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**Towards a Framework for the
Resolution of the Territorial Dispute
over the Kurile Islands**

Seokwoo Lee

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by

Seokwoo Lee

Edited by

Shelagh Furness and Clive Schofield

International Boundaries Research Unit
Department of Geography
University of Durham
South Road
Durham DH1 3LE
UK

Tel: UK + 44 (0) 191 334 1961 Fax: UK +44 (0) 191 334 1962

E-mail: ibru@durham.ac.uk

www: <http://www-ibru.dur.ac.uk>

The Author

Visiting Scholar, East Asian Legal Studies Program (EALS), Harvard Law School; The Wai Seng Senior Research Scholar, Asian Studies Centre, St. Antony's College, University of Oxford; D.Phil. Candidate in Public International Law, Faculty of Law, University of Oxford; LL.B., LL.M. in Public International Law, Korea University Department of Law; LL.M., University of Minnesota Law School; LL.M. in International Legal Studies, New York University School of Law.

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The opinions contained herein are those of the author and are not to be construed as those of IBRU

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Towards a Framework for the Resolution of the Territorial Dispute over the Kurile Islands

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[Mr Hugh Borton¹] *put the question of defining the Kuriles before the committee. On a map it was pointed out that there was a definite break between the northern and southern islands. In considering the question of definition the committee divided equally. Therefore Mr Borton declared that **the committee as a group could reach no decision.** [Mr John K. Emerson²] suggested a possible compromise: the northern and central islands should go back to Russia with no strings attached; the southern if covered by the Yalta agreement should go back to Russia; if there was any doubt about the disposition of the southern islands, they should be retained by Japan.*³

1. Introduction

The surrender of Japan to the United States in 1945 ended World War II in the Asia Pacific region. However, territorial disputes, arising from that period remain unresolved into the twenty first century. Japan is a disputant in three such cases involving islands in East Asia: with Russia over the Southern Kurile Islands/Northern Territories (hereinafter 'Kurile Islands');⁴ with China and Taiwan over the Senkaku Islands/Diaoyu Dao⁵ and with Korea over the Liancourt Rocks.⁶

This *Briefing* examines the Kurile Islands case in detail starting with the geographical and historical background to the dispute. Although both claimants marshal support for their cases from historical sources, it cannot be denied that much of the uncertainty surrounding the territorial demarcation is a by-product of immediate post-World War II boundary decisions and territorial dispositions. The final disposition of territories in East Asia at the end of World War II was effected by the *San Francisco Peace Treaty* of 1951. Interpretation of the territorial clauses of that treaty and their implementation are pivotal to an understanding, and even an eventual solution, of the dispute.

¹ Acting Special Assistant to the Director, Office of Far Eastern Affairs; and Chairman of the Committee Office of Far Eastern Affairs.

² United States Department of State (hereinafter 'USDOS'), 1946a (on file with author) (see References for citation and classification information) (emphasis added).

³ A small group of islands, just north of Hokkaido, known by the Russians as the 'Southern Kurile (or Kuril) Islands', but known to the Japanese as the 'Northern Territories'. Except when quoting or directly referring to sources that use 'Kuril', this paper uses 'Kurile'. For further information on this dispute, see, Hara, 1991:14-6 and 1994:163-82; Ishiwatari, 1995: 224-40; Northern Territories Issue Association, 1974; Price, 1993; Rees, 1982: 19-30 and 1985; Sugiyama, 1972: 21-39; Sutton, 1951: 35-61; Tabata, 1955; Taijudo, 1998: 2-8; Takano, 1959; Tamura, 1962; Uyehara, 1950. See also, Okita and Takahashi, 1995: 5-10; Garthoff, 1995: 11-25; Panov, 1995: 27-33; Ouimet, 1995: 35-46; Stephan, 1995: 47-53, in Goodby, *et al.* Also generally refer to: <http://www.american.edu/projects/mandala/TED/ice/kurile.htm>.

⁴ These islands are called the 'Diaoyu Dao' by China and the 'Senkaku Islands' by Japan. They consist of five islands and three rocks standing above the high-water line in three shoal areas (Prescott and Schofield, 2001: 21).

⁵ Known as 'Takeshima' to Japan and 'Tok Do' to Korea (Prescott and Schofield, 2001: 1).

Drawing upon international law relating to territorial disputes, together with study of the recent history and developments in the dispute, this *Briefing* will assess the respective claims of Russia and Japan to the Kurile Islands and the likelihood of a resolution to the dispute in the near future.

2. Geographical and Historical Background

The ongoing territorial dispute between Russia and Japan centres around the Kurile Islands, which are composed of three main islands, Etorofu, Kunashiri and Shikotan, together with the Habomai group (hereinafter 'Habomais'),⁷ located at the southern end of the Kurile Archipelago which is a chain of islands linking the northernmost of Japan's main islands, Hokkaido, with the Kamchatka peninsula in mainland Russia.⁸

The Kurile Islands were made known to western countries for the first time by a Dutch navigator Develle who visited by sea in 1634.⁹ From various sources,¹⁰ it is also assumed that until the late 19th century the Ainu¹¹ were the islands' original inhabitants. They had settled first in the Kurile Archipelago, though it is difficult to date the first appearance of humans on the archipelago or identify the earliest inhabitants.¹² Japan's push northwards resulted in their displacement first in northern Honshu, then in Hokkaido, and finally in the Kurile Archipelago and Sakhalin.

The *Treaty of Commerce, Navigation and Delimitation* between Japan and Russia¹³ (hereinafter *Treaty of Shimoda*), signed on 21 December 1855, established the first Russo-Japanese boundary line regarding the Kurile Archipelago. The *Treaty of Shimoda* states that:

*[h]enceforth the frontier between Japan and Russia will run between the islands of [Etorofu and Uruppu]. The entire island of [Etorofu] belong to Japan and the entire island of [Uruppu], as well as the other Kuril islands to the north of that island, belong to Russia. As for the island of [Sakhalin], it remains as heretofore undivided between Japan and Russia.*¹⁴

⁷ In Russia, Etorofu is known as 'Iturup', Kunashiri as 'Kunashir', and Shikotan together with the Habomais as 'Little Kuriles (or Lesser Kuriles)'. This paper uses Japanese terms, since they refer to four separate islands respectively. In terms of size, Etorofu's area is 3,139km²; Kunashiri, 1,500km²; Shikotan, 255km²; and the Habomais, 102km². The total area is just short of 5,000km². The Habomai group of islets comprises Shibotsu (Zelyonyi), Taraku (Polonskogo), Yuri (Yurii), Akiyuri (Anuchina), Suisho (Tanfileva), and Kaigara (Signal'nyi). In terms of distance, Suisho in the Habomais is about three miles from the tip of Cape Nosappu in Hokkaido, while Kunashiri is clearly visible from Shiretoko Peninsula in Hokkaido. See, Berton, 1992: 8, 11 and Roucek, 1952: 297-301.

⁸ Generally refer to the maps in Japan, 1999: 8-9.

⁹ USDOS, n.d. (a) (on file with author).

¹⁰ Berton, 1992: 13-4; Hara, 1998: 14; Stephan, 1974: 21-30.

¹¹ For further information on the Ainu, see, Siddle, 1997: 17-49; Sjöberg, 1995: 373-88.

¹² See Stephan, 1974: 21-2.

¹³ 112 C.T.S. 467.

¹⁴ *Id.*, Article II; also available in Strengthening Democratic Institutions Project, 1991: 4; Allison, *et al.*, 1992: 81. It is very instructive to note that the official Japanese translation of the Article II of the *Treaty of Shimoda* provided that "[h]enceforth the boundary between the two nations shall lie between the islands of Etorofu and Uruppu. The whole of Etorofu shall belong to Japan, **and the Kurile Islands, lying to the north of and including Uruppu, shall belong to Russia. With regard to Sakhalin Island, rather than establishing a boundary, historical precedent will continue to be observed**" [emphasis added]. See, Japan, 1999: 4. This provision has very significant implications for a legally binding definition of the 'Kurile Islands'. See, Section 4 below.

Figure 1: East Asia and the Kurile Archipelago



Source: Based on a map found in the US National Archives produced in association with UNDOS, Working Group on Japan Treaty, “Notes of Meeting on Friday, August 1, 1947”, 1947/8/1, [USNARA/Doc. No.: N/A] (on file with author).

Even after the conclusion of the *Treaty of Shimoda*, quarrels frequently arose between Russia and Japan in connection with the Kurile Islands in parallel with the Sakhalin issue. Consequently, Japan sent Buyo Enomoto, Ambassador Plenipotentiary to Russia to conduct a series of negotiations with Sutumov, Chief of the Asia Bureau there.¹⁵ As a result, the *Treaty of Shimoda* was amended on 22 August 1875 by a treaty for the mutual cession of territory between Japan and Russia, namely the *Treaty for the Exchange of Sakhalin for the Kurile Islands* (hereinafter *Treaty of St. Petersburg*).¹⁶ Article 2 of this treaty provided that:

*In return for the ceding to Russia of the rights to the island of Sakhalin...Russia... cedes to...Japan, the group of islands known as the Kurils...henceforth the said group of Kuril Islands shall belong to...Japan. This group shall include the eighteen islands indicated below, that is: 1) Shumshu... and 18) [Uruppu]....*¹⁷

The *Treaty of St. Petersburg* thus gave Japan full right and title to the entire Kurile Archipelago, while, in exchange, Japan ceded to Russia any and all of its claims to Sakhalin Island. Japan reclaimed the southern half of Sakhalin at the conclusion of the Russo-Japanese War with the signing of the *Treaty of Peace between Japan and Russia* (hereinafter *Treaty of Portsmouth*) of 5 September 1905.¹⁸

In 1941, during the early part of World War II, the Soviet Union and Japan mutually agreed on a *Soviet-Japanese Neutrality Pact*¹⁹ (hereinafter *Neutrality Pact*) which was, however, renounced by the Soviet Union, by signing the *Agreement regarding Entry of the Soviet Union into the War against Japan* (so-called and hereinafter *Yalta Agreement*) on 11 February 1945.²⁰ Subsequently, under the *Yalta Agreement*, the Soviet Union promised to join the war effort against Japan within two months of Germany's surrender, and, in exchange, the United States and United Kingdom promised to return Sakhalin Island and to hand over the Kurile Islands to the Soviet Union.

The Soviet Union declared war on Japan on 8 August 1945²¹, and the Russian invasion of Shimushu, the northernmost island of the Kurile Archipelago, began on 18 August, three days after Japan surrendered.²² On 31 August, the Commander-in-Chief of the Japanese Fifth Area Army issued an order placing the 89th Division under the command of the Commander of the 91st Division to facilitate the surrender of the Kurile Islands. Etorofu was occupied even before this order was issued and Kunashiri, Shikotan and the Habomais were completely occupied by

¹⁵ USDOS, n.d. (a) (on file with author).

¹⁶ 149 C.T.S. 179.

¹⁷ *Id.*, Article 2. Also available in Strengthening Democratic Institutions Project, *supra*, note 14: 9.

¹⁸ 199 C.T.S. 144. Article 9 of the *Treaty of Portsmouth* provided that "...Russia cedes to...Japan, in perpetuity and full sovereignty, the southern part of the island of Sakhalin, and all the islands adjacent thereto, ...The fiftieth parallel of north latitude is adopted as the limit of the ceded territory..." Also available in Strengthening Democratic Institutions Project, *id.*: 10.

¹⁹ Full text is available at <http://www.yale.edu/lawweb/avalon/wwii/s1.htm>. See also, Allison, 1992: 90 for extract version of the pact.

²⁰ 3 Bevans 1022; USDOS, 1950a: 23-28; USDOS, 1946b. See also, Allison, *id.* for extract version. Full text is also available at <http://www.yale.edu/lawweb/avalon/wwii/yalta.htm>; <http://newtaiwan.virtualave.net/yalta.htm>.

²¹ For *Soviet Denunciation of Pact with Japan* of 5 April 1945, see, <http://www.yale.edu/lawweb/avalon/wwii/s3.htm>. For *Declaration of War on Japan by the Soviet Union*, see, <http://www.yale.edu/lawweb/avalon/wwii/s4.htm>; USDOS, 1945.

²² Stephan, 1974: 162-4; Japan, 1999: 6; Generally refer to, Slavinsky, 1992: 42-65.

2 September 1945 when General Order No. 1²³ was issued.²⁴ By September 5, Soviet troops had taken possession of the entire Kurile Archipelago, including Etorofu, Kunashiri, Shikotan, and the Habomais.²⁵

On 20 September all property on the islands was nationalised, and in February 1946, the Presidium of the Supreme Soviet issued a decree to the effect that the Kurile Archipelago belonged to the Soviet Union,²⁶ and in 1947 the Kurile Archipelago was incorporated into the South Sakhalin region of the Russian Soviet Federated Socialist Republic.²⁷ With only a few exceptions, the approximately 17,000 Japanese on the Kurile Islands before the war,²⁸ were repatriated in the years 1947-50.²⁹

The status of the Kurile Islands was addressed in the *Treaty of Peace with Japan*,³⁰ namely the *San Francisco Peace Treaty with Japan* of 1951 (hereinafter *San Francisco Peace Treaty*). Article 2(c) provided that “*Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.*”³¹ However, it is doubtful whether the Allied Powers intended to effect the legal disposition of these territories, since they did not mention by name who should own them.³² In addition, the Soviet Union refused to sign the *San Francisco Peace Treaty*, and as a result, it was unclear whether the Soviet Union became the beneficiary of the Japanese renunciation of sovereignty over the Kurile Islands.³³

²³ Following General Order No. 1 dated 2 September 1945 which directed Japanese forces in the Kurile Archipelago to surrender to the Commander-in-Chief of Soviet Forces in the Far East, an agreement was reached between the Chief of Staff, Kwantung Army and the Soviet Commander-in-Chief in the Far East for the local cessation of hostilities and for the surrender of arms. In accordance with that agreement, the Commander-in-Chief of the Japanese Fifth Area Army ordered the Commander of the 91st Division to take steps to implement the provisions relating to the local cessation of hostilities and the surrender of arms in the northern Kurile islands. The northern Kurile islands were soon occupied by the Soviet forces who then proceeded to take the whole of the Kurile Archipelago, one island after another (USDOS, 1951a) (on file with author).

²⁴ The date of this event appears differently ranging from 28 August to 5 September 1945. See, Slavinsky, 1992: 76-84.

²⁵ Stephan, 1974: 165-6; For further details on the historical background of the Soviet Occupation of the Kurile Islands, generally refer to, Slavinsky, *id.*

²⁶ *Decree of the Presidium of the USSR Supreme Soviet: The Creation of the South Sakhalin Province (Oblast) in the RSFSR Khabarovsk Region (Krai)*, reprinted in Allison, 1992: 116 for extract version of the decree; Stephan, *id.*: 168.

²⁷ Berton, 1992: 36.

²⁸ Japan, 1999: 7.

²⁹ Stephan, 1974: 166-9.

³⁰ 3 UST 3169; 136 UNTS 45 [hereinafter ‘SF Peace Treaty’]. A full text is also available on the Internet at <http://newtaiwan.virtualave.net/sanfrancisco01.htm>. See also O’Connell 1952: 423-35 for the legal background of the treaty; USDOS, 1951b; for list of participants, agenda, rules of procedure, verbatim minutes, and treaty documents; and Ohira 1957: 115-24 for territorial dimension of the *San Francisco Peace Treaty*. For general information on the *San Francisco Peace Treaty*, also refer to the following sources: Dunn, 1963; The Palo Alto Peace Club, (August 1951); US Congress, 1951; USDOS, 1951c; Yoshitsu, 1983.

³¹ Article 2(c), SF Peace Treaty, *id.*

³² For further details on the Allied Powers’ policy on the status of Kurile Islands, generally refer to, Hill, 1995.

³³ See, Section 5.5 The Legal Effect of the Soviet Union’s Non-signing of the *San Francisco Peace Treaty*, below.

