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Southern Kurils or Northern Territories? Resolving the Russo-Japanese Border Dispute

I. INTRODUCTION

Although the guns of World War II were mercifully silenced over forty-five years ago, Japan and Russia (formerly the Soviet Union) have regrettably never formally concluded the war. The on-going conflict is caused by a boundary dispute involving a small group of islands, just north of Hokkaido, known by the Russians as the Southern Kuril¹ Islands, but known to the Japanese as the Northern Territories.

The total area of the disputed territory is not large,² but conflicting claims to the islands have prevented both countries from signing a formal treaty to end the Second World War.³ Important factors bearing on each country's reluctance to give up the Kurils include strategic significance, a valuable fishing industry, and emotional attachment.⁴ The lengthy dispute has gained new significance in light of recent developments in the former Soviet Bloc—the quarrel over the islands constitutes a major barrier in negotiations for much needed economic aid from Japan to the newly formed Commonwealth of Independent States.⁵

This comment analyzes both the Russian and Japanese claims to these islands from a strictly legal, as opposed to political, standpoint. Section II of this comment presents a factual overview of the problem. Section III briefly discusses the dis-

1. Sometimes spelled "Kurile." This comment uses "Kuril" except when quoting or directly referring to sources which use "Kurile."

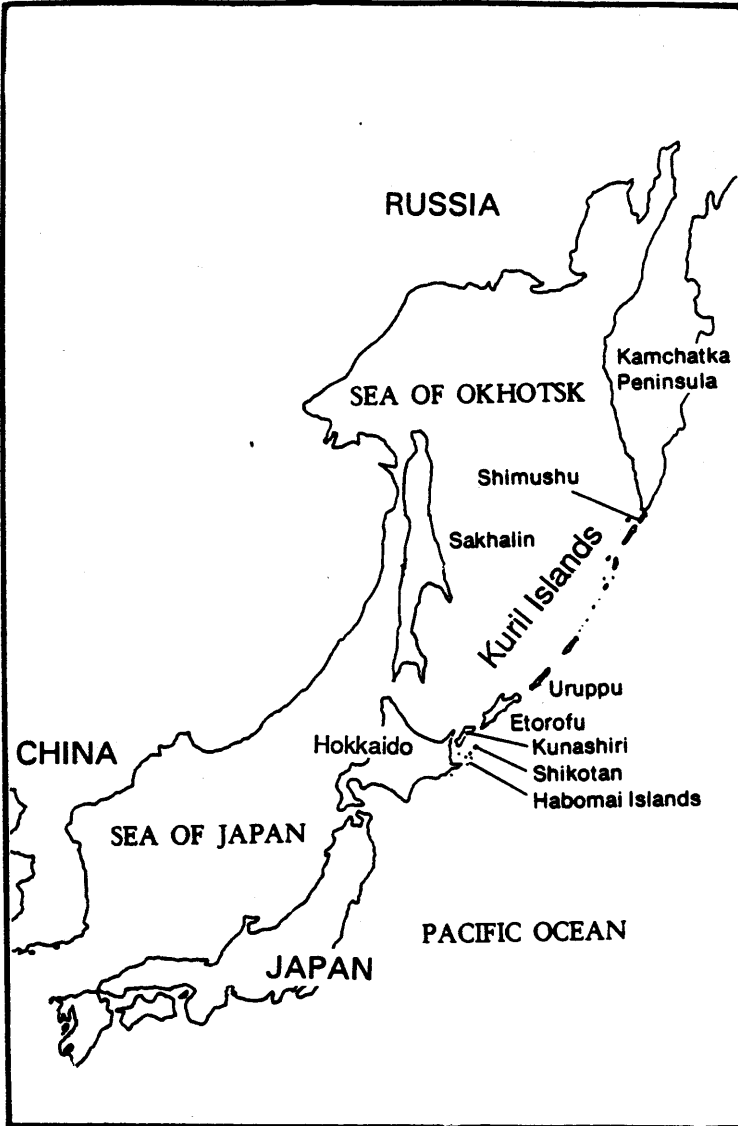
2. Together, the islands make up an area of 4996 square kilometers. RAJENDRA K. JAIN, *THE USSR AND JAPAN 1945-1980* 50 (1981); MINISTRY OF FOREIGN AFFAIRS, JAPAN, *JAPAN'S NORTHERN TERRITORIES* 3 (1987) [hereinafter *JAPAN'S NORTHERN TERRITORIES*].

