designed to address commercial disputes between

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[5]/ Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Cal. Civ. Proc. Code § 354.6.

parties over back wages or breaches of employment contracts; rather, it clearly contemplates the litigation of war-related claims, defining the victims covered by the statute as "Second World War slave labor victim(s)." The purpose of the statute is to provide redress against "the Nazi regime, its allies and sympathizers" for injustices arising out of WW II. California is doing nothing less than second guessing the difficult and complex decisions made by the United States after World War II to resolve the issue of claims spawned by that conflict.

Second, Cal. Civ. Proc. Code §354.6, as we have shown above, would frustrate the federal policy established by the 1951 Peace Treaty of fostering resolution of all war claims against Japan by state-to-state negotiations, a policy that has been in effect for half a century. Rather than bringing closure on war claims against Japan and its nationals – the purpose of the 1951 Treaty – the California statute instead abrogates the ordinary rules that apply to California state tort claims, such as statutes of limitation, and singles out these claims for special consideration. Such a statutory regime could result in a case-by-case adjudication of war-related claims, possibly based on 50 different state statutory schemes.[1]/ The United was the driving force behind the decision to waive all Allied claims against Japan in the 1951 Treaty. It did so to fulfill fundamental U.S. foreign policy and national security goals. The Peace Treaty, along with a bilateral security agreement the United States entered into with Japan on the same day the Peace Treaty was signed, forms the basis of U.S.-Japan relations, and has been the very cornerstone of our country's foreign policy and regional security in East Asia and the Pacific. The California statute seeks to undo that foreign policy, which has benefitted the entire country for the last 50 years, by reopening claims that have long since been resolved. One state cannot be permitted to unilaterally overturn U.S. national foreign policy in such a manner. See, e.g. United Pink, 315 U.S. at 233; Belmont, 301 U.S. at 331-32; Bethlehem Steel Corp. 276 Cal. App. 2d at 225.

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[6]/ Entertaining these lawsuits not only presents difficulties of federalism, but also of separation of powers. Consideration of these claims also would require U.S. courts to pass on

In Article 14 of the 1951 Treaty, the Allied nations expressly waived – on behalf of themselves and their nationals – claims arising out of actions taken by Japan and its nationals during the war. Allowing United States' courts to become a forum for aliens around the world to bring claims against Japan and/or its nationals stemming from actions taken in the course of WWII would be inconsistent with the framework established by the Treaty. This decision by the federal government is entitled to substantial deference because, "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice." See United States v. Li, 206 F.3d 56, 67 (1st Cir.) (Selya, J., concurring), cert. denied, 121 S. Ct. 379 (2000); Curtiss-Wright Export Corp., 299 U.S. at 320; accord Department of Navy v. Egan, 484 U.S. 518, 529 (1988); Haig v. Agee, 453 U.S. 280, 293-94 (1981); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 n.18 (1976); and United States v. Louisiana, 363 U.S. 1, 35 (1960).

California's approach risks frustrating the federal government's ability to speak with one voice as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." Curtiss-Wright Export Corp., 299 U.S. at 319. By enacting the statute, California has created its own policy in a particular area of foreign relations – one which judges the activities of foreign governments and corporations during the World War II, and the treaties and agreements Japan and other nations made in the wake of the war. If each State were free to impose burdens that diverge from the foreign policy interests of the nation as a whole as expressed by the President and to have its own foreign policy, it would, as the Supreme Court

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the sufficiency of other countries' agreements with Japan and those countries' reasons for entering agreements with Japan. Japan has entered into, or is in the process of negotiating, war-claims settlement and/or peace agreements with China and the two Koreas that emerged after WWII. The United States actively has encouraged and facilitated these agreements and negotiations. Whether the United States shall attempt to interpret agreements between two foreign powers affecting the rights of foreign nationals with respect to events that occurred outside the United States is quintessentially a question for the Executive Branch, not one for the courts.

has noted, significantly diminish the President's "economic and diplomatic leverage" and, hence, his authority to negotiate agreements with foreign governments. See National Foreign Trade Council, 120 S. Ct. at 2296.

CONCLUSION

As this Court noted in its September 21, 2000 Opinion (Order No. 4), the fundamental goal of the United States in negotiating the 1951 Treaty was "to settle the reparations issue once and for all" because "it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace." 114 F. Supp. 2d at 946 (emphasis added). However, rather than allowing that peace to last, California is attempting to overturn a United States foreign policy decision made decades ago that has served U.S. security interests in Asia and supported peace and stability in the region for over 50 years. California also is creating a system that will place U.S. courts in the position of interpreting treaties and agreements between foreign powers affecting the rights of non-nationals with respect to events that occurred outside the United States over 50 years ago. In the process, California potentially will be jeopardizing relations between the United States and Japan and Japan and its Asian neighbors. For the reasons stated above, Cal. Civ. Proc. Code §354.6 impermissibly intrudes on the foreign policy powers of the federal government and is preempted by the 1951 Treaty of Peace with Japan.

Accordingly, the United States respectfully submits that the claims raised by the plaintiffs should be dismissed.

Respectfully submitted,

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