Finally, in 1956, the Soviet Union and Japan signed a Joint Declaration providing for the termination of the state of war between them and a resumption of diplomatic relations.³⁴ This declaration stated that once a peace treaty was concluded between the Soviet Union and Japan, the former would hand over Shikotan and the Habomais, the two southernmost of the four disputed islands, to the latter.³⁵ However, the envisaged peace treaty has not been concluded to date due to Japanese insistence on the return of all four subjected islands, and the Soviet Union's (now Russia's) rejection of this demand.³⁶

To date the territorial dispute over the Kurile Islands remains unresolved, notwithstanding the diplomatic efforts which have been made, including the visit of Soviet and Russian Presidents Mikhail Gorbachev and Boris Yeltsin to Japan in 1991 and 1993, respectively.³⁷ Remarkably, even though the territory is inhabited by thousands of people, no serious effort has been, or is being, made to determine their views or otherwise exhibit a serious concern for their interests.

The current positions of each claimant on the territorial dispute vividly illustrate the deadlocked situation. For example, Russia has emphasised that the inviolability of Russia's border remains "*its principle*",³⁸ and the Russian parliament also stressed that it will not ratify any agreement on the transfer of any of the Kurile Islands to Japan, and the settlement of the issue is not "*a matter of today, tomorrow or even the day after tomorrow*."³⁹ Russian Foreign Minister Igor Ivanov has further announced that Russia plans to explore mutually acceptable forms of cooperation with Japan over the disputed Kurile Islands, but "*We intend to solve these questions without detriment to the sovereignty and territorial integrity of the Russian Federation*."⁴⁰ President Yeltsin of Russia once said that the problem of the four islands

³⁴ 263 UNTS 99.

³⁵ *Id.*, Article 9.

³⁶ Ministry of Foreign Affairs, Japan, 1999: 11.

³⁷ *Id.*: 11-3. After President Yeltsin's visit to Japan in September 1992 and October 1993, the Tokyo Declaration was signed, which established,
...the clear basis for negotiations toward an early conclusion of a peace treaty through the solution of the territorial issue on the basis of historical and legal facts and based on the documents produced with the two countries' agreement as well as on the principles of law and justice.

Thereafter, substantial progress was made between the two parties, including a Russia-Japan Summit Meeting on the occasion of the Moscow Nuclear Safety Summit in April 1996; a Russia-Japan Summit Meeting on the occasion of the Denver Summit in June 1997; a Russia-Japan Summit Meeting in Krasnoyarsk in November 1997; a Russia-Japan Summit Meeting in Kawana in April 1998; Japanese Prime Minister Obuchi's visit to Russia in November 1998 (signed the Moscow Declaration on Establishing a Creative Partnership between Japan and the Russian Federation, and Agreement on the Establishment of a Subcommittee on Border Demarcation and a Subcommittee on Joint Economic Activities within the Framework of the Russian-Japanese Joint Committee on the Conclusion of a Peace Treaty) Japan, 1999, available at <http://www.mofa.go.jp/region/europe/russia/territory/index.html>. The measures taken by the two parties to create an appropriate environment for negotiations toward solving the territorial issue are: mutual visits between Japanese citizens and the current Russian residents of the Kurile Islands without passports or visas; visits to the graves in the Kurile Islands; and, withdrawal of Russian military troops from the Kurile Islands.

³⁸ See, *Itar-Tass News Agency*, "Japan-Russia (Kurils): 'Interference' Claims", Moscow, 30 March 1999, available in International Boundary News Database at: <http://www-ibru.dur.ac.uk/database/data.html> by search term 'Kurile' (hereinafter 'IBRU News Database/ Kurile').

³⁹ See, *Itar-Tass News Agency*, "Japan-Russia (Kuriles): 'Will Not Transfer' Kuril Island to Japan", Moscow, 22 May 1992, available in IBRU News Database/Kurile.

⁴⁰ See, *Itar-Tass News Agency*, "Peace Treaty Discussions in Tokyo", Moscow, 10 February 2000, available in IBRU News Database/Kurile.

should be put aside for the next generation of leaders to resolve.⁴¹ Meanwhile, Japanese Prime Minister Miyazawa said that “*the disputed ‘Northern Islands’ [should be] returned to Japanese control*”,⁴² and Japanese Foreign Minister, Taro Nakayama, urged Russia to make a “*political decision to end the territorial dispute over the [Kurile Island]*.”⁴³

3. Legal Arguments for Claiming Sovereignty over the Kurile Islands

There are three key legal issues with respect to the dispute over the Kurile Islands.⁴⁴ The first is whether Russia or Japan can validly claim sovereignty over the disputed islands based on prior discovery and occupation. Both claimants disagree as to who was actually the first to discover and settle on the Kurile Islands, though neither claim is well documented. The second is to define the term ‘Kurile Islands’, since Japan maintains that the Kurile Islands that Japan renounced in the *San Francisco Peace Treaty* do not include the current disputed territory, viz. the islands of Etorofu, Kunashiri, Shikotan, and the Habomais, which had always been Japanese territories.⁴⁵ Clarification of how a series of legal instruments defined the terms of specific islands is also required, together with an examination of the subsequent acts and behaviour of the interested parties to supplement the text of the territorial clauses of the *San Francisco Peace Treaty*.

The third issue concerns the implications of the failure to specify the entity in whose favour Japan renounced sovereignty over the Kurile Islands in the *San Francisco Peace Treaty*. Given the refusal of the Soviet Union to sign the treaty, can it take any benefits thereunder? This requires an examination of the context of the drafting history of the *San Francisco Peace Treaty*, and of the relevant provisions of the law of treaties as to the binding legal effects of treaties and non-parties.

3.1 The Respective Claims to Sovereignty over the Kurile Islands

3.1.1 The Claims of Russia

Over time as a result of a ‘moving-to-the-east’ policy adopted by Russia, Russian people gradually advanced eastward, then southward, to explore the islands south of the Kamchatka Peninsula which prompted a move into the Kurile Archipelago.⁴⁶ It is claimed that Russians first became acquainted with the Kurile Archipelago in 1632, and that later, in 1726, Russian sailors still did not see a single Japanese on the islands, because the shogunate had completely closed the country and forbidden the Japanese to leave or to build long-range vessels.⁴⁷

⁴¹ See, *Kyodo News Service*, “Japan-USSR: Yeltsin on Kurile Islands”, Tokyo, 13 June 1991, available in IBRU News Database/Kurile.

⁴² See, *Kyodo News Service*, “Japan-Russia (Kuriles): Statement on Northern Islands”, Tokyo, 3 February 1992, available in IBRU News Database/Kurile.

⁴³ See, *Kyodo News Agency*, “Japan-USSR: Japan Appeals for Decision on ‘Kuriles’”, Tokyo, 11 October 1991, available in IBRU News Database/Kurile.

⁴⁴ See also, Highet, 1992a, 1992b and 1992c in Allison, 1992.

⁴⁵ Japan 1999: 10.

⁴⁶ Berton, 1992: 13. See also, Stephan, 1974: 36-50 for the information on discovery and early exploration by the Russian; and, pp. 50-6 for the Japanese approaches from the south.

⁴⁷ This argument was supported by referring to the writings of Japanese historian Kuno Yosi, author of *Japanese Expansion on the Asian Continent* in 1949, as showing that even Hokkaido was not considered part of the Japanese Empire until the 19th century. Kudryavtsev, B., *Izvestiya*, 12 November 1970, reprinted in USDOS, 1970.

Figure 2: The 'Northern Territories'



Russia also cites a variety of sources on the Kurile Archipelago within the context of extending its claims to the exercise of effective occupation over the disputed Kurile Islands. These examples of the exercise of effective occupation include: baptising the Ainu inhabitants in the Kurile Archipelago and making them swear allegiance to the Tsar, together with Russian mapping of the Kurile Archipelago in 1711 and 1739;⁴⁸ Russia exacting a fur-per-man as land-tax in 1711, and converting the natives in the various islands north of the island of Rasheda;⁴⁹ the control of the islands north of Etorofu by Russia in 1736 due to the weakness of the Matsumae Clan who controlled the eastern Hokkaido and who lacked the power to withstand Russian domination;⁵⁰ from 1766 to 1767 the establishment of the first Russian village in the Kurile Archipelago and a Russian survey of about 10 of the southern islands of the Kurile Archipelago;⁵¹ a visit by Russian officials from Uruppu Island to Akkeshi Harbour in Hokkaido;⁵² the appearance at the end of the 18th century of Russian naval vessels in the waters near Uruppu Island, for the first time, to protect Russian residents there from Japanese looters who attacked Russian ships and robbed them;⁵³ the journey in 1811 of a Russian explorer to the Kurile Archipelago from Kamchatka, and the recording of every detail of his expedition which he thought might be of use to future navigators;⁵⁴ the same explorer also found an old native of the Kurile Archipelago who spoke Russian fluently on Ushisir Island, two old wooden crosses on Russian graves on Shimushiru Islands, and four similar crosses on Uruppu Island, all of which were cited as evidence that Russian people had lived on these islands long before the explorer visited them.⁵⁵

⁴⁸ Berton, 1992: 13.

⁴⁹ USDOS, n.a. (a) (on file with author).

⁵⁰ *Id.*

⁵¹ *Soviet Far East Service*, 1947 (on file with author).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Russia makes further claims to have exercised state authority over the Kurile Islands, on the basis of several historical facts. One concerns the fact that Japanese historians who visited Uruppu Island had to recognise the fact that Uruppu and Etorofu and the other islands of the Kurile Archipelago had never belonged to Japan.⁵⁶ Furthermore it is maintained that in 1806 and 1807 Russian people landed at Etorofu taking advantage of the force of invasion into Sakhalin, and since then, Japanese control had not extended over the northern border,⁵⁷ and that in 1830 a Russo-American firm occupied the Kurile Islands,⁵⁸ and Russia came to extend its influence to the Kurile Islands taking advantage of the weakened guard there inasmuch as these areas were quite distant from the ruling Shogunate.⁵⁹ A further claim is that there were 2,886 Russians in these islands in the early part of 20th century, and the Russian-placed names still remained in regions discovered and inhabited by the Russian people.⁶⁰ The view has also been expressed that the Kurile Islands south of Uruppu were at one time part of Russia, and thus Russia has an historical claim to all the Kurile Islands including the southernmost part:

In the year 1800 the Japanese officials Yamada and Takataya for the first time arrived on a large ship at the island of Etorofu, constructed in Oito a shop, threw down crosses placed there by Russians, signifying that the island belonged to Russia and erected a post signifying that this island belonged to Japan. Thereafter 50 soldiers were conveyed to the island for 'the protection of the place.' From that time on Russian expeditions continued their research from the north only as far as the island of Uruppu.⁶¹ ...The Russo-American Company in the thirties of the last century extended its trade throughout all the Kurile Islands. Not wishing, however, to complicate relations with Japan, the Russian Government agreed to delimit its empire, and in accordance with the Treaty of 1855 the southern islands up to Uruppu became part of the possession of Japan, and all the islands to the north remained within the boundaries of Russia.⁶²

Thus, this book is attempting to establish previous Russian claim to Etorofu, while the *Treaty of Shimoda* of 1855 is interpreted as an agreement on the part of Russia to cede to Japan the islands south of Uruppu in the Kurile chain, all of which the book implied formerly belonged to Russia.⁶³

3.1.2 The Claims of Japan

Japan's claims of occupation are not based on the physical settlement of the disputed islands, but rather on extension of Japanese control over the islands originally settled by the Ainu.⁶⁴ Japanese sources or chronologies⁶⁵ indicate that Japan's *de facto* ruler, Hideyoshi Toyotomi, granted Hokkaido, Kuriles Archipelago, and Sakhalin to the Matsumae⁶⁶ warrior clan in

⁵⁶ *Id.* The detailed information on how Japanese historians recognised Russia's claims over the Kurile Islands, however, did not appear in the report.

⁵⁷ USDOS, n.d. (a) (on file with author).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Soviet Far East Service*, 1947 (on file with author).

⁶¹ Institute of Geography of the Academy of Sciences of the USSR, 1945: 9, reprinted in USDOS, 1947a (on file with author). This book is considered as "obviously the result of considerable research, probably represents the official Soviet view or something approaching it". See also, USDOS, 1947b (on file with author).

⁶² Institute of Geography of the Academy of Sciences of the USSR, *id.*: 11 (emphasis in original).

⁶³ USDOS, 1947c (on file with author).

⁶⁴ Berton, 1992: 13.

⁶⁵ *Id.*

⁶⁶ Who had been a powerful clan chief in Southern Hokkaido. Japan, 1946.

1590.⁶⁷ After the inauguration of the Tokugawa Shogunate in 1603, the Matsumae clan was formally made the feudal lord of Yezo⁶⁸ district which was considered at that time to consist of Hokkaido and adjacent islands, including the Kurile Archipelago and Sakhalin.⁶⁹

The Matsumae clan explored Hokkaido and completed the first maps of Kunashiri, Etorofu and others in 1635;⁷⁰ the Ainu inhabitants of Kunashiri and Etorofu sent tribute to the Matsumae authorities for the first time in 1731;⁷¹ and the Matsumae established a trading post on Kunashiri in 1754.⁷² The Japanese claims are also supported by actions later in the century. Lord Matsumae had stationed functionaries on Kunashiri island since 1754, who took charge of administration, trade and fishing.⁷³

Alarmed by the Russian infiltration, the Shogunate sent an investigation corps in 1785 and again in 1786 to Uruppu, Etorofu and Kunashiri.⁷⁴ The Shogunate dispatched exploration parties to the Uruppu from the Etorofu in 1791 and made a further large-scale survey in 1798.⁷⁵ The party sent in 1798 erected in each of Etorofu and Kunashiri islands posts indicating that the island was a Japanese territory,⁷⁶ then in 1799 the Shogunate put these islands under its direct control, and established 17 fishing bases on Etorofu island in 1800.⁷⁷

In 1801 the Tokugawa Shogunate sent Genjuro Toyama, as a special envoy to Uruppu, to demand that the Russians evacuate the island, which they did in 1805, thus making the Uruppu Channel the dividing line between the Japanese and Russian spheres of influence. Genjuro Toyama erected on the island a wooden post indicating that it was Japanese territory.⁷⁸ The following year the Shogunate dispatched its officials to Etorofu to have them inspect there occasionally and placed the area under permanent direct control by the Shogunate in 1802 by abolishing the temporary control of the east land of Hokkaido and established a duty office there to be charged with the guard.⁷⁹ With the restoration of the Imperial rule in 1868, the Kurile Archipelago were placed under the Government's direct control and a commissioner of colonisation was established there in 1869.⁸⁰ The control over Kunashiri and Etorofu was revised in 1871 and the islands came under the jurisdiction of Nemuro Sub-prefecture in 1872.⁸¹

⁶⁷ Berton, 1992: 13.

⁶⁸ Known today as Hokkaido.

⁶⁹ Japan 1946.

⁷⁰ Berton, 1992: 13.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Japan 1946.

⁷⁴ *Id.*; USDOS, n.d. (a) (on file with author).

⁷⁵ Japan, 1946.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ USDOS, n.d. (a) (on file with author).

⁸⁰ *Id.*

⁸¹ *Id.*

3.2 Determining the ‘Critical Date’

The critical date is defined as “*the date by reference to which a territorial dispute must be deemed to have crystallized*”⁸² and the concept is linked to the admissibility and weight of evidence. Thus, it is generally admitted that “*evidence emanating from the parties after this date is presumed to be self-serving and unreliable.*”⁸³

In the case of the disputed Kurile Islands should the critical date be:

1. 21 December 21 1855, when the first Russo-Japanese boundary line regarding the Kurile Archipelago was established by the *Treaty of Shimoda*; or,
2. 22 August 1875, when Japan was given full right and title to the entire Kurile Archipelago by the *Treaty of St. Petersburg*; or,
3. 5 September 1945, when Soviet troops had taken possession of the entire Kurile Archipelago, including the Kurile Islands in dispute; or,
4. 8 September 1951, when Japan renounced all right, title and claim to the Kurile Islands by the *San Francisco Peace Treaty*; or,
5. 19 October 1956, when the Joint Declaration between the Soviet Union and Japan provided for the termination of the state of war between them, a resumption of diplomatic relations, and handing over of Shikotan and the Habomais to Japan by the Soviet Union; or,
6. any other reliable date(s)?

