



PERMANENT COURT OF ARBITRATION

JAPANESE HOUSE TAX

GERMANY, FRANCE AND GREAT BRITAIN

v.

JAPAN

AWARD OF THE TRIBUNAL

Arbitrators:

G. Gram

L. Renaud

I. Motono

The Hague, 22 May 1905

[47]¹

**Award of the Tribunal of Arbitration Constituted in Accordance with the Protocols
Signed at Tokyo on the 28th August, 1902, by Japan of the one part, and Germany,
France, and Great Britain of the other part²**

Whereas, in the terms of the Protocols signed at Tokyo on the 28th August, 1902, a dispute has arisen between the Government of Japan on the one side, and the Governments of Germany, France, and Great Britain on the other side, respecting the true intent and meaning of the following provisions of the Treaties and other engagements respectively existing between them, that is to say:

Paragraph 4 of Article XVIII of the Treaty of Commerce and Navigation of the 4th April, 1896, between Japan and Germany:³ *“Sobald diese Einverleibung erfolgt”* (that is to say, when the several foreign Settlements in Japan shall have been incorporated with the respective Japanese communes), *“sollen die bestehenden, zeitlich unbegrenzten Ueberlassungsverträge, unter welchen jetzt in den gedachten Niederlassungen Grundstücke besessen werden, bestätigt and hinsichtlich dieser Grundstücke sollen keine Bedingungen irgend einer anderen Art auferlegt werden, als sie in den bestehenden Ueberlassungsverträgen enthalten sind”*; and section 3 of the complementary communication of the same date from the Imperial German Secretary of State for Foreign Affairs to the Japanese Minister at Berlin : *“3. Dass, da das Eigentum an den im Artikel XVIII des Vertrages erwähnten Niederlassungsgrundstücken [49] dem Japanischen Staate verbleibt, die Besitzer oder deren Rechtsnachfolger für ihre Grundstücke ausser dem kontraktmässigen Grundzins Abgaben oder Steuern irgend welcher Art nicht zu entrichten haben werden”*; and the following paragraph in the reply of the Japanese Minister of the same date to the foregoing communication: *“dass die darin unter Nummer 1 bis 4 zum Ausdruck gebrachten Voraussetzungen, welche den Erwerb dinglicher Rechte an Grundstücken, die Errichtung von Warenhäusern, die Steuerfreiheit der Grundstücke in den Fremdeniederlassungen and die Erhaltung wohlerworbener Rechte nach Ablauf des Vertrages zum Gegenstande haben, in allen Punkten zutreffend sind”*;

¹ Page numbering in brackets refers to the text as it appears in THE HAGUE ARBITRATION CASES (Boston and London, Ginn and Company Publishers, 1915). Please note that the English language version was only published on uneven numbered pages in this text.

² From British Parliamentary Papers, Japan No. 1, [1905], [Cd. 2583].

³ *Translation.* – Paragraph 4 of Article XVIII of the Treaty of Commerce and Navigation of the 4th April, 1896, between Japan and Germany : *“When such incorporation takes place”* (that is to say, when the several foreign Settlements in Japan shall have been incorporated with the respective Japanese communes), *“existing leases in perpetuity under which real property is now held in the said Settlements shall be confirmed, and no conditions of any kind other than those contained in the existing leases shall be imposed in respect of such property”*; and section 3 of the complementary communication of the same date from the Imperial German Secretary of State for Foreign Affairs to the Japanese Minister at Berlin: *“3. That, as the ownership of the Settlement properties mentioned in Article XVIII of the Treaty remains vested in the Japanese State, the holders or their legal successors will have no dues or taxes of any kind to pay in respect of their property, besides the ground rent fixed by contract”*; and the clause in the reply of the Japanese Minister of the same date to the foregoing communication: *“that the assumptions expressed therein under Nos. I to 4, respecting the acquisition of real rights to property, the erection of warehouses, the exemption of real property in the foreign Settlements from taxation, and the maintenance of properly acquired rights after the expiration of the Treaty are correct in all points.”*

Paragraph 4 of Article XXI of the revised Treaty of the 4th August, 1896, between Japan and France:⁴ *“Lorsque les changements ci-dessus indiqués auront été effectués” (c'est-à-dire : lorsque les divers quartiers étrangers qui existent au Japon auront été incorporés aux communes respectives du Japon et feront dès lors partie du système municipal du Japon; et lorsque les autorités Japonaises compétentes auront assumé toutes les obligations et tous les devoirs municipaux, et que les fonds et biens municipaux qui pourraient appartenir à ces quartiers auront été transférés aux dites autorités), “les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés, et les propriétés de cette nature ne donneront lieu à aucuns impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dans les baux en question”;*

Paragraph 4 of Article XVIII of the revised Treaty of the 16th July, 1894, between Japan and Great Britain: “When such incorporation [51] takes place” (that is to say, when the several foreign Settlements in Japan shall have been incorporated with the respective Japanese communes) “existing leases in perpetuity under which property is now held in the said Settlements shall be confirmed, and no conditions whatsoever, other than those contained in such existing leases, shall be imposed in respect of such property.”