3. *JAPAN'S NORTHERN TERRITORIES*, *supra* note 2, at 1.

4. See, e.g., JOHN J. STEPHAN, *THE KURIL ISLANDS* 119-24, 208-09 (1974); *JAPAN'S NORTHERN TERRITORIES*, *supra* note 2, at 1.

5. See Ronald E. Yates, *Japan, Soviets Seek Accord over Islands*, CHI. TRIB., Apr. 14, 1991, § 1, at 21; *Japan Asks Soviets for Two Islands Now*, WASH. TIMES, Mar. 20, 1991, at A7. Following the dramatic changes in the Soviet Union in 1991, the Kurils became part of the Russian Federation. *Japan Recognizes Russia*, AGENCE FRANCE PRESS, Dec. 27, 1991, available in LEXIS, Nexis Library, Omni File.

pute in terms of customary international law. Section IV considers the legal claims to the islands based on international agreements. This comment concludes that Japan has strong legal claims to part, but not all, of the disputed territory.



II. FACTUAL OVERVIEW

The Kurils⁶ are a chain of over thirty volcanic islands that stretch approximately 1200 kilometers in a northeast to southwest axis from the southern tip of the Kamchatka Peninsula to the northeastern tip of Hokkaido. The Russo-Japanese boundary dispute centers around four of these islands. Two of the islands, Etorofu⁷ and Kunashiri,⁸ are the southernmost islands of the Kuril chain. The other disputed islands lie southeast of Etorofu and Kunashiri. They are known in Russia as the "Little Kurils" and in Japan as Shikotan and the Habomai Islands.⁹ As a whole, Russia refers to the disputed islands as the "Southern Kurils and Little Kurils," while Japan calls the islands its "Northern Territories."¹⁰ Sakhalin Island, not a part of the Kurils, also has historical significance in the dispute. Sakhalin lies along the Eurasian coast directly west of the Kuril chain.¹¹

Russo-Japanese contests for control of Sakhalin and the Kuril Islands have existed for as long as the history of the islands is verifiable. Japanese and Russian writers disagree as to who was actually the first to discover and settle the Kurils.¹²

6. Unless otherwise specified, the term "Kuril Islands" in this comment means the entire chain of Kuril Islands, including the four disputed islands.

7. In Russian, "Iturup."

8. In Russian, "Kunashir."

9. STEPHAN, *supra* note 4, at 11.

10. See RODGER SWEARINGEN, *THE SOVIET UNION AND POSTWAR JAPAN: ESCALATING CHALLENGE AND RESPONSE 186-88* (1978). Some extreme Japanese groups have made claims to the entire chain of the Kuril Islands as well as the southern half of Sakhalin Island. STEPHAN, *supra* note 4, at 197. However, the official position of the Japanese government limits territorial claims to the four islands described in the text. See *JAPAN'S NORTHERN TERRITORIES*, *supra* note 2.

11. JOHN J. STEPHAN, *SAKHALIN: A HISTORY* v (1971) [hereinafter *SAKHALIN: A HISTORY*]. The Japanese refer to Sakhalin as Karafuto.

12. An exchange between the Russian and Japanese negotiators to the 1855 Treaty of Shimoda provides an excellent example of the difficulty of determining who had first claim on the Kurils. In arguing that the Kurils belonged to Russia, Admiral Putiatin urged that the Russians had lived on the northern islands for over 100 years. The Japanese were not impressed, however, and quickly retorted that the Japanese had been there for over 1000 years! Neither claim is documented. STEPHAN, *supra* note 4, at 87. See also 3 JAMES MURDOCH, *A HISTORY OF JAPAN*, part 2, 595 (Joseph H. Longford ed., Frederick Ungar Publishing Co. 1964).

Undoubtedly, the issue has become politicized. STEPHAN, *supra* note 4, at 31. As an example of the political aspect of the discovery issue, Stephan states that a "book published [by a Russian historian] as late as June 1945 conceded that [the] Japanese . . . discovered Kunashir, Shikotan, and the Habomais, but this passage was deleted in a revised edition that appeared two years later." *Id.* at 204 (citing

Regardless of who was first, it seems reasonable to conclude that by the end of the eighteenth century, Russia had closer ties with the northern Kurils while Japan had closer ties with the southern islands.¹³