Beyond the fact that the disputants may have strong incentives for adopting contrasting dates for their own purposes, the critical date for the territorial disputes over the Kurile Islands should be 1951 as will be shown below. This is based on three facts: first, neither claim based on historical evidence is well documented enough, in particular for the period before the *Treaty of Shimoda*, to serve as a basis for establishing sovereignty over the disputed Kurile Islands; second, the final disposition of the Kurile Islands was significantly affected by a series of World War II resolutions, including the *San Francisco Peace Treaty* in which territorial dispositions were decided at the full discretion of the Allied Powers; and third, acts by both the claimants and other interested parties subsequent to the *San Francisco Peace Treaty* should be interpreted within the extended context of the territorial dispositions of that treaty. The territorial implications of the Joint Declaration between the Soviet Union and Japan in 1956 were mainly based on their interpretation of the territorial clause of the *San Francisco Peace Treaty*, and thus, it is doubtful that the Joint Declaration has any distinctive nature, except in its role of clarifying the meaning of the territorial clause of the *San Francisco Peace Treaty*.

This is all the more so given that political entanglements deriving from regional Cold War dynamics after the *San Francisco Peace Treaty* were used to interpret the historical facts for the purpose of supporting their own geopolitical interests.⁸⁴

⁸² Lauterpacht, 1958: 242; Brownlie, 2000: 3 also defines the critical date as “*the point at which the dispute has crystallised and is apparent to the parties.*” For further comprehensive discourse, refer to Fitzmaurice, 1955-56; Thirlway, 1995.

⁸³ Brownlie, *id.*

⁸⁴ For the political implications of this dispute, generally see, Gelman, 1993: 1-26; Hara, 1998: 15-20; Kimura, 1998: 1-80.

3.3 Appraisal

Both Russia and Japan have claimed sovereignty over the Kurile Islands based on prior discovery and occupation.⁸⁵ They have produced all available evidence in support of their claims of ownership. The issue here therefore is how to evaluate objectively the evidence and judge its probative value for establishing sovereignty over the Kurile Islands by the means of effective occupation.

The arguments marshalled by both Russia and Japan on prior discovery are not supported by material evidence. As Stephan, an historian on the Kurile Islands, states:

*[c]omparisons of Russian and Japanese exploration suggest how fruitless it is to ascribe exclusive 'discovery' of the Kurils to either. Japanese probably set foot upon the arc first, but their earliest landings are undocumented and hence undatable[.]*⁸⁶

According to Japanese sources, Russians first appeared in 1711 in the two northern islands of the Kurile Archipelago, and thereafter gradually penetrated as far south as Uruppu and Etorofu by about 1766. Towards the end of the 18th century some Russians settled in Uruppu and in some islands to the north.⁸⁷ With increasing Russo-Japanese contact on the Kurile Archipelago, there ensued a series of negotiations between the two countries beginning in 1813, and culminating in the *Treaty of Shimoda* in 1855.⁸⁸ Beyond that, given that the historical events are not precisely documented, it appears that there was no clear borderline between Russia and Japan over the disputed Kurile Islands until the signing of the treaty. According to Stephan:

*[A] Russo-Japanese frontier developed almost imperceptibly over a period of years, during which national boundaries in the modern sense of the word did not exist. Until the nineteenth century, neither Russia nor Japan had a clear conception of how far its sovereignty extended in the Kurils.*⁸⁹

The *Treaty of Shimoda* precisely defined the boundary in the Kurile Archipelago establishing the first Russo-Japanese boundary line between the islands of Etorofu and Uruppu.⁹⁰ This admission of Japanese sovereignty over the currently disputed Kurile Islands is evidenced by Russian sources such as a Russian foreign ministry's instruction of 27 February 1853 to Admiral Putiatin, signed by Tsar Nicholas I, preparatory to negotiations with Japan which resulted in the signing of the *Treaty of Shimoda*. The important parts of this instruction stated:

*On the subject of the borders, we should make concessions (without, however, damaging our interests), but considering that the attainment of the other goal, namely, trade benefits, is essential. ... The southernmost Kuril island, belonging to Russia is [Uruppu] island and therefore the southern tip of that island shall be our border with Japan, while the end of the Japanese territory shall be the northern tip of [Etorofu] island.*⁹¹

⁸⁵ It seems Japan is relying more on this argument than Russia within the context of the interpretation of the territorial clause of the *San Francisco Peace Treaty*. See, *infra*, Section 5.6. 'Appraisal'.

⁸⁶ Stephan, 1974: 55.

⁸⁷ Japan, 1946; USDOS, n.d. (a) (on file with author).

⁸⁸ Japan, 1946.

⁸⁹ Stephan, 1974: 61; see also, Berton, 1992: 14.

⁹⁰ 112 C.T.S. 467. Article II.

⁹¹ *Izvestiia*, 4 October 1991: 6, reprinted in Berton, 1992: 19.

The instruction made it clear that the primary purpose of the Putiatin mission was the setting up of trade relations with Japan, and that concessions on the delineation of the border between the two countries should be contemplated within that context. This instruction also vividly illustrates Russian recognition of the extension of Japanese territory to the two southernmost islands of the Kurile Archipelago, namely Kunashiri and Etorofu, and on the limiting of Russian territory to Uruppu. It is also clear that the *Treaty of Shimoda* recognised this Japanese primary position over the Kurile Islands, since it was based on a finding of where the Japanese settlements ended and the Russian settlements began, and, thus setting a boundary between the two countries.

By evaluating available historical evidence, the following conclusions may be drawn:

1. The evidence produced by the Russian side is not primarily related to the disputed Kurile Islands, but rather relates to the Kurile Archipelago in general;
2. Although it appears that Japanese arguments for claiming sovereignty over the Kurile Islands are more chronologically organised than Russia's, it is apparent that these arguments are not fully supported by subsequent historical events within the context of the Shogunate's 'close the country' policy at the relevant times;
3. Japan cannot establish its claim to sovereignty over the Kurile Islands before the year 1855 because its evidence, compared to that of Russia, is very marginal, in particular with reference to the exercise of functions of state and governmental authority by acts normally indicative of sovereignty;
4. As to the period before the *Treaty of Shimoda* in 1855, neither Russia nor Japan has produced evidence of probative value in respect of related states' activities with direct bearing on the possession of the Kurile Islands;
5. Neither Russia nor Japan has proved its claim to established sovereignty before 1855 by means of prior discovery and occupation;
6. Accordingly, neither's expansion at the material times before 1855 can, in a legal sense, shed light on the issue of sovereignty;
7. After defining precisely the boundary in the Kurile Archipelago by the *Treaty of Shimoda* Japan, but not Russia, manifested and exercised functions of state and governmental authority by acts normally indicative of sovereignty over the Kurile Islands.⁹²

4. The "Kurile Islands" Japan Renounced in the *San Francisco Peace Treaty*

There is no agreed definition of what constitutes the Kurile Islands acceptable to both claimants. The word "Kuriles" is a Russian word, meaning smoky or volcanic area.⁹³ For the Japanese, the Kurile Archipelago was known as 'Chishima Retto', which means 'Thousand Islands Archipelago', starting from Shimushu, the northernmost island, to Uruppu, the southernmost island.⁹⁴ The determination of whether Etorofu, Kunashiri, Shikotan, and the Habomais are part of the Kurile Archipelago or part of Hokkaido is critical.

⁹² See, USDOS, n.d. (a) (on file with author); *infra*, Section 4. 'The "Kurile Islands" Japan Renounced in the *San Francisco Peace Treaty*.'

⁹³ USDOS, 1955a.

⁹⁴ Berton, 1992: 8-9.

Since Japan, by the terms of the *San Francisco Peace Treaty*, renounced all claims to the “*Kurile Islands*”, and since the term ‘Kurile Islands’ was not precisely defined by the treaty itself, Japan can move to exclude Etorofu, Kunashiri, Shikotan, and the Habomais from the Kurile Archipelago and claim that these islands are separate entities from the eighteen islands in the Kurile Archipelago. In support of this claim Japan cites the *Treaty of St. Petersburg* since only eighteen islands were enumerated in Article II of the treaty implying that Etorofu, Kunashiri, Shikotan, and the Habomais do not belong to the Kurile Archipelago.⁹⁶

This current official Japanese view on the Kurile Archipelago, has been articulated since 1956. On 11 February 1956, Mr. Morishita, the Deputy Minister of Foreign Affairs, replied to a parliamentary question in the Committee on Foreign Affairs of the House of Representatives of the Japanese Parliament that the term ‘Kurile Islands’ in the *San Francisco Peace Treaty* did not include Kunashiri and Etorofu,⁹⁷ and therefore, also Shikotan and the Habomais. Shikotan and the Habomais are widely considered not part of Kurile Archipelago but part of Hokkaido by the Japanese.

Meanwhile, Russia claims that not only Kunashiri and Etorofu, but also Shikotan and the Habomais are part of the Kurile Islands. In contrast with the Japanese, the Russians refer to the Kurile Archipelago as the ‘Great Kuriles’, and, in particular, to Shikotan together with the Habomais as the ‘Little Kuriles (or Lesser Kuriles)’.⁹⁸ Russia also refers to the term ‘Southern Kuriles’ as a single entity to include the currently disputed Kurile Islands – Etorofu, Kunashiri, Shikotan, and the Habomais.⁹⁹ Russia has rejected efforts to treat the ‘Southern Kuriles’ as separate from the main Kurile Archipelago on the grounds that Japanese historical and geographical literature treated the Kurile Islands as one unit for nearly three centuries.¹⁰⁰

A definition of the “*Kurile Islands*” Japan renounced in the *San Francisco Peace Treaty* is also very important because it is assumed that in any future negotiations with Russia the Japanese will not seek to repudiate the renunciation but rather will seek to define it as being limited to those islands in the Kurile Archipelago formerly owned by the Russians, which would exclude Etorofu, Kunashiri, Shikotan, and the Habomais.

Inasmuch as usage in this remote area was largely undocumented, it may be difficult to produce a mutually acceptable interpretation. But to the extent that the issues are: first, what the Japanese intended to relinquish by the words “*Kurile Islands*” in the *San Francisco Peace Treaty*; and second, what the Allied Powers intended to effect by the disposition of these territories, the following sources are of great importance in determining the meaning of the phrase.

⁹⁵ Berton, 1992: 8-9.

⁹⁶ *Id.*: 21-2.

⁹⁷ *Answer by Japanese Deputy Foreign Minister Morishita on February 11, 1956*, reprinted in Allison, 1992: 130 for extract version. See also, USDOS, 1964:

The [U.S. Department of State] is willing to comply with the Japanese Government’s request that the United States refrain from using the term “Southern Kuriles” when referring to Kunashiri and Etorofu in the future. ... [It] should be recognized that the Japanese Government has frequently referred to these islands as the “Southern Kuriles”. Furthermore, Etorofu and Kunashiri were included as part of the Kuriles chain on all pre-war maps.

⁹⁸ Berton, 1992: 8.

⁹⁹ Kudryavtsev, *supra*, note 47.

¹⁰⁰ *Id.*

1. Japanese usage and administrative history as well as the Japanese cultural and economic history in this area;
2. Evidence produced by Russia;
3. Certain geological and geographical aspects of the disputed area; and,
4. Preparatory works for the territorial clause of the *San Francisco Peace Treaty*, i.e., drafts of the treaty, relevant research memoranda, and other diplomatic correspondence.

For the purpose of further clarifying the term “*Kurile Islands*”, this chapter has divided them into two groups, i.e., Etorofu and Kunashiri as one; Shikotan and the Habomais as the other.

4.1 Etorofu and Kunashiri

Japanese attempts to exclude Etorofu and Kunashiri from the Kurile Archipelago¹⁰¹ are not fully supported by even the Japanese side. Some authoritative Japanese sources reveal a contrary interpretation regarding their exclusion. The 1988 edition of *Kokushi Dai Jiten* (Large Dictionary of Japanese History) defines ‘Chishima Retto’ (Kurile Archipelago) as “*Twenty-three islands stretching in one line from the Kamchatka Peninsula to the Japanese Archipelago,*”¹⁰² thus excluding the Kurile Islands, and more specifically, Etorofu and Kunashiri, from the Japanese Archipelago.

A further critical official remark on the definition of the Kurile Islands is the 19 October 1951, testimony of Kumao Nishimura, Director of the Treaties Bureau of the Foreign Ministry of Japan, before the Special Committee on the Peace Treaty and the Japan-US Security Treaty of the National Diet that was conducting hearings for the ratification of the treaties. He admitted as follows:

*[B]oth Northern and Southern Kuriles were included in the scope of the “Chishima Retto” [Kurile Archipelago] named in the San Francisco Peace Treaty. ... Committee Member Teisuke Takakura wanted confirmation that the “Chishima Retto” in the San Francisco Peace Treaty was the same as the “Kuriru Gunto” [The Kurile Archipelago] listed in Article II of the 1875 Sakhalin-Kurile Exchange Treaty, namely the eighteen islands north of the Island of Uruppu. Nishimura summarily denied Takakura’s interpretation, stating that...both Northern and Southern Kuriles were included in the definition of the Kurile Islands listed in the San Francisco Peace Treaty.*¹⁰³

Japan’s efforts to exclude Etorofu and Kunashiri from the Kurile Archipelago were also damaged by then Prime Minister Shigeru Yoshida in his speech accepting the *San Francisco Peace Treaty* on behalf of Japan. Referring to territorial questions and to the Kurile Islands in particular, Yoshida declared that “[Japanese] ownership of two islands of [Etorofu] and Kunashiri of the South Kurils was not questioned at all by the Czarist government.”¹⁰⁴ This reference to Etorofu and Kunashiri as ‘Southern Kuriles’ repeatedly appeared in Yoshida’s

¹⁰¹ See, *supra*, notes 92-94.

¹⁰² *Kokushi Dai Jiten*, Vol.9, 1988: 404-5, reprinted in Berton, 1992: 22.

¹⁰³ Berton, *id.*: 47.

¹⁰⁴ *Verbatim Minutes of the San Francisco Peace Conference: Speech by the Delegate of Japan – Sigeru Yoshida (Prime Minister and Minister of Foreign Affairs) in the 8th Plenary Session on Sept. 7, 1951*, reprinted in Allison, 1992: 128, for extract version of the speech.

memoirs with phrases such as “*Japanese sovereignty over the Southern Kurils was a fact accepted even by Imperial Russia, while the Habomai and Shikotan Islands formed an integral part of Hokkaido...*”¹⁰⁵

Other notable sources in support of the inclusion of Etorofu and Kunashiri in the Kurile Archipelago are: administrative definitions which predominantly included Etorofu and Kunashiri in the Kurile Archipelago;¹⁰⁶ a petition letter to General Douglas MacArthur from Mr Hidetaro Bando, Chairman of Hokkaido Prefectural Assembly, describing Etorofu and Kunashiri as “*Southern Kurile Islands*”;¹⁰⁷ the report on the Kurile Islands, prepared by the Foreign Office of the Japanese Government, acknowledging Etorofu and Kunashiri as the southern zone of the Kurile Islands;¹⁰⁸ a memorandum of the US Department of State concluding that there seemed to be no sound legal reason for claiming that Etorofu and Kunashiri are not part of the Kurile Islands, in particular, based on the *Treaty of Shimoda* and the *Treaty of St. Petersburg*, indicating that they were considered to be part of the Kurile Islands;¹⁰⁹ a report of background information on the Kurile Islands included Etorofu and Kunashiri as Kurile Archipelago, and further stated that they belonged to the “*Southern Kurile Islands*”;¹¹⁰ the report of a Japanese historian, Irie Keisiro, as reported in *Mainichi* of 17 May 1959, to the effect that “*Japan has legally given up the Southern Kurile islands*”;¹¹¹ the Japanese Socialist Party’s policy statement on treaty provisions surrendering Japanese sovereignty over territories, which spoke of “*...the Kurile Islands, the Habomai Islands, Shikotan Island...*”;¹¹² a *Mainichi* public opinion poll conducted in December 1950 indicated that an average of 76% of respondents desired that the Kurile Archipelago be restored to Japan with a lesser majority seeking the return of the Habomais and Shikotan;¹¹³ the resolution adopted by a Japanese national gubernatorial conference in which the Kurile Archipelago was referred to separately from the Habomais and Shikotan;¹¹⁴ Vice Foreign Minister Ryuen Kusaba’s declaration before the Lower House Foreign Affairs Committee 14 March 1951 that “*only the Kurile Islands, not the Habomai Group and Shikotan Islands, were dealt with in the Yalta Agreement*”;¹¹⁵ a memorandum of the US Department of State differentiating the Habomais and Shikotan from Etorofu and Kunashiri, and further endorsing the inclusion of Etorofu and Kunashiri in the Kurile Archipelago;¹¹⁶ in its advice and consent to the ratification of the *San Francisco Peace Treaty*, the US Senate mentioned as “*the Kurile Islands, the Habomai Islands, the island of Shikotan*”;¹¹⁷ and, the instruction of the Supreme Commander

¹⁰⁵ Yoshida, 1962: 256; see also Allison, *id.*: 124, for extract version.