Whereas, the Powers at variance have agreed to submit their difference to the decision of a Tribunal of Arbitration,

and, in accordance with the Protocols mentioned above,

the Governments of Germany, France and Great Britain have named as Arbitrator Mr. LOUIS RENAULT, Minister Plenipotentiary, Member of the Institute of France, Professor of Law in the University of Paris, Legal Adviser to the Department of Foreign Affairs, and

the Government of Japan have named as Arbitrator his Excellency Mr. ITCHIRO MOTONO, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan at Paris, Doctor of Law.

Whereas, the two Arbitrators above mentioned have chosen as Umpire Mr. GREGERS GRAM, formerly Norwegian Minister of State, Governor of a province;

Whereas, the task of the Tribunal thus composed is to pronounce a final decision on the following question: —

“Whether or not the provisions of the Treaties and other engagements above quoted exempt only land held under leases in perpetuity granted by or on behalf of the Japanese Government, or land and buildings of whatever description, constructed or which may hereafter be constructed on such land, from any imposts, taxes, charges, contributions, or conditions whatsoever, other than those expressly stipulated in the leases in question?”

Whereas, the Government of Japan maintain that the land only, to the extent above indicated, is exempt from the payment of imposts and other charges;

⁴ *Translation.* – Paragraph 4 of Article XXI of the revised Treaty of the 4th August, 1896, between Japan and France : “When the changes indicated above shall have been effected” (that is to say, when the several foreign Settlements in Japan shall have been incorporated with the respective Japanese communes, and made a part of the municipal system of Japan, and when the competent Japanese authorities shall have assumed all municipal obligations and duties, and the municipal funds and property belonging to such Settlements shall have been transferred to the said Japanese authorities), “the leases in perpetuity, in virtue of which foreigners now hold property in the Settlements shall be confirmed, and property of this nature shall not give rise to any imposts, taxes, charges, contributions, or any conditions whatsoever other than those expressly stipulated in the leases in question.”

And the Governments of Germany, France, and Great Britain [53] contend, on the contrary, that buildings constructed on such land enjoy the same exemption;

Whereas, in order to estimate the nature and extent of the engagements entered into on both sides by the leases in perpetuity, it is necessary to refer to various arrangements and Conventions arrived at between the Japanese authorities and the Representatives of various Powers, when the old Treaties were in force;

Whereas, from these instruments and from the stipulations inserted in the leases it appears:

That the Japanese Government had consented to cooperate in the creation of foreign settlements in certain towns and ports of Japan open to the dependents of other nations;

That the Japanese Government have, at their own expense, with a view of encouraging the establishment of towns thereon,⁵ carried out works on the land appointed for the use of foreigners in different localities.

That foreigners not being permitted, according to the principles of Japanese law, to acquire ownership of land situated in that country, the Government have leased land to them in perpetuity;

That the leases determine the extent of the plots of land leased and lay down a fixed annual payment, calculated in proportion to the area leased;

That it was agreed that in principle the foreign settlements should remain outside the municipal system of Japan, but that nevertheless they were not subject to uniform organization;

That it was decided by means of regulations how provision should be made for the various functions of Administration, and that it was laid down that the holders of land should be bound to contribute in part towards the expenses of the municipality by means of dues, the amount and mode of collection of which were determined;

Whereas, it would be easy to account for the care taken in drawing up the said instruments with a view of defining the obligations of every kind incumbent upon foreigners towards the Japanese Government, if it was understood that the annual payment represented, [55] not only the rent, but also the amount of the imposts for which the lessees would have been liable, by reason of the position created in their favour under the leases, and that, in consequence, they would, as lessees, only have to pay the imposts and charges expressly mentioned in the said leases;

Whereas, moreover, it is not disputed that this is the true meaning of these instruments as far as the land is concerned, but the Japanese Government allege that the leases only applied to the naked land, and they do not admit that buildings erected on the land were included in the stipulations upon which the exemption from imposts is said to be founded, alleging that the land alone belongs to the Government, the buildings being on the other hand the property of the lessees, and that in consequence the immunity in question could only extend to the ground which had not ceased to be the patrimony of the State;

Whereas, however, the question to be decided is whether, from the fiscal point of view, the buildings erected on the leased land were, by common accord, considered as accessories of the land or not, and the solution of this question does not depend upon distinctions drawn from an alleged difference as to the ownership of the property;

Whereas, the Tribunal cannot therefore pay regard to the discussion raised on this subject and based upon principles of civil law;

Whereas, the land was leased for building purposes, which is indicated both by the situation of the ground and by the nature of the measures taken for its management by the Japanese Government;

⁵ This is understood to be the meaning attached by the Arbitrators to the words "*occupation urbaine*."