¹⁰⁶ USDOS, 1955a.

¹⁰⁷ Hidetaro Bando, 1950 (on file with author).

¹⁰⁸ Foreign Office, Japanese Government, *supra*, note 66.

¹⁰⁹ USDOS, 1949a (on file with author).

¹¹⁰ USDOS, n.d. (a) (on file with author).

¹¹¹ See, *supra*, note 47.

¹¹² Sebald, 1950. William J. Sebald was US POLAD for Japan, Chief of Diplomatic Section, General Headquarters (hereinafter ‘GHQ’), Supreme Commander for the Allied Powers (hereinafter ‘SCAP’), and held the personal rank of Ambassador.

¹¹³ USDOS, 1951d.

¹¹⁴ *Jiji Press*, 26 August 1951, reprinted in USDOS, 1951e (on file with author).

¹¹⁵ *Jiji Press*, ‘Territorial Aspirations’, Tokyo, 14 March 1951 (on file with author).

¹¹⁶ USDOS, 1949b (on file with author).

¹¹⁷ USDOS, 1956a. See also, US Congress, Foreign Relations Committee, 1952: 8:

9. Territorial Provisions ...It is important to remember that article 2 is a renunciatory article and makes no provision for the power or powers which are to succeed Japan in the possession of and sovereignty over the ceded territory. During the negotiation of the treaty some of the Allied Powers expressed the view that article 2 of the treaty should not only relieve Japan of its sovereignty over the territories in question but should indicate specifically what disposition was to be made of each of them. The committee believes, however, that this would have been

for the Allied Powers (hereinafter ‘SCAP’) 677 entitled “*Governmental and Administrative Separation of Certain Outlying Areas from Japan*” on 29 January 1946 which referred to “... the Kurile (Chishima) Islands, the Habomai (Hapomaze) Island Group (including Suisho, Yuri, Aki-yuri, Shibotsu and Taraku Islands) and Shikotan Island.”¹¹⁸

4.2 Shikotan and the Habomais

On Japan’s surrender, Soviet forces occupied the Kurile Archipelago promised to them at Yalta, including the Habomais and Shikotan which are together sometimes called the “*Shikotan archipelago*.” This action was not protested by any Allied Government or by any SCAP and, indeed, had been specifically respected in the determination of the permitted Japanese fishing area.¹¹⁹ In discussing the disposition of the Kurile Islands, Mr S.W. Boggs, a geographer at the US Department of State, stated that he had been unable to find any basis for retention of the Habomais by Japan,¹²⁰ and further stated that while he could present no definitive case to prove that Shikotan was not part of the Kurile Archipelago, he could likewise present no definitive case to prove that it was part of the Kurile Archipelago.¹²¹

It is, therefore, more complicated to determine the status of Shikotan and the Habomais than is the case with Etorofu and Kunashiri, since there remains only obscure political propaganda that the former have been parts of Hokkaido, not of the Kurile Archipelago, throughout history as claimed by Japan and disputed by Russia. Nonetheless, the Russian claim to these two islands is somewhat weaker than that of the Japanese, since it is evident that the inclusion of Shikotan and the Habomais into a Kurile nomenclature was done by the Soviet Union after its occupation of the islands in 1945 for the purpose of formulating a connection of these islands to the Kurile Islands awarded to the Soviet Union in the *Yalta Agreement* of 1945.¹²² This is particularly so given that Russia never claimed, nor physically occupied, Shikotan and the Habomais before September 1945.¹²³

The sources supporting the inclusion of Etorofu and Kunashiri into the Kurile Archipelago, cited above,¹²⁴ can equally support a case for differentiating Shikotan and the Habomais from the Kurile Archipelago and endorse their inclusion in Hokkaido. Other sources in this category are: memoranda of the US Department of State concluding that Shikotan and the Habomais are not historically part of the Kurile Islands and have never been included in treaties respecting the islands;¹²⁵ the demand by the Japanese Socialist and People’s Democratic party for confirmation of Japanese sovereignty over the Kurile Islands and insistence upon the

unwise course to pursue. It might have raised differences among the Allies which would have complicated and prolonged the conclusion of the peace. Under the circumstances it seems far better to have the treaty enter into force now, leaving to the future the final disposition of such areas as...the Kuriles...

¹¹⁸ GHQ, SCAP, 1946a, Article 3; See also, *infra*, Section 5.2. ‘Interpretation of the Supreme Commander for the Allied Powers’ Instructions (SCAPINs)’.

¹¹⁹ USDOS, 1951d; See also, *infra*, Section 5.2.

¹²⁰ In replying to the suggestion of exclusion of the Habomais from the Kurile Islands because of their close association with Japan and in order to allow Japan to retain navigable waters around its north-eastern extremity. USDOS, 1946c (on file with author).

¹²¹ USDOS, 1946d (on file with author).

¹²² Berton, 1992: 8.

¹²³ USDOS, 1951f (on file with author).

¹²⁴ See, *supra*, notes 99-115.

¹²⁵ USDOS, n.d.(b) (on file with author); USDOS, 1955b; USDOS, 1955a.

return of Shikotan and the Habomais;¹²⁶ a US State Department memorandum acknowledging that US sponsorship of Japan's claim to Shikotan and the Habomais indicated to the Japanese a US desire to support their claims in this area to the maximum extent permitted by existing international agreements.¹²⁷

On the other hand, sources also exist supporting the inclusion of Shikotan and the Habomais in the Kurile Archipelago. These are: the *Oriental Economist*, known in Japan as influential and conservative, which wrote of the Russian occupation of Shikotan and the Habomais in the "Kurile group";¹²⁸ a US State Department memorandum on the question of defining the Kurile Islands, in which the Geographer's Office stated that there is no reason for separating the southern and central islands from the northern;¹²⁹ the waters of Shikotan and the Habomais and of Etorofu and Kunashiri constitute a unit for fishing operations by Japan.¹³⁰

There is a convincing argument, however, that Shikotan cannot be claimed to have been a part of Hokkaido outside the Kurile Archipelago; accordingly, the status of Shikotan and the Habomais should be further examined separately.

4.2.1 Shikotan

Although Japan maintains that Shikotan is geologically an extension of Cape Nosappu of Hokkaido, and is not a part of the Kurile Archipelago,¹³¹ the argument for inclusion of Shikotan in the Kurile Archipelago is supported by various sources, mainly historical documents.

Administrative records for Shikotan show that it was administered together with the Kurile Archipelago under the Branch of the Hokkaido Administration.¹³² In terms of an administrative district of Japan, Shikotan was brought under the Hanasaki-gun of Nemuro-Koku in 1869, later it was changed to the Shikotan-gun, Kamichishima-Koku in 1885 when the natives of the northern Kurile Archipelago were moved there; the village head office of Shakotan-village (Shikotan) was established in 1887.¹³³ In July 1880, six villages were established in Tomari of Kunashiri, and four villages' offices were established out of Tomari. After many changes, the Hokkaido second class-municipality system was enforced from 1 April 1923 to: Tomari village and Ruyabetsu of Kunashiri; Shakotan village (Shikotan); Rubetsu village, Sana village, and Shibetoro village of Etorofu. On 1 November 1933, the name of Shakotan village was changed to Shikotan village and in June 1943, the Hokkaido municipality system was established.¹³⁴ Thus, in the three islands of Kunashiri, Etorofu and Shikotan, there was the municipality system.¹³⁵

¹²⁶ See, *supra*, note 47. On 31 July 1952, at a Plenary Session, the Japanese House of Representatives passed the resolution on returning Shikotan and the Habomais to Japan. See, USDOS, 1952.

¹²⁷ USDOS, 1951d.

¹²⁸ See, *supra*, note 47; *FBIS Daily Report* (Far Eastern Section), No. 177, 5 September 1951 (Reuters reported, p.DDD7/p.3] (on file with author).

¹²⁹ USDOS, 1946e (on file with author).

¹³⁰ USDOS, 1951d.

¹³¹ *Kokushi Dai Jiten* (Vol.9)(1988): 405; reprinted in Berton, 1992: 22.

¹³² Berton, *id.*: 25.

¹³³ Hidetaro Bando, 1950.

¹³⁴ USDOS, n.d. (a) (on file with author).

¹³⁵ For the argument that Shikotan was included with the southern Kurile Archipelagos for the sake of the administrative convenience, see, USDOS, n.a. (b).

Other notable sources implying the inclusion of Shikotan in the Kurile Archipelago are: a US State Department memorandum on substantive problems in drafting the territorial clauses of the *San Francisco Peace Treaty* categorised the disposition to be made as “*the southern Kurils and the Habomais*”, or “*the lower Kurils and [the] Habomais*”;¹³⁶ a report for background information on the Kurile Islands referred to “*Habomai islands and southern Kurile islands*”, or “*Habomai Island and Kurile Archipelagoes*”;¹³⁷ the authoritative multi-volume Russian *Large Encyclopaedia* includes Shikotan in the Kurile Archipelago;¹³⁸ and various pre-1945 Japanese records, such as travel guides, administrative handbooks, and other publications, recognised Shikotan as a part of Kurile Archipelago.¹³⁹

4.2.2 The Habomais

The small secondary chain immediately east of Hokkaido, south of Kunashiri, the outermost being Shikotan are known as the Habomai group/Habomais (also as “*Suisho*” or “*Goyomai*” islands). The relation with Hokkaido of the Habomais can be supported through the following facts: US Secretary of State John Dulles stated at the San Francisco Peace Conference that the US interpretation of the words “*Kurile Islands*” excluded the Habomais;¹⁴⁰ in administration, a part of Habomai village located in the Hanasaki-gun, Nemuro-Koku of Hokkaido, was included in Chishima county for administrative purposes to 1884 when the natives living in the northern Kurile Archipelago migrated to Shikotan, then after 1915 the Habomais came under the jurisdiction of Nemuro subprefectural office of Hokkaido;¹⁴¹ the statement by the Social Democratic Party’s Secretary General demanding the return of the Habomais, specifically;¹⁴² the Habomais, geologically older than those of the rugged, often precipitous Kurile Archipelago, are low, with rolling hills, and constitute an extension of the eastern Hanasaki Peninsular of Hokkaido;¹⁴³ and its quite different geography from the Kurile Archipelago.¹⁴⁴

There is also an argument to the effect that the Habomais have no relation with the phrase ‘The Kurile’ in the *Yalta Agreement*, since these islands would have been under the occupation of the US Supreme Commander through the General Order No. 1, as minor islands close to mainland Japan.¹⁴⁵

4.3 Appraisal

The *Treaty of Shimoda* states that:

[h]enceforth the frontier between Japan and Russia will run between the islands of [Etorofu and Uruppu]. The entire island of [Etorofu] belong to Japan and the entire

¹³⁶ USDOS, 1949c.

¹³⁷ USDOS, n.d. (a) (on file with author).

¹³⁸ Berton, 1992: 25.

¹³⁹ *Id.*

¹⁴⁰ See, *supra*, note 114. See also, USDOS, 1964a. A US memorandum mentioned Southern Kurile, Shikotan, and the Habomais, respectively, as well as Etorofu and Kunashiri, as “*the fairly large islands of the Southern Kuriles.*”

¹⁴¹ USDOS, n.d. (a) (on file with author); USDOS, 1947b.

¹⁴² USDOS, n.d. (a) (on file with author).

¹⁴³ USDOS, 1947d (on file with author).

¹⁴⁴ USDOS, n.d. (a) (on file with author); USDOS, 1947b (on file with author).

¹⁴⁵ USDOS, n.d. (a) (on file with author).

*island of [Uruppu], as well as the other Kuril islands to the north of that island, belong to Russia.*¹⁴⁶

Both Russia and Japan have attempted to support their claims by reference to this clause. Russia attempted to establish a prior claim to Etorofu and Kunashiri by interpreting the treaty as an agreement on the part of Russia to cede to Japan the islands south of Uruppu in the Kurile Archipelago.¹⁴⁷ The term “*the other Kuril islands*” in this clause can be interpreted as indicating that among the currently disputed Kurile Islands – Etorofu, Kunashiri, Shikotan, and the Habomais – there are certain islands to be labelled as the single entity of the ‘Kurile Islands.’ This provision appears differently¹⁴⁸ however, in official Japanese documents, because the word ‘other’ is deleted. There is a strong presumption that Japan manipulated the translation so that the first Russo-Japanese boundary line regarding the Kurile Archipelago excluded the currently disputed Kurile Islands from the term ‘Kurile.’ This is particularly so given that the translations jointly prepared by the Ministries of Foreign Affairs of Russia and of Japan,¹⁴⁹ and other translations in various materials¹⁵⁰ appear to be different to the Japanese translation.

The language of Article 2 of the *Treaty of St. Petersburg* of 1875, provided that “...henceforth the said group of Kuril Islands shall belong to...Japan. This group shall include the eighteen islands indicated below, that is: 1) Shumshu...and 18) [Uruppu].” This indicates that the islands ceded to Japan were only one group of the Kurile Archipelago, and that the other group may well have been either certain island(s) of the currently disputed Kurile Islands or the Kurile Islands themselves as a whole. Therefore, both of these treaties of 1855 and 1875 are evidence that Etorofu and Kunashiri, at least, are parts of the Kurile Archipelago, but neither of them gives any clear indications as to what the other component(s) of the Kurile Islands are.

There seems, therefore, to be no sound legal reason for claiming that Etorofu and Kunashiri are not part of “*the Kurile Islands*”, the term employed in the *Yalta Agreement*. Although there has been no Soviet claim to the two islands since the *Treaty of Shimoda* set the frontier in Etorofu Straits north of Etorofu, both that treaty and the *Treaty of St. Petersburg* indicate that they were considered to be part of the Kurile Archipelago.

On the other hand, there is believed to be a sound legal basis for claiming that the Habomais are not properly part of the Kurile Archipelago. The Habomais were not joined politically with the Kurile Archipelago before the surrender, being administered as part of Nemuro District of Hokkaido. While Russia at one time and another claimed or possessed most of the Kurile Archipelago, including Etorofu, it never before claimed any part of Shikotan and the Habomais. In the case of Shikotan, though Japan maintains that its inclusion within the Kurile Archipelago was for the sake of convenience,¹⁵¹ various documentary and other circumstantial evidence, in particular administrative records, place Shikotan within the Kurile Archipelago.

¹⁴⁶ See, Japan, 1946.

¹⁴⁷ See, *supra*, notes 61-63.

¹⁴⁸ See, Japan, 1946.

¹⁴⁹ Strengthening Democratic Institutions Project, 1992a, Doc. No. I.7.

¹⁵⁰ See, Japan, 1946; Strengthening Democratic Institutions Project, 1992b: 4; USDOS, 1956b: 2 (on file with author) (citing Harrison, (1953: 165): “... *The Island of Etorofu belongs entirely to Japan, while the Island of Uruppu and other islands of the Kuriles north of this island belong to Russia ...*”

¹⁵¹ USDOS, 1951d.

By evaluating the historical records and other evidence, it is reasonable to reach the conclusion that while Etorofu and Kunashiri were considered as parts of the Kurile Archipelago together with Shikotan, the Habomais were grouped with Hokkaido.

5. Territorial Dispositions and the *San Francisco Peace Treaty* with Japan of 1951

5.1 The Implications of the Wartime Resolutions

There was general agreement that the *San Francisco Peace Treaty* could hardly do other than endorse the territorial agreements made at Cairo, Yalta, and Potsdam,¹⁵² and in fact, the territorial dispositions of the treaty followed the terms of these agreements and of US studies and policy decisions relating to the implementation of these agreements.¹⁵³

The pertinent provisions of these agreements are: “...Japan will...be expelled from all other territories which she has taken by violence and greed.”¹⁵⁴ in the *Cairo Declaration* of 1 December 1943; “*The Kuril islands shall be handed over to the Soviet Union*”¹⁵⁵ in the *Yalta Agreement* of 11 February 1945; “...Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine”¹⁵⁶ in the *Potsdam Proclamation* of 26 July 1945; and “[Japan]...accept[s] the provisions set forth in the [Potsdam Proclamation]...”¹⁵⁷ in the *Instrument of Surrender* of 14 August 1945.

5.1.1 The Cairo Declaration

The *Cairo Declaration* referred specifically only to “*the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores*”,¹⁵⁸ although it did add that “*Japan will also be expelled from all other territories which she has taken by violence and greed.*” As to the words of the *Cairo Declaration*, there were harsh responses from Japan, for example, “*the expulsion of Japan from the territory which she took by violence and greed is difficult for the Japanese to understand, since all countries have acquired additional territory in such a way.*”¹⁵⁹

It is quite correct to say that Japan did not acquire the Kurile Islands by violence, but it might be as well to remember that they were for a century a matter of dispute with Russia, and that by the *Treaty of Shimoda* the frontier between the two countries was drawn between the islands of Etorofu and Uruppu, leaving the Kurile islands to Japan, and the eighteen northern islands in the Kurile Archipelago, beginning with Uruppu, to Russia. The northern islands in the Kurile Archipelago remained Russian until the *Treaty of St. Petersburg* in 1875, when, in exchange for Japanese claims to Sakhalin, they were ceded to Japan.

¹⁵² USDOS, 1947e.

¹⁵³ USDOS, 1951d.

¹⁵⁴ USDOS, 1961: 448-9; USDOS, 1950a: 20. Also available at: <http://www.yale.edu/lawweb/avalon/wwii/cairo.htm>; <http://newtaiwan.virtualave.net/cairo.htm>.

¹⁵⁵ *Supra*, note 20.

¹⁵⁶ USDOS, n.d.(c): 53; USDOS, 1950: 28-40. Also available at: <http://www.yale.edu/lawweb/avalon/decade/decade17.htm>; <http://newtaiwan.virtualave.net/potsdam.htm>.

¹⁵⁷ USDOS, 1945: 257-9.

¹⁵⁸ See, USDOS, 1951d.

¹⁵⁹ USDOS, 1950b (on file with author).

5.1.2 *The Yalta Agreement*

Russia maintains that as a result of the *Yalta Agreement* the Kurile Islands became an integral part of Russia. As mentioned earlier, the basis of the Russian claim to these islands is a passage in the agreement between the leaders of the Soviet Union, Great Britain, and the United States:

2. *The former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored, viz.:*
 - (a) *the southern part of Sakhalin as well as all the islands adjacent to it shall be returned to the Soviet Union ...*
3. *The Kuril islands shall be handed over to the Soviet Union.*

A report on the discussions at Yalta concerning the Kurile Archipelago by Mr Charles E. Bohlen¹⁶⁰ notes a conversation between Roosevelt and Stalin on 8 February 1945 in the following terms:

*MARSHAL STALIN said that he would like to discuss the political conditions under which the USSR would enter the war against Japan. ...THE PRESIDENT said...that there would be no difficulty whatsoever in regard to the...Kurile Islands going to Russia at the end of the war ...*¹⁶¹

A memorandum by Mr W. Averell Harriman¹⁶² concerning the events of 10 February 1945, contained the following statement:

*Mr Molotov*¹⁶³ *...handed me in English translation the draft of Marshal Stalin's political conditions for Russia's entry in the war against Japan as discussed with the President on February 8. ...The Kuril Islands should be handed over to the Soviet Union. The Heads of the three Great Powers have agreed that these claims of the Soviet Union should be unquestionably satisfied after Japan has been defeated.*¹⁶⁴

In that context, it could be argued that, on an historical basis, certain of the Kurile Islands never belonged to the Soviet Union, have always been administered by Japan, and, therefore, should not be included in the group now occupied by Soviet forces and ceded at Yalta. This is particularly so given that there is also no distinctive evidence that the minds of any of the negotiators at Yalta were ever directed to the term "*Kurile Islands*." The question is therefore a legal one, the definition of the words "*Kuril Islands*", to be determined on the basis of all relevant legal considerations. Since all of the islands in the Kurile Archipelago were part of Japan before the war, they should be retained by Japan unless they are part of the "*Kuril Islands*" within the meaning of the *Yalta Agreement*.¹⁶⁵ It should also be noted, in that sense, that the "*Kuril Islands*" were dealt with in a paragraph separate from that which stated that the former rights of Russia violated by Japan in 1904 should be restored.

¹⁶⁰ Counselor of the Department of State.

¹⁶¹ USDOS, 1953.

¹⁶² US Ambassador to the Soviet Union.

¹⁶³ Vyacheslav Mikhailovich Molotov, People's Commissar for Foreign Affairs of the Soviet Union.

¹⁶⁴ USDOS, 1950b.

¹⁶⁵ USDOS, 1955a.

5.1.3 The Potsdam Proclamation

The *Potsdam Proclamation* indicated that other minor Japanese islands might be detached from Japan, at the discretion of the Allied Powers. As for the other areas, it was stipulated only that Japan shall renounce right, title and claim to them, and no reference was made to their status following such renunciation.

The Soviet Union purported to adhere to the surrender terms of the *Potsdam Proclamation* in its declaration of war. From the instrument of surrender it would seem that the power of the Potsdam signatories to determine which islands should remain under Japanese sovereignty rested not upon legal rights but the political fact that they spoke for the great powers which were in a position to determine the peace settlement. Such legal force as the declaration has would appear to arise from its unconditional acceptance by Japan. It follows from this acceptance that Japan should abide by any determination by the Allied Powers concerning the limits of its territory.

5.1.4 Appraisal

Should the *Yalta Agreement*, which was not known to Japan at the time of its acceptance of the *Potsdam Proclamation* and which was not referred to in the *Potsdam Proclamation*, be considered the relevant determination by the Allied Powers as envisaged in paragraph 8 of the *Potsdam Proclamation*? And further, could the Soviet Union singly and unilaterally determine acquisition of the Kurile Islands as its own territory by strength of the provisions of paragraph 8 of the *Potsdam Proclamation*? The legal nature of the *Yalta Agreement* is also debatable from the point of view of whether it was a simple statement of common purpose arrived at by the heads of three Great Powers or whether it had certain legal effects on the issue of transferring territories.

By virtue of its legal system, the United States maintains that the *Yalta Agreement* was not meant to be self-executing or a final determination of the purposes expressed therein, or to be of any legal effect in transferring territories. On the other hand, by virtue of the British constitutional system, the Prime Minister of the United Kingdom may have bound his Government at Yalta as to the disposition of the Kurile Islands.¹⁶⁶ Meanwhile, as mentioned earlier, though the Soviet Union maintained that as a result of the *Yalta Agreement* the Kurile Islands became an integral part of the Soviet Union, it is doubtful that the Soviet Union could determine by unilateral declaration the acquisition of the Kurile Islands. The Soviet Union could, however, acquire sovereignty over those territories on an independent basis of occupation, control, and effective administration, or it could acquire prescriptive title.¹⁶⁷

As to the question whether the United States agreed in the *Yalta Agreement* that these islands did not belong to Soviet Union, the United States has consistently maintained that with respect to Japan, neither the *Yalta Agreement* nor the *San Francisco Peace Treaty* was intended to nor did it have the effect of conveying legal title to any Japanese territory to the Soviet Union. The phrase “*Kurile Islands*” in those documents was not intended to include these islands which have always been part of Japan.¹⁶⁸

¹⁶⁶ Hill, 1955: 9-14. For further information on the United Kingdom and other Commonwealth countries' opinions on this issue, see, USDOS, 1947f: “*Despite secrecy of Yalta [A]greement it looks as though it must be accepted.*”; USDOS, 1947g (on file with author): “*The Canberra Conference agreed that the [territorial] provisions of Cairo, Potsdam and Yalta would have to be confirmed in the treaty.*” See, also, Australian Legation (Rio de Janeiro), 1947.

¹⁶⁷ USDOS, 1956c.

¹⁶⁸ USDOS, 1972.

In reply to questions from Democratic Liberal Mr Morio Sasaki and Socialist Madam Satoko Toganai at a meeting of the Japanese Foreign Affairs Committee of the House of Representatives as to whether it was permitted to interpret the *Yalta Agreement*, which is a secret pact concluded between the United States, Great Britain, and the Soviet Union for the return of the Kurile Archipelago to the Soviet Union, as not binding on Japan, Mr Kawamura, Parliamentary Vice-Minister of Foreign Affairs, and Mr Nishimura, Chief of the Treaty Bureau of the Foreign Office, stated in substance as follows:

It is natural that Japan should accept Potsdam and Cairo Declarations at the peace conference, “*We agree with you that Japan will not be bounded by the Yalta Agreement, which is a secret agreement from the viewpoint of international law.*” Under terms of the Cairo Declaration, the question of the territorial rights to the islands around the Japanese mainland will be settled at the peace conference...¹⁶⁹

Mr Hisao Shimazu, Chief of the Political Affairs Bureau of the Foreign Office, also told the Foreign Affairs Committee of the House of Representatives, in answer to a question asked by Democratic Liberal Mr. Morio Sasaki, that the *Yalta Agreement* did not make it clear which islands were included in the Kurile Islands nor was there any means to clarify it. He further added that it was up to the Allies Powers to define what the Kurile Islands were.¹⁷⁰

Japan further argues that is not bound by the terms of the *Yalta Agreement*, since Japan was not a party thereto and the *Yalta Agreement* was not mentioned in the *Potsdam Proclamation* which Japan accepted. Equally Japan claims that the *Yalta Agreement* could not have been the determination referred to in para. 8 of the *Potsdam Proclamation*, since it was concluded prior to the *Potsdam Proclamation*.¹⁷¹

It is however, difficult to totally disregard in its entirety the legal weight of the *Yalta Agreement*, since the drafters of the *San Francisco Peace Treaty* took this instrument into consideration throughout their working process. For example, it was stated that the paper on the disposition of the Kurile Islands, which was the basic source for deciding the disposition of the Kurile Islands in the *San Francisco Peace Treaty*, had been revised in accordance with the *Yalta Agreement*.¹⁷² At a meeting between Mr Matsumoto and Mr Malik in London for normalisation of relations between Russia and Japan, Mr Malik made a statement on the territorial issues as follows:

*Whatever Yoshida had pleaded for at San Francisco Conference of 1951, he actually signed instrument stipulating renunciation by Japan of its title to ...Kuriles. We know that some parties to Yalta Agreement now entertain doubt as to validity of agreement. From legal standpoint, however, such doubt is of no value. In conclusion, ...Kuriles have legitimately been delivered to USSR by terms of Potsdam Proclamation and Yalta Agreement.*¹⁷³

¹⁶⁹ *Nihon Keizai Shimbun*, 1949 (on file with author).

¹⁷⁰ *Jiji Press*, ‘Kurile Islands Said Undefinable’, Tokyo, 1 February 1950 (on file with author).

¹⁷¹ USDOS, 1955b.

¹⁷² USDOS, 1946f (on file with author).

¹⁷³ USDOS, 1955c. Furthermore, concerning statements by the Democratic Party as to the territorial provisions of the San Francisco Peace Treaty, Prime Minister Yoshida said, “*They should be reminded Japan surrendered unconditionally. I think they’d better study Yalta Agreement*” (USDOS, 1950c); The Soviet Union requested an interpretation of the proposal of the United States concerning the Kurile Islands, in the light of the Cairo Declaration and the Yalta Agreement. With regard to the Yalta

In other words, the *San Francisco Peace Treaty* appears to be an implementation of the precise terms of the *Potsdam Proclamation* and the *Yalta Agreement*, which clearly left the question of Japanese territorial determination, in particular over the Kurile Islands, for subsequent consideration, rather than an attempt to carry out the vague provision of the *Cairo Declaration* regarding territories taken by violence and greed.

The *San Francisco Peace Treaty* in principle superseded all the instruments previously made among the Allied Powers concerning Japan, including the *Potsdam Declaration*, in the case of the Allied Powers signatory to the treaty. *Vis-à-vis* the United States and the other Allied Powers which signed and brought into force the *San Francisco Peace Treaty*, Japan renounced all claim to the Kurile Islands and had no power to affect sovereignty over them. Therefore, if there be any discrepancy between them, the former would prevail.

On the other hand, Japan and those Allied Powers which were signatories to the *Instrument of Surrender* and which did not participate in the *San Francisco Peace Treaty*, continued to be reciprocally bound by the terms of the *Instrument of Surrender*, since it was not abrogated between them and Japan by the conclusion of the peace treaty. Furthermore, the relation between such Allied Powers and Japan would not revert to the status prior to the surrender.¹⁷⁴ As the formal state of war continues, however, they may assert their right to continue the territorial occupation on the contention that the terms of the *Instrument of Surrender* have not been or are not being carried out.

In that sense, Japan's only legal obligation *vis-à-vis* the Soviet Union after April 28, 1955¹⁷⁵ was to abide by the terms of the *Instrument of Surrender*, which incorporated by reference the *Potsdam Proclamation*. The *Potsdam Proclamation* in turn incorporated the statement issued at the Cairo Conference, which provided that Japan should be expelled from all other territories which she had taken by violence and greed. Japan argues that it did not obtain the Kurile Islands by violence and greed but by peaceful means confirmed by international agreement, and further claims that the Kurile Islands did not become Japanese territory through the *Treaty of Shimoda* and the subsequent treaties, but only were confirmed by them. If the above arguments are tenable, the position could be taken that Japan is not required, *vis-à-vis* the Soviet Union, to act as if it had renounced its claim to the Kurile Islands.¹⁷⁶

Agreement, the US Government remained consistently of the opinion that its territorial provisions would need to be implemented in the *San Francisco Peace Treaty*. USDOS, 1950d (on file with author).

¹⁷⁴ This problem had assumed special importance in Japan in connection with the obligation undertaken by the Allied Powers to return to Japan prisoners of war in their custody and the failure of the Soviet Union to repatriate several hundred thousand Japanese soldiers taken prisoner by Soviet forces. Therefore, for instance, such promise given in the *Potsdam Declaration* that the Japanese Military Forces should be permitted to return to their homes would remain so far as the relation between Japan and the Soviet Union is concerned. On the other hand, it follows that Japan continued to be bound by the terms of that *Instrument vis-à-vis* non-participating powers. USDOS, 1951g. See also, *infra*, Section 5.5 'The Legal Effect of the Soviet Union's Non-signing of the *San Francisco Peace Treaty*.'

¹⁷⁵ Initial entry into force of the *San Francisco Peace Treaty* is 28 April 1952, and the obligation on the part of Japan to make a treaty with the Soviet Union on substantially the same terms as the *San Francisco Peace Treaty* expired three years after the first coming into force of the *San Francisco Peace Treaty*. See, Article 26 of the *San Francisco Peace Treaty*, *infra*, note 268.