Whereas, the obligation to erect buildings was imposed in certain localities, on pain of forfeiture, and the leases often contained a clause, by the terms of which buildings on the land were to become the property of the Japanese Government, in the event of the lessee not carrying out his engagements;

Whereas, it must be admitted that the circumstances thus recorded constitute arguments against the plea that the ground and buildings form entirely separate objects in the relations between the parties and from the fiscal point of view; [57]

Whereas, in becoming a party to the said instruments the Government of Japan acted not only as proprietor of the land leased, but also as being invested with the sovereign power of the country;

Whereas, the will of the parties consequently formed the law in the matter and, in order to ascertain how the instruments have really been interpreted, it is necessary to refer to the treatment to which the holders of the land have in fact been subjected in the different localities, in regard to the imposts;

Whereas, in this respect, it is unquestionable that, in accordance with a practice which has not varied and which has existed for a long series of years, not only the land in question, but also the buildings erected on the land, have been exempt from all imposts, taxes, charges, contributions, or conditions whatsoever, other than those expressly stipulated in the leases in perpetuity;

Whereas, the Government of Japan maintains, it is true, that this state of things, as well as the fiscal immunity enjoyed in general by foreigners in the country, was only due to the circumstance that the Consular Tribunals refused to give the necessary sanction to the fiscal laws of the country;

Whereas, however, this claim is devoid of proof, and it is not even alleged that the Japanese Government ever made reservations to the Governments of Germany, France, and Great Britain, such as to maintain the rights which they say were violated;

Whereas, although it had been alleged that the immunity from imposts, enjoyed in fact by foreigners under the old Treaties, was general, and that it extended to foreigners residing outside the Concessions in question, information supplied respecting the holders of real estate, land, and houses, at HIOGO, shows that the said rule has not been applied universally, and in any case, the actual situation is not in doubt, however it may be explained;

Whereas, as regards the interpretation of the provisions of the new Treaties on the subject of which the parties are in disagreement;

The drawing up of Article XVIII of the Treaty between Great [59] Britain and Japan – which Treaty was concluded earlier than the two others – was preceded by proposals tending to place foreigners holding land on the same footing as Japanese subjects, both with regard to the ownership of the real property which had been leased to them and with regard to the payment of taxes and imposts, but it was finally agreed to maintain the system in practice up to that time;

The Japanese Government, it is true, contend that the question of maintaining the *status quo* only referred to the land, but this contention is not borne out by the expressions used in the course of the negotiations.

On the contrary, the Representative of the Japanese Government, who took the initiative in coming to an agreement in this sense, confined himself to proposing the “maintenance of the *status quo* in the foreign settlements”;

It cannot be supposed that the British Delegate, in presenting a draft drawn up on the basis of the said proposal, intended that a reservation should be made with regard to buildings, and that does not follow, either from the words inserted in the record of proceedings, or from the contents of the Article proposed by him;

To maintain this *status quo* in its integrity, it would not suffice to allow that the fiscal immunity, which up to that time extended both to the land and to the buildings in the foreign settlements, should be maintained for the land only, and that it should cease to apply to the houses;

This must above all be so when it is considered that, in order to conform to what had been agreed upon, the Parties did not confine themselves to formulating a provision on the subject of the confirmation of the leases, but they added “that no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property”;

This latter clause is worded even more clearly in the Treaty with France;

Whereas, moreover, in the clauses in question, the Powers have not spoken of land, as they must necessarily have done if the immunity, contrary to the practice obtaining up to then, was to be restricted to the land: [61]

Whereas, on the contrary, they used expressions wide enough to include the whole situation created by the leases for the lessees;

Whereas, the Tribunal cannot, moreover, admit that the notes exchanged between the Governments of Germany and Japan, at the time the new Treaty was concluded, contain expressions calculated to place Germany in a less advantageous position than the two other Powers;

The Government of Japan have, above all, endeavored to adduce an argument from the fact that the German Government have based fiscal immunity upon the ground that foreigners are prohibited from acquiring ownership of land situated in Japan, but in this respect it must be considered that in fact the buildings had always had the character of dependencies of the land in regard to imposts, and it cannot be supposed that the German Government intended to renounce privileges conceded to Great Britain by the new Treaty, which would besides be incompatible with the clause securing most-favored-nation treatment to Germany;

FOR THESE REASONS:

The Tribunal of Arbitration, by a majority of votes, decides and declares:

The provisions of the Treaties and other engagements mentioned in the Protocols of Arbitration exempt not only the land held in virtue of the leases in perpetuity granted by or on behalf of the Government of Japan, but they exempt the land and buildings of every description constructed or which may hereafter be constructed on such land, from all imposts, taxes, charges, contributions, or conditions whatsoever, other than those expressly stipulated in the leases in question.

Done at The Hague, at the Permanent Court of Arbitration, the 22nd May, 1905.

(Signed) G. GRAM

(Signed) L. RENAULT

At the moment of proceeding to the signature of the present Award, making use of the power conferred on me by Article 52, [63] paragraph 2 of the Convention for the Pacific Adjustment of International Disputes, concluded at The Hague on the 29th July, 1899, I desire to place on record my entire disagreement with the majority of the Tribunal, both as regards the argument and the conclusion.

(Signed) I. MOTONO