¹⁷⁶ See, *infra*, Section 5.5 'The Legal Effect of the Soviet Union's Non-signing of the *San Francisco Peace Treaty*.'

Therefore, it can be said that the implications of the wartime resolutions, made at Cairo, Yalta, and Potsdam, as to the territorial dispositions over the Kurile Islands in the *San Francisco Peace Treaty* are significant.¹⁷⁷

5.2 Interpretation of the Supreme Commander for the Allied Powers' Instructions (SCAPINs)

The General Headquarters of SCAP gave instruction (hereinafter 'SCAPIN') 677 entitled "*Governmental and Administrative Separation of Certain Outlying Areas from Japan*" on 29 January 1946¹⁷⁸ which stated:

*The Imperial Japanese Government is directed to cease exercising, or attempting to exercise, governmental or administrative authority over any area outside of Japan, or over any government officials and employees or any other persons within such areas.*¹⁷⁹ It further stated that, *For the purpose of this directive, Japan is defined to include the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately 1,000 smaller adjacent islands...and excluding...(c) the Kurile (Chishima) Islands, the Habomai (Hapomaze) Island Group (including Suisho, Yuri, Aki-yuri, Shibotsu and Taraku Islands) and Shikotan Island.*¹⁸⁰

This instruction has been considered as one of the significant legal instruments that decided the destiny of the Kurile Islands, especially in favour of Russia. Russia continuously maintains that SCAPIN 677 decreed the cessation of Japanese administration over various non-adjacent territory, including the Kurile Islands, and this is strong indication of what the Allied Powers desired to dispose of. In response to this claim, Japan argues that SCAPIN 677 only suspended Japanese administration of various island areas, including the Kurile Islands, but did not preclude Japan from exercising sovereignty over this area permanently.

The United States recognises that the question of international sovereignty was outside SCAP's authority. As SCAPIN 677 itself stated "*Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.*"¹⁸¹ The United States also pointed out that in all SCAPINs to the Japanese Government regarding authorisation of areas for Japanese fishing and whaling which were established under SCAP, there appeared a statement providing essentially that "*the present authorisation is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.*"¹⁸² Therefore, it is the US position that SCAPIN 677 was an operational directive to the Japanese Government tentative in character which specifically stated further in paragraph 6 that it was not an Allied policy determination of Japanese territory.¹⁸³ In the same vein, the SCAP General Order No. 1 merely stated that Japanese troops in Sakhalin and Kurile Archipelago should surrender to Commander Soviet

¹⁷⁷ See, *infra*, Section 5.3.2 'The Implications of Drafts on the Territorial Dispositions of the Kurile Islands in the *San Francisco Peace Treaty*.'

¹⁷⁸ GHQ, SCAP, 1951 (SCAPIN No.677). There were other relevant SCAPINs such as SCAPINs 677/1, 841, 1033, 1033/1 and SCAPIN 1033/2.

¹⁷⁹ SCAPIN 677, *id.*, Article 1.

¹⁸⁰ *Id.*, Article 3.

¹⁸¹ *Id.*, Article 6.

¹⁸² GHQ, SCAP, 1946a (SCAPIN No.1033): Article 5.

¹⁸³ USDOS, 1955b.

Forces Far East, and did not and was not intended to touch upon the final disposition of these islands.¹⁸⁴

There is also, however, a report on “*Summaries of FEC Policy Statements and Certain SCAP Directives to the Japanese Government, with Proposals for Disposition in the Peace Settlement with Japan*” regarding the relationship between territorial questions and SCAPIN 677, that “[d]efines present area of Japanese jurisdiction and provides a starting point for decisions on details of territorial adjustments.”¹⁸⁵

5.3 Drafts of the Territorial Clause of the *San Francisco Peace Treaty* and their Implications

The territorial disposition of the Kurile Islands was addressed in the *San Francisco Peace Treaty*. Article 2(c), as mentioned earlier, provided that “*Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.*”¹⁸⁶ Since the *San Francisco Peace Treaty* provides only for a renunciation of Japanese sovereignty over the Kurile Islands without mentioning by name who should own them, a clarification of the meaning of the legal disposition of these territories is required.

5.3.1 Drafts of the Territorial Clause of the *San Francisco Peace Treaty*

Draft Dated 19 March 1947

The territorial clause on the Kurile Islands in the first draft¹⁸⁷ provided that “*The territorial limits of Japan shall be those existing on January 1, 1894, subject to the modifications set forth in Articles 2, 3...As such these limits shall include the four principal islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor offshore islands, excluding the Kurile Islands...*”¹⁸⁸, and further provided that “*Japan...cedes to the Soviet Union in full sovereignty the Kurile Islands, lying between Kamchatka and Hokkaido.*”¹⁸⁹

Thus, the draft dated 19 March 1947, concluded that the currently disputed Kurile Islands were to be handed over to the Soviet Union. This was the outcome of US commitment in the *Yalta Agreement*¹⁹⁰ and also the reflection of the US policy and security considerations such as weighing the vital strategic importance of the specific territories.¹⁹¹

¹⁸⁴ *Id.*

¹⁸⁵ USDOS, 1947h (on file with author).

¹⁸⁶ Article 2(c), SF Peace Treaty.

¹⁸⁷ USDOS, 1947i. It is believed that, before circulating this draft, there are possibilities of the existence of other earlier versions, though their contents on the territorial disposition were identical. See, USDOS, 1947d (citing the treaty draft dated on 3 February 1947).

¹⁸⁸ Chapter I. Territorial Clauses, Article 1.

¹⁸⁹ Article 3(2).

¹⁹⁰ USDOS, 1956a.

¹⁹¹ *Id.* The United Kingdom’s object was also to see that whatever arrangements were made provided adequately for the defense of the British Commonwealth territories elsewhere in the Far East and the Pacific, including especially Australia and New Zealand. See, United Kingdom, 1947 (in USDOS, 1947j).

There was, however, a memorandum recommending that the Kurile Islands should be retained by Japan, or alternatively divided and retained by Japan through a variety of modules, such as: Etorofu and Kunashiri, together with Shikotan and the small islands between the latter and the easternmost cape of Hokkaido; or, if that was not feasible, Kunashiri, with Shikotan and the minor islands between the latter and Hokkaido.¹⁹² This memorandum further clarified the reason for the suggestion that the United States favoured the Etorofu Strait between Etorofu and Uruppu and the Kunashiri Channel between Kunashiri and Etorofu as good lines of separation between Japanese and Russian territories, since the former is a deep, unobstructed strait, with a width of about 22 nautical miles, while the latter, is 12 nautical miles wide and also clear of dangers.¹⁹³ This memorandum also recommended the retention of the Kurile Islands by Japan on the grounds that to Japan these islands are the home of resident Japanese,¹⁹⁴ and on the basis of the importance for fishing, given that about one ninth of Japan's fishing products were said to have come from the Kurile Islands and the vicinity of Nemuro on Hokkaido. The views expressed in this memorandum are reflected in subsequent drafts.

Draft Dated 5 August 1947

The territorial clause on the Kurile Islands in this draft,¹⁹⁵ provided that “*The territorial limits of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor islands, including...the Habomai Islands, Shikotan, Kunashiri and Etorofu...*”¹⁹⁶, and it further provided that “*Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands, comprising the islands northeast of Etorofu Strait (Etorofu Kaikyo) from Urup (Uruppu) to Shumushu inclusive, which were ceded by Russia to Japan by the Treaty of 1875.*”¹⁹⁷

Consequently, this draft concluded that the currently disputed Kurile Islands be retained by Japan. This is largely based on the fact that the United States newly interpreted the *Yalta Agreement's* reference to the term “*Kurile islands*” as not including the currently disputed islands, in particular Etorofu and Kunashiri, since the United States adjudged that, ethnically, economically, and historically, these have been part of Japan.¹⁹⁸

Draft Dated 8 January 1948

This territorial clause¹⁹⁹ provided that “*Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands.*”²⁰⁰ This draft refrained from defining the Kurile Islands that Japan should cede to the Soviet Union and mentioned the sources for the territorial clauses, which were based largely on international agreements made at Cairo, Yalta

¹⁹² USDOS, 1947d.

¹⁹³ *Id.*

¹⁹⁴ *Id.* For the population factors, this memorandum reported that the permanent population of the whole Kurile Archipelago (approximately 18,000 in 1940) is almost wholly Japanese. About 90% live in the southernmost islands which it is proposed should remain with Japan – Kunashiri (9,000), Etorofu (5,100), Shikotan (1,500), and perhaps another 500 on the Habomais. This memorandum also mentioned the United States' interests over the Kurile Islands, because of their nearness to the principal sea route to Japan, and to the Aleutian Islands.

¹⁹⁵ USDOS, 1947k.

¹⁹⁶ Chapter I. Territorial Clauses, Article 1(1).

¹⁹⁷ Article 3(2).

¹⁹⁸ USDOS, 1947l (on file with author). The final status for which the United States should press, with respect to the territorial limits of Japan, would be that shown on the attached map (see Figure 1). See, USDOS, 1947m.

¹⁹⁹ USDOS, 1948.

²⁰⁰ Article 3(2).

and Potsdam, and further mentioned the *Yalta Agreement* as the sole source for the disposition of the Kurile Islands, in particular.²⁰¹ This also acknowledged that the main outstanding problems in the territorial clauses concerned the Kurile Islands and the Ryukyus. In addition, in reference to the Kurile Islands, since they were not defined in the *Yalta Agreement*, the United States was to reach a definitive decision on the disposition of the Kurile Islands.²⁰² It further noted that if the United States proposed a narrow interpretation of the “*Kurile Islands*”, the southernmost islands of Etorofu, Kunashiri, Shikotan, and the Habomais would be retained by Japan.²⁰³

Draft Dated 13 October 1949

The territorial clause in this draft²⁰⁴ provided that “*The territorial limits of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including the islands of...Etorofu, Kunashiri, the Habomai Islands, Shikotan...*”²⁰⁵ It also provided that “*Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands.*”²⁰⁶ The drafters adopted a narrow interpretation of the “*Kurile Islands*”, and clarified that the southernmost islands of Etorofu, Kunashiri, Shikotan, and the Habomais would be retained by Japan. The accompanying Note I also envisaged the possibility that the Soviet Union would not sign the *San Francisco Peace Treaty*. In that situation, this Note mentioned that “*it would be the US position that the treaty should not contain a provision whereby Japan would cede the territories described in Article 3, but that it should provide that the status of these territories should be determined subsequently by the states concerned, including the parties to the present Treaty.*”²⁰⁷

As to the territorial questions of the draft, a report titled “*Interests and Attitudes of F.E.C. Powers on Questions relating to the Peace Settlement with Japan*” by the US Department of State summarised the individual countries’ response, in particular against the issue of the Kurile Islands. The report raised the questions as to the disposition of the Kurile Islands stating that “[an] attempt by the US to assign to Japan...the Kuril Islands...will undoubtedly appear to some powers as an attempt to violate the Yalta agreement at the expense of the USSR and in favor of Japan.”²⁰⁸

Draft Dated 2 November 1949

This territorial clause,²⁰⁹ provided that:

The territory of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including...all other islands within a line beginning at a point in 45° 45′ N. latitude, 140° longitude east of Greenwich, proceeding due east through La Perouse Strait (Soya Kaikyo) to 146° E. longitude; thence by a rhumb line in a direction to the west of south to a point in 43° 45′ N. latitude, 145° 20′ E.

²⁰¹ USDOS, 1948.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ USDOS, 1949d.

²⁰⁵ Chapter I. Territorial Clauses, Article 1(1).

²⁰⁶ Article 3(2).

²⁰⁷ Note 1.

²⁰⁸ USDOS, 1947c. For the report on the position of individual states, i.e., Australia, see, USDOS, n.d.(d); for China, USDOS, n.d.(e); for India, USDOS, n.d.(f); and for Soviet Union, USDOS, n.d.(g) (on files with author).

²⁰⁹ USDOS, 1949e (on file with author).

*longitude; thence by a rhumb line in a southeasterly direction to a point in 43° 20' N. latitude, 146° E. longitude; thence due east to a point in 149° E. longitude; thence due south to 37° N. latitude;...*²¹⁰

It further provided that “Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands.”²¹¹ Again, by this draft, Etorofu, Kunashiri, Shikotan, and the Habomais, the currently disputed Kurile Islands, were excluded from Japanese territory, and were to be ceded to the Soviet Union. In addition, there are accompanying notes, one of which concerned what would happen should the Soviet Union not sign the *San Francisco Peace Treaty*, which is identical with the draft dated 13 October 1949.²¹² Another stated in Article 5(2) that the decision whether the United States would propose the retention by Japan of Etorofu, Kunashiri, Shikotan, and the Habomais had not been finally made.²¹³ This Note also acknowledged the difficult position of the United States, in particular, considering its relationship with Japan; thus the United States preferred not to raise this issue, and suggested whether it might be advisable for the United States to propose that the Soviet Union place the Kurile Islands under the trusteeship system.²¹⁴

The territorial dispositions of the Kurile Islands as set out in this draft, however, brought about many repercussions within the US Department of State, and these resulted in a different provision, as shown below, in subsequent drafts. In that sense, some internal memoranda by a ranking officer of the US Department of State, William J. Sebald, the US Political Adviser for Japan, should be noted considering their important and influential nature. His comments concerning Article 5(2)²¹⁵ were that Japan unquestionably advances a strong claim to Etorofu, Kunashiri, Shikotan, and the Habomais and that the United States should support such claim and due allowance be made in drafts for peculiarities in this case and that the United States considers this issue highly important in the view of questions such as fixing permanent boundary and fisheries issues. His other comments on a draft dated 2 November 1949, with regard to the disposition of the Kurile Islands were as follows:

*[It] is suggested that the draft to be supplied to the United Kingdom and British Commonwealths by the United States contain a provision for the “ceding to the Soviet Union in full sovereignty of the Kuril Islands, being those islands eastward and northeastward from the mid-channel line between Etorofu Island and Uruppu Island”, and that this be accompanied by a footnote to the effect that “It is the hope of the United States that the Soviet Union will not seek to annex Etorofu, Kunashiri, Shikotan, or Habomai Islands. The claim of their forming a part of the Kuril Islands is historically weak, and they are of far greater navigational and fishing importance to Japan than to any other possessor.” Concordantly with this expression, the islands listed in our proposed Article 3 as belonging to Japan would include specifically Etorofu, Kunashiri, Shikotan, or Habomai Islands.*²¹⁶

²¹⁰ Chapter II. Territorial Clauses, Article 3(1).

²¹¹ Article 5(2).

²¹² Note I.

²¹³ Note II.

²¹⁴ *Id.*

²¹⁵ USDOS, 1949f.

²¹⁶ Office of US POLAD for Japan, 1949.

Draft Dated 8 December 1949

This territorial clause,²¹⁷ provided that “*The territory of Japan shall comprise the four principal Japanese home islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including...the southern Kuril Islands (Chishima) northeastward to and including Etorofu and including Shikotan and the Habomai group.*”²¹⁸

This draft was largely influenced by the suggestion of Mr Sebald, as the accompanying memorandum referred to “*a revision of Article 3, “in positive terms” as proposed by Mr Sebald.*”²¹⁹ It is also noted that the drafter of this draft, however, questioned the desirability of this revision due to its problematic nature, in particular the existence of disagreement on the fact that Mr Sebald intimated the possibility of the Soviet Union’s concession of the Kurile Islands to Japan.²²⁰

Draft Dated 19 December 1949

This clause²²¹ was drafted as the “*Agreement respecting the Disposition of Former Japanese Territories on December 19, 1949.*” The territorial clause on the Kurile Islands in this draft provided that “*The Allied and Associated Powers agree that the island of Sakhalin (Karafuto) south of 50° N. latitude, and adjacent islands, including...the Kurile Islands shall be transferred to the Union of Soviet Socialist Republics in full sovereignty.*”²²² This provision stated that the Kurile Islands should be transferred to the Soviet Union, but it failed to clarify the definition of the Kurile Islands.

Drafts Dated 29 December 1949; and 3 January 1950

The territorial clause on the Kurile Islands in these²²³ drafts²²⁴ provided that “*The territory of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including...the Habomai group and Shikotan...*”²²⁵ It further provided that “*Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands.*”²²⁶ In these two drafts, territorial disposition of the Kurile Islands was influenced by two groups. One favoured recognising Etorofu and Kunashiri as the Kurile Islands, thus requiring their cession to the Soviet Union, while the other favoured the inclusion of Shikotan and the Habomais as Japanese territory. This revision was based on the memorandum of 8 December 1949.²²⁷

The accompanying commentary noted that the provision, by which in an earlier draft post-treaty Japan was circumscribed by a continuous line described in Article 3 and drawn on the map accompanying the treaty, was eliminated at the suggestion of Mr Sebald, who believed that a figurative fencing about of Japan was undesirable psychologically.²²⁸ This commentary also noted that Mr Sebald further suggested that to spare Japan having to cede or renounce

²¹⁷ USDOS, 1949g (on file with author).

²¹⁸ Chapter II Territorial Clauses, Article 3.

²¹⁹ USDOS, 1949g (on file with author).

²²⁰ *Id.*

²²¹ USDOS, 1949h (on file with author).

²²² Article 2.

²²³ USDOS, 1949i (on file with author).

²²⁴ USDOS, 1950e.

²²⁵ Article 3(1).

²²⁶ Article 5(2).

²²⁷ USDOS, 1949h.

²²⁸ USDOS, 1951d.

each by name of a long list of former territories and territorial claims the chapter be reduced merely to two simple articles.

In the first would be listed the territories Japan was to retain and in the second Japan would renounce all other former territories and territorial claims, which would not be mentioned by name, to the Allied and Associated Powers for disposition under a separate agreement concluded among themselves. This proposal was rejected after careful consideration because it was feared that if, as was probable, the Soviet Union and China did not sign the treaty or separate agreement and final disposition of Formosa, Southern Sakhalin and the Kurile Islands was accordingly postponed, the rights of the United States and its friendly Allies in the final disposition of those territories would be weaker as a result of their detachment from Japan than if they had been left under Japanese sovereignty. With Japan's title extinguished, the Soviet Union and China might claim that their former titles had been automatically re-established. It was also thought that the United States might find it difficult to justify such a departure from normal practice to the friendly Allies, the only reason for the change being to spare Japanese sensibilities.²²⁹

Drafts Dated 7 August 1950; and 11 September 1950

These territorial clauses,²³⁰ provided²³¹ that:

*Japan accepts whatever decision may hereafter be agreed upon by the United States, the United Kingdom, the Soviet Union and China with reference to the future status of ... the Kurile Islands. In the event of failure in any case to agree within one year, the parties of this treaty will accept the decision of the United Nations General Assembly.*²³²

This draft was drawn up as a possible alternative to the long form previously drafted, on the theory that circumstances may make it desirable to act expeditiously to bring about peace with Japan on the basis of a simple treaty.²³³ This provision stated Japanese acceptance of the territorial disposition over the Kurile Islands exercised by the Allied Powers, but it also failed to clarify what the reference to Kurile Islands in the provision meant.

Drafts Dated 12 March 1951; and 17 March 1951

These territorial clauses²³⁴ provided that “*Japan will return to the Union of Soviet Socialist Republics the southern part of Sakhalin as well as all the islands adjacent to it and will hand over to the Soviet Union the Kurile Islands, as they may be defined by bilateral agreement or by judicial decision...*”²³⁵

²²⁹

Id.

²³⁰

USDOS, 1950f.

²³¹

USDOS, 1950g.

²³²

Chapter IV. Territory, para.5. Chapter IV. Territory, para.5 of the draft dated on September 11, 1950 provided that:

Japan accepts whatever decision may hereafter be agreed upon by the United Kingdom, the Soviet Union, China, and the United States with reference to the future status of ... the Kurile Islands. In the event of failure in any case to agree within one year from the effective date of this treaty, the parties to this Treaty will seek and accept the recommendation of the United Nations General Assembly.

²³³

USDOS, 1949h.

²³⁴

USDOS, 1951h.

²³⁵

Chapter III Territory, para.5.

This provision manifested the cession of the Kurile Islands to Soviet Union, but it was not clarified what was included in the definition of the Kurile Islands. This draft followed closely the draft of 11 September 1950.²³⁶ The drafters of this draft also envisaged an alternative mechanism to resolve the issue of territorial disposition over the Kurile Islands by suggesting that the island might be defined by bilateral agreement or by judicial decision. Thus, regarding territory the drafters planned to omit any reference to the definition of the Kurile Islands, leaving this automatically to bilateral agreement or by judicial decision in the event of a disagreement. The drafters ensured that the Soviet Union got no benefits unless it accepted the treaty, and if it was apparent in advance that the Soviet Union was definitely out of forum, the drafters would further be prepared to reconsider whether reference to the Kurile Islands should be totally eliminated from the treaty.²³⁷

This idea of an alternative mechanism was deleted in the draft dated 17 March 1951,²³⁸ which provided that “*Japan will return to the Union of Soviet Socialist Republics the southern part of Sakhalin as well as all the islands adjacent to it and will hand over to the Soviet Union the Kurile Islands.*”²³⁹

Draft Dated 7 April 1951

The territorial clause in this draft²⁴⁰ provided that:

*Japanese sovereignty shall continue over all the islands and adjacent islets and rocks lying within an area bounded by a line...in a south-easterly direction parallel to the coast of Hokkaido to 145° 30' E. entering Numero Kaikyo at approximately 44° 30' N. in a south-westerly direction to approximately 43° 45' N. and 145° 15' E., then in a south-easterly direction to approximately 43° 35' N. 145° 35' E., then bearing north-easterly to approximately 44° N., so excluding Kunashiri, and curving to the east and then bearing south-westerly to include Shikotan at 147° 5' E....*²⁴¹

It further provided that “*Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands, and that portion of South Sakhalin over which Japan formerly exercised sovereignty.*”²⁴² Thus, as in the territorial disposition of the previous two drafts, Etorofu and Kunashiri were counted as part of the Kurile Islands to be ceded to the Soviet Union, but Shikotan and the Habomais were to be retained by Japan.

Draft Dated 3 May 1951

This draft²⁴³ provided that “*Japan cedes to the Union of Soviet Socialist Republics the Kurile Islands, and that portion of South Sakhalin and the islands adjacent to it over which Japan formerly exercised sovereignty.*...”²⁴⁴ Apart from requiring the Japanese cession of the Kurile Islands to the Soviet Union, this draft, like the preceding ones left the definition of the Kurile Islands open to question. This issue was further affected by individual countries’ response to this draft, notably a memorandum of Canada to the United States. Canada suggested that Japan

²³⁶ USDOS, 1950g.

²³⁷ USDOS, 1951i.

²³⁸ USDOS, 1951j.

²³⁹ Chapter III Territory, para.5.

²⁴⁰ USDOS, 1951k (on file with author).

²⁴¹ Part I. Territorial Clauses, Article 1.

²⁴² Article 3.

²⁴³ USDOS, 1951l.

²⁴⁴ Chapter II Territory, Article 4.

might merely renounce its title to the Kurile Islands, rather than cede them to the Soviet Union subject to the proviso that the Soviet Union became a party to the treaty.²⁴⁵ The United States responded that this suggestion could with advantage be further considered if and when the ultimate attitude of the Soviet Union towards the treaty was made apparent.²⁴⁶

This idea – not to cede the Kurile Islands specifically to the Soviet Union, and simply renounce its title to them – was further pursued in the United States’ response to the inquiry of New Zealand. In view of the need to ensure that none of the islands near Japan was left in disputed sovereignty, New Zealand favoured the idea of the precise delimitation by latitude and longitude of the territory to be retained by Japan. New Zealand further suggested that the adoption of this device could make it clear that Shikotan and the Habomais at present under Russian occupation would remain with Japan.²⁴⁷ On the first point, the United States pointed out the psychological disadvantages of seeming to fence Japan in by a continuous line around Japan and, on the second point, as regards Shikotan and the Habomais, it seemed for the United States more realistic, with the Soviet Union in occupation of the islands, not to specifically stipulate their return to Japan.²⁴⁸ In sum, it is strongly presumed that the United States preferred not to clarify the definition of the Kurile Islands to be ceded, and further not to specify the beneficiary of the ceded territory, beyond simply providing renunciation of the Japanese title to them.

Drafts Dated 14 June 1951; 3 July 1951; 20 July 1951; and 13 August 1951

The territorial clause in the drafts dated June,²⁴⁹ July 3,²⁵⁰ July 20,²⁵¹ and August,²⁵² provided that “*Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.*”²⁵³ These drafts had been prepared by the United States and the United Kingdom on the basis of the previous draft by the United States, circulated to the governments of the countries most closely concerned with the war against Japan; the draft independently prepared by the United Kingdom circulated at about the same time to the British Commonwealth nations; and comments and observations received from the governments concerned in relation to the two preceding drafts.²⁵⁴ Thus these drafts reflected the views of the interested countries, in particular, the United States’ stance against territorial disposition of the Kurile Islands.

It was the US view that Japan should be required to renounce its rights in the Kurile Islands but that disposition of these territories should not be made by the treaty itself. The reason for leaving the disposition of the islands undetermined was that it was considered undesirable that the Soviet Union should have its title to these territories cleared by a treaty which it would almost certainly refuse to sign.²⁵⁵ Thus, the United States maintained that it was better to leave

²⁴⁵ USDOS, 1951m.

²⁴⁶ *Id.*

²⁴⁷ USDOS, 1951n.

²⁴⁸ *Id.*

²⁴⁹ USDOS, 1951o.

²⁵⁰ USDOS, 1951p (on file with author).

²⁵¹ USDOS, 1951q.

²⁵² Japanese Peace Conference, San Francisco, 1951 (on file with author).

²⁵³ Chapter II Territory, Article 2(c) .

²⁵⁴ See, USDOS, 1951n. This provision – simply renounce its title to the Kurile Islands without designating the recipient – received wide support, in particular, from the United Kingdom and France. For the response of the United Kingdom, see, USDOS, 1951r; And for the response of France, see, USDOS, 1951s.

²⁵⁵ USDOS, 1947b.

the issue of what was a correct definition of the Kurile Islands to subsequent arbitration or ICJ decision rather than to precipitate the issue in the *San Francisco Peace Treaty* itself, particularly since the Russians were already in occupation of the disputed islands.²⁵⁶

5.3.2 *The Implications of Drafts of the Territorial Dispositions of the Kurile Islands in the San Francisco Peace Treaty*

The territorial clause of the treaty that was finally agreed upon states that: “*Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.*”²⁵⁷ From the foregoing review it is clear that various wartime resolutions, in particular the *Yalta Agreement*, have significant legal weight with respect to the territorial dispositions of the Kurile Islands and that the Soviet Union is the only recipient of the Kurile Islands envisaged by the Allied Powers.

There are, however, no agreed definitions of the “*Kurile Islands*” among the Allied Powers not even within the US State Department. Due to the frequently contradictory nature of the various drafts of the treaty, and other relevant instruments, the question what exactly constituted the Kurile Islands remains unclear to this day. There are, indeed, strong indications that the Allied Powers preferred not to resolve the matter of the ultimate disposition of the Kurile Islands by the *San Francisco Peace Treaty* and, instead, left it to the future to be resolved through the invocation of international mediation or arbitration.

5.4 Japan’s Renunciation of Sovereignty over the Kurile Islands

5.4.1 *Characteristics of the Territorial Disposition of the Kurile Islands in the San Francisco Peace Treaty*

The status of the Kurile Islands was addressed in the *San Francisco Peace Treaty*. However, the Allied Powers failed to specify any particular State as the beneficiary of the Japanese renunciation, and therefore, it is unclear how they intended to effect the legal disposition of these territories. In treaties of peace in which the vanquished relinquish territory such renunciation is generally made either in favour of the country to which the renounced territory is ceded, or in favour of an ultimate recipient, or in favour of the victorious power or powers designated as having the right to dispose of the sovereignty of the renounced territory.

In this respect the *San Francisco Peace Treaty* is unusual in that Japan renounced “*all right, title and claim*” to the Kurile Islands, without either conveying title to any other power, or specifying any ultimate recipient, or placing the disposition of title explicitly in the hands of the victorious powers. As far as the *San Francisco Peace Treaty* is concerned, Japan simply renounced its rights to these territories without retaining or obtaining any legal right to the question of the subsequent disposition, seizure, or cession of these territories by any other power or powers.

Thus, the salient characteristic of the situation is that Japan, by the *San Francisco Peace Treaty*, simply removed Japanese sovereignty from the territories in question without specifying to whom the territories were to be ceded or who had a legal right to dispose of the territories prior to definitive cession.

²⁵⁶ USDOS, 1951/6/14; 1951q.

²⁵⁷ Article 2(c), SF Peace Treaty.

5.4.2 Appraisal

Some Allied Powers suggested that the territorial clauses of the *San Francisco Peace Treaty* should not merely delimit Japanese sovereignty according to the 1945 *Potsdam Proclamation*, but should specify precisely the ultimate disposition of the renounced Japanese territories. Since, however, it would have raised questions to which there are now no agreed answers, the *San Francisco Peace Treaty* did not determine the ultimate disposition of all the territories which were taken from Japan, including the Kurile Islands.

In view of the lack of the Allied Powers' unanimity on the future status of the Kurile Islands, it was agreed that, in the interests of a speedy settlement, no attempt should be made to reach a final solution of these difficult and complex questions but that the appropriate course was to have the *San Francisco Peace Treaty* provide only for a renunciation of Japanese sovereignty over certain agreed territories. Clearly, the course was to proceed then, so far as Japan was concerned, leaving the future to resolve doubts by invoking international solutions other than the *San Francisco Peace Treaty*.²⁵⁸

5.5 The Legal Effect of the Soviet Union's Non-signing of the *San Francisco Peace Treaty*

Russia claims that the Kurile Islands were promised to the Soviet Union by the *Yalta Agreement*, and that Japan accepted this decision when it accepted the *Potsdam Declaration* leading to Japan's surrender in August 1945. Under the terms of the *San Francisco Peace Treaty* Japan relinquished the title over the Kurile Archipelago but the treaty did not transfer these islands to another State. Furthermore the *San Francisco Peace Treaty* provided that no country that did not sign the treaty shall derive benefits from it.²⁵⁹

In his speech in the 2nd Plenary Session of the San Francisco Peace Conference on September 5, 1951, Andrei Gromyko, the Delegate of the Soviet Union and Deputy Minister of Foreign Affairs, stated why the Soviet Union would not sign the treaty. Notable among the reasons advanced were questions of territorial disposition regarding the Soviet Union, including the Kurile Islands; the status of previous international agreements, including the *Yalta Agreement*; the lack of protective measures against Japanese re-militarism; the lack of provisions for the withdrawal of foreign occupation forces from Japan, notably US troops; the lack of clarity on the restitution of former Chinese territory, and its disposition;²⁶⁰ questions of reparation by Japan for the damage caused during Japanese occupation; and denial of the Soviet Union's request for veto power over the proceedings at the San Francisco Peace Conference.²⁶¹

Although, as Gromyko warned, the Soviet Union did not sign the treaty, it is difficult to postulate any state other than the Soviet Union as the intended beneficiary of the Japanese

²⁵⁸ USDOS, 1951t: 454-5.

²⁵⁹ Article 25, SF Peace Treaty; See, *infra*, note 264.

²⁶⁰ All the countries at war with Japan, except China and Taiwan but including the Soviet Union, were invited to the San Francisco Peace Conference beginning 4 September 1951. The reason why neither China nor Taiwan was invited to the Conference was the fact that several of the Allied Powers, most notably the United Kingdom, had already recognised China and could not support Taiwan representing 'China'. On the other hand, it was inconceivable to invite China since it was actively engaged in warfare against the UN-sponsored allied coalition in the Korean War. Berton, 1992: 45.

²⁶¹ "Verbatim Minutes of the San Francisco Peace Conference: Speech by Andrei Gromyko (The Delegate of the Soviet Union, Deputy Minister of Foreign Affairs)" in the 2nd Plenary Session on 5 September 1951, reprinted in Allison, 1992: 126-7 for extract version of the speech; see also, Berton, *id*: 45-6.

renunciation of the Kurile Islands in the treaty. It is indisputably supported by the history of several prior international agreements and drafting records during the negotiations leading to the *San Francisco Peace Treaty*. It can be also interpreted, at least theoretically, that Japanese renunciation of the Kurile Islands in the *San Francisco Peace Treaty* was tantamount to *de facto* recognition that these territories had been ceded to the Soviet Union which occupied them at that time.²⁶²

Nonetheless, it is also questionable whether the Soviet Union gained ownership over the Kuriles Islands in international law despite its status as a non-signatory of the *San Francisco Peace Treaty*. Two main sources, the Vienna Convention on the Law of Treaties²⁶³ (hereinafter '*Vienna Convention*') and the *San Francisco Peace Treaty* itself, can be examined to clarify this matter.

Articles 34, 35, and 36 of the Vienna Convention set forth the rules regarding the effect of treaties on states not party to a treaty. In particular, Article 36, entitled *Treaties Providing for Rights for Third States*, stipulates when a state that is not a party to a treaty may obtain rights under the treaty.²⁶⁴ From this clause, there are, at least, two requirements to be satisfied before a non-party can benefit under a treaty. The first is that the parties to the treaty must have intended to create a right in the non-party state. The second is that the non-party state should agree to receive the right given it by the treaty.²⁶⁵ With regard to the Russian claims to the Kurile Islands, the second requirement can hardly be refuted, based on the actual exercise of Russian *de facto* sovereignty over the Kurile Islands since its physical occupation in 1945. However, it is difficult to satisfy the first requirement since the parties to the *San Francisco Peace Treaty*, notably the United States, did not intend to give the Soviet Union a right to claim the Kurile Islands.²⁶⁶ Additionally, the language of the *San Francisco Peace Treaty* does not allow rights to accrue to non-signatories. A party must affirmatively accede to the treaty in order to enjoy any benefits under it.²⁶⁷

The inclusion of Article 25 in the *San Francisco Peace Treaty* further forecloses Russia's ability to claim any rights over the Kurile Islands thereunder since the Soviet Union is not one

²⁶² See, Adams, 1974: 74.

²⁶³ 1155 UNTS 331 [hereinafter '*Vienna Convention*']. For further information on the rule for interpretation of treaties, see, Aust, 2000: 184-206; McNair, 1961: 364-473; Rosenne, 1970: 214-9; Sinclair, 1973: 114-58; Thirlway, 1991; Watts, 1999: 681-97.

²⁶⁴ Article 36(1) of the Vienna Convention provides that:

A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides (Id.).

²⁶⁵ International lawyers generally agree that these rules correctly state the effect of treaties on third parties. See, e.g., Brownlie, 1998: 628-30; Jennings and Watts, 1992: 1,260-6 [hereinafter '*Oppenheim 9th*'].

²⁶⁶ See, *supra*, Section 5.3. 'Drafts of the Territorial Clause of the *San Francisco Peace Treaty* and their Implications' for drafting history of the *San Francisco Peace Treaty* and the relevant memoranda of the US Department of State. For the Allied Powers' positions, mainly the United States and the United Kingdom, on this matter, see, Berton, 1992: 47-8; Hill, 1993: 20-31.

²⁶⁷ Article 25 of the treaty declares that:

*For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. ... [T]he present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favour of a State which is not an Allied Power as so defined (SF Peace Treaty, *supra*, note 30).*

of the states named in Article 23,²⁶⁸ nor did it sign the treaty. Therefore, the question whether the Soviet Union gained any rights under the *San Francisco Peace Treaty* should be answered in the negative.

The locus of sovereignty over the Kurile Islands has not been determined and, the Soviet Union acquired no benefits from the *San Francisco Peace Treaty*, including benefits from Japan's renunciation of claims to the Kurile Islands. After 28 April 1955 Japan would not be obligated to make a treaty with the Soviet Union on substantially the same terms as the *San Francisco Peace Treaty*. Article 26 of the treaty is to the effect that:

*Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of 1 January 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, 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, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.*²⁶⁹

5.6 Appraisal

The *Hokkaido Shinbun*, the most widely read newspaper in northern Japan, once published an editorial featuring the following views on the Kurile Islands:

*To begin with the assertion of the Japanese Government, it is solely based on the political interpretation that the South Kuriles (Minami Chishima), that is the two islands of Kunashiri and Etorofu, are not (a part of the) so-called Chishima. However, we are compelled to say frankly that such an interpretation is contrary to the traditional concept of our people and lacks very much the power to convince other peoples. ...The Government's interpretation that Minami Chishima is not Chishima, which goes against the people's common sense, was because it had already agreed to give up the Kurile Islands in the *San Francisco Peace Treaty*. ...Moreover, the fact of abandonment by the Japanese Peace Treaty will remain as a fact forever and the traditional concept of the people will*

²⁶⁸ Article 23 provided that:

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force of each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification. (b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification (Id.).

²⁶⁹ Article 26, SF Peace Treaty. See also, Jennings and Watts, 1992: 1,262, for the discussion of third-state rights to treaties, in particular, as to Article 26 of the *San Francisco Peace Treaty*.

*not possibly change at one stroke by the Government's dogmatic interpretation. ...What about the Soviet position? Her assertion that Japan's demand for the return (of the Kurile Islands) is unfounded has on the surface, we must admit, a far stronger basis than the position of the Japanese Government. The reason for this is that the Yalta Agreement, by which the United States and Great Britain consented to the Soviet possession of the Kuriles in exchange for the latter's participation in their war against Japan, is at the minimum a patent historical fact. Furthermore, the agreement by the Japanese Government to give up the Kurile Islands which was forced upon it by the United States in the San Francisco Peace Treaty is also a historical fact. Frankly speaking, the attitude of the Soviet Union is seeking to justify her possession of the Kuriles on the strength of the secret Yalta Agreement which has no direct relationship with the conditions of Japan's surrender and on the strength of the San Francisco Peace Treaty which she did not herself sign is unpleasant and not clear. ...This, however, does not cancel out the fact that the Japanese Government agreed in an international treaty to give up the Kuriles [emphasis in original].*²⁷⁰

Japan has a marginally better case that the currently disputed Kurile Islands have historically been Japanese, were never taken by Japan by force, and thus should in fairness be regarded as Japanese in the San Francisco peace settlement. Etorofu, Kunashiri, and Shikotan have been described in Japanese and international usage as part of the Kurile Archipelago, however, and it would be difficult to prove that they are not a part of the "Kurile Islands" as the term is used in the *San Francisco Peace Treaty*.

By signing the *San Francisco Peace Treaty*, Japan formally renounced "all right, title and claim to the Kurile Islands." The treaty, which conferred no rights upon the Soviet Union, because it refused to sign, did not determine the sovereignty of the territories renounced by Japan, leaving that question, as was stated by the Delegates of the United States at San Francisco, to "international solvents other than this treaty." It is the considered opinion of the United States that by virtue of the *San Francisco Peace Treaty*, however, Japan does not have the right to determine the sovereignty over the territories renounced by it therein.²⁷¹

In strict legal sense, therefore, it is established that Japan cannot rightfully claim ownership of the Kurile Archipelago, including Etorofu, Kunashiri, and Shikotan that clearly fit into the terminology of either Kurile Archipelago or Kurile Islands. Japan has only a rightful title to the Habomais placed outside of the currently disputed 'Kurile Islands.' Most significantly, by failing to sign the *San Francisco Peace Treaty*, Russia, on the other hand, does not, and cannot, have a clear legal title thereunder to the Kurile Islands (Etorofu, Kunashiri, Shikotan, and the Habomais).

In sum, the outcome of the territorial dispute over the Kurile Islands may be itemised as follows: first, there is legal ownership vacuum on Etorofu, Kunashiri, and Shikotan, and Russia has exercised its jurisdiction over them without any international endorsement; and

²⁷⁰ *Hokkaido Shinbun*, 1959, in USDOS, 1959.

²⁷¹ There are, however, other arguable theories, such as that to the extent any residual sovereignty may remain in Japan after the renunciation, the power to perfect sovereignty in the Soviet Union rests not with Japan but with the parties to the treaty, because the renunciation ran to such parties. See, USDOS, 1956d.

second, Russia should be required to return the Habomais to Japan,²⁷² due to Japan's rightful title to the Habomais and Russia's legally groundless occupation of them.

6. Concluding Remarks

The ongoing territorial disputes over the Kurile Islands involves intertwined political and legal issues. This is particularly so given that historical facts did not count as a major factor in the post-World War II territorial dispositions in East Asia.²⁷³ Since there are repercussions on the issue of sovereignty for Russia,²⁷⁴ the likelihood of a hand-over of some parts of the Kurile Islands to Japan is low. None-the-less, progress can be made if the disputants are flexible in their approaches. There are some positive factors that could facilitate an amicable resolution, though there are no cure-all solutions to the sovereignty dispute over the Kurile Islands.

Both claimants have taken bargaining positions over the Kurile Islands. Russia's is the physical possession of one of the most productive fishing grounds in the world, while seeking massive Japanese economic investment and assistance. Japan desperately seeks a return of the Kurile Islands and exploitation of the fishing resources in that area²⁷⁵ while at the same time having the bargaining advantage of its enormous economic power. The disputants could, for instance, make arrangements for joint administration of the disputed islands, and/or joint development of the disputed maritime zone for their mutual benefits.²⁷⁶ Also, they could opt for the residual sovereignty of either Russia or Japan, or decide on dual sovereignty and exercise it co-jointly, such as a regime of condominium, over the disputed area.²⁷⁷ Meanwhile, the presence of a significant Russian population on the islands for over half a century introduces an additional dimension. For them, any forcible transfer would be harsh, since it

²⁷² In that context, the issue of how Russia could transfer the Habomais to Japan is another important issue to explore, since those islands were not Russia's to start with, despite the fact that Russia regarded them as Russian territory by Allied decision and by occupation. The fact that there are no Russian civilians in the Habomais so far, however, can shed light on developing the ways to transfer the Habomais to Japan without the human factor implications. For information on the current situation of the Kurile Islands, see, Bondarenko, 1992: 13. As to internal law in Russia and the resolution of the territorial issue over the Kurile Islands, it is also noted that the territory of Russia cannot be altered without an expression of the people's will by means of a referendum according to the Declaration of State Sovereignty and the Russian Constitution. See, Punzhin, 1992: 34.

²⁷³ For documents emphasising the political nature of territorial disposition over the Kurile Islands, refer to USDOS, 1956a: 169, 214, 244.

²⁷⁴ Refer to Berton, 1992: 78-84.

²⁷⁵ The fact that the real interests of the Japanese people, in particular, in Hokkaido, over the Kurile Islands appears to be one of fishing rights and not of territorial jurisdiction can shed light on the current situation. See also, USDOS (1955d) stating that "*If the questions of seizures, and safe haven, and rights to dry seawood on shore could be resolved, the question of ownership of the tiny islands would appear to be of little interest to most of those concerned in Hokkaido.*"

²⁷⁶ For further information on joint development, generally refer to, British Institute of International and Comparative Law, 1989; Fox, 1990; Khan, 1991. For precedents for joint development agreements in the absence of boundaries, generally refer to, Miyoshi, 1999: 7-29 (The precedents in this category are as follows: Kuwait-Saudi Arabia Agreement (1965); Iran-Sharjah Memorandum of Understanding (1971); Japan-South Korea Agreement (1974); Malaysia-Thailand Memorandum of Understanding (1979); Australia-Indonesia Treaty (1989); Malaysia-Vietnam Memorandum of Understanding (1992); Colombia-Jamaica Treaty (1993); and Argentina-United Kingdom Joint Declaration (1995)). For states' obligation to cooperate for joint development agreements, see, Ong, 1999. For the Kurile Islands context, Saplin, 1995: 153-9; Valencia and Ludwig, 1995: 161-71; Takahashi, 1995: 203-14.

²⁷⁷ Zinberg, 1997-98: 89-98 and 1998-99: 86-95. For the general discourse on ways to develop relationship between Russia and Japan, see, Ivanov and Smith, 1999.

would be their second movement, having been earlier relocated to the Kurile Islands after World War II.

Beyond these approaches, there are several options available to resolve the dispute: recourse to international judicial or arbitral bodies; signing a separate peace treaty or applying a 'right of self-determination' to the islands.

Reference of the dispute to a third party adjudicative body such as the International Court of Justice (ICJ), Permanent Court of Arbitration or *ad hoc* international arbitration, is unlikely due to the unpredictability of the outcome and the highly sensitive nature of the domestic politics of both claimants. In addition, only Japan has accepted the compulsory jurisdiction of the ICJ. Furthermore, given Russia's strong aversion to adversarial litigation or arbitration, it is highly unlikely that it would consent to a reference to such a body.

For a separate peace treaty between Russia and Japan to serve the desired purpose, it would be imperative to agree on what should and could be returned to Japan, as well as the scope and method of the hand-over. This option is equally unfeasible until both claimants agree to put the territorial question on the agenda of any peace treaty negotiation. The fact that in 1956 the now defunct Soviet Union declared that it would hand over Shikotan and the Habomais to Japan does give some cause to consider that this option might be viable.

With regards to the option of 'right to self-determination', any historical claim to territory by a formerly dispossessed state would have to accord with the rights of self-determination of the territory's inhabitants. Franck expresses the paramount importance of contemporary self-determination over historical claims as:

*Generally, neighbouring states have not been allowed to help themselves to adjacent territories on the basis of historical claims; boundary readjustments must come as an expression of the democratically expressed will of those subject to the readjustment.*²⁷⁸

Although Franck's submission was made in the context of decolonisation, the relinquishment of inhabited territory has close parallels with decolonisation. One of the primary considerations for the primacy of contemporary self-determination over historical title is "*the assumption that any other approach would lead to endless conflicts, as modern states found themselves under pressure to join a general reversionary march backward to a status quo ante of uncertain age and validity.*"²⁷⁹ This consideration applies as strongly in the context of relinquishment as it does in the context of decolonisation. Therefore, even if a state that was previously dispossessed of territory by the use of force, can successfully assert a superior right to such territory at the time of its relinquishment, such a right will have to accord with the right of the local inhabitants to self-determination.

The presence of a significant Russian population on the Kurile Islands for over half a century may well have implications for the principle of self-determination. Clearly the interests of the current Russian settlers should be taken into consideration. However, due consideration should also be given to the circumstances under which they settled on the islands, since it raises questions as to who is eligible to participate in any referendum on the future of the territory. There are a significant number of ethnic Japanese who were forcibly move from the islands

²⁷⁸ Franck, 1976.

²⁷⁹ *Id.*

after 1945, while a further complicating factor is the recent claim by the Ainu association, the Committee for the Return of the Autonomous Land Ainu-Moshiri,²⁸⁰ and the demand for the establishment of an autonomous national district under UN administration. They characterise Russo-Japanese talks regarding the dispute as a “*dispute between two robbers over stolen property.*”²⁸¹

In any event, any attempt to change the current regime without serious consideration of the future of the interested peoples, in particular the Russian settlers, would raise fundamental human rights questions. Therefore, it is suggested that various confidence building measures, including joint development of the disputed maritime zone for the mutual benefit of all the affected parties, should be engendered first, instead of a hasty emphasis on the question of ownership of the Kurile Islands.

²⁸⁰ *Japan Times*, 29 April 1992. *Ainu-Moshiri*, meaning ‘The Land of the People’, includes Hokkaido and the surrounding territories originally inhabited by the Ainus.

²⁸¹ *Id.*

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