The Treaty of Shimoda, signed in 1855, established the first Russo-Japanese boundary line in the Kurils between the islands of Etorofu and Uruppu.¹⁴ Japan received rights to Etorofu and all islands to the south while Russia received Uruppu and all islands to the north.¹⁵ The Treaty of Shimoda was amended in 1875 by the Treaty of St. Petersburg.¹⁶ This treaty gave Japan full right and title to the entire Kuril Island chain. In exchange, Japan ceded to Russia any and all of its claims to Sakhalin Island.¹⁷ Japan reclaimed the southern half of Sakhalin at the conclusion of the Russo-Japanese War with the signing of the Treaty of Portsmouth in 1905.¹⁸

A. SOLOVIOV, *KURILSKIE OSTROVA* 6 (1945); A. SOLOVIOV, *KURILSKIE OSTROVA* 4-7 (1947)).

13. See STEPHAN, *supra* note 4, at 31-56.

14. STEPHAN, *supra* note 4, at 88. The Treaty of Shimoda was the result of a series of peaceful negotiations between Japanese and Russian representatives. See *id.* at 86-88.

15. Treaty of Commerce, Navigation and Delimitation between Japan and Russia, Feb. 7, 1855, Japan-Russia, art. II, 112 Consol. T.S. 467-471 (French text), reprinted in STEPHAN, *supra* note 4, at 237 (English translation) (citing JAPAN, FOREIGN OFFICE, *TREATIES AND CONVENTIONS BETWEEN THE EMPIRE OF JAPAN AND OTHER POWERS TOGETHER WITH UNIVERSAL CONVENTIONS, REGULATIONS AND COMMUNICATIONS SINCE MARCH 1854*, at 585 (rev. ed. 1884)) [hereinafter Treaty of Shimoda]. The Treaty of Shimoda specifically left unpartitioned the island of Sakhalin (located along the coast of northeast Asia and not part of the Kurils). *Id.* Article II of the Treaty of Shimoda is reproduced in the appendix. See also HUGH BORTON, *JAPAN'S MODERN CENTURY* 38 (1955); JAIN, *supra* note 2, at 1, 50; 3 MURDOCH, *supra* note 12, at 612; STEPHAN, *supra* note 4, at 88; SWEARINGEN, *supra* note 10, at 5.

16. Treaty for the Mutual Cession of Territory between Japan and Russia, May 7, 1875, Japan-Russia, art. II, 149 Consol. T.S. 179-82 (French text), reprinted in STEPHAN, *supra* note 4, at 237-38 (citing JAPAN, FOREIGN OFFICE, *DAI NIHON GAIKO BUNSHO*, VIII, 216-26 (1940)) (English translation) [hereinafter Treaty of St. Petersburg]. Article II of the Treaty of St. Petersburg is reproduced in the appendix. The 1875 treaty was also the result of peaceful negotiations between Japan and Russia. See STEPHAN, *supra* note 4, at 92-95.

17. See STEPHAN, *supra* note 4, at 93-94; JAIN, *supra* note 2, at 50-51; SWEARINGEN, *supra* note 10, at 5, 189. The Japanese public apparently was unhappy with the Treaty of St. Petersburg because of the general feeling that Japan had traded Japanese territory (Sakhalin Island) in exchange for territory they felt already belonged to Japan (the Northern Kurils). See STEPHAN, *supra* note 4, at 94-95. This suggests that the Japanese gave little credence to the Treaty of Shimoda.

18. *SAKHALIN: A HISTORY*, *supra* note 11, at 198. Both countries were unhappy with the treaty because both felt they had legitimate claims to all of Sakhalin

In the early part of World War II, the Russians and the Japanese mutually agreed to what has been described as a "strange neutrality."¹⁹ Both countries promised to maintain "peaceful and friendly relations" with each other.²⁰ Yet, at least one historian surmises that "neither side felt bound to [honor] the Neutrality Pact . . . one moment longer than it served strategic needs."²¹ The Soviet Union expressly renounced the Neutrality Pact by signing the secret Yalta Agreement on February 11, 1945.²² Under the agreement, the Soviets promised to join the war effort against Japan within two months after Germany's surrender. In exchange, the United States and Great Britain promised to return Sakhalin Island and to "hand over" the Kuril Islands to the Soviet Union.²³

The Soviet Union declared war on Japan on August 9, 1945.²⁴ The Russian invasion of the Kurils began on August 18, three days after Japan surrendered.²⁵ By September 4, the Russian armada had taken possession of the entire Kuril Island chain, including the islands of Etorofu, Kunashiri, Shikotan, and the Habomais.²⁶ On September 20, all property on the islands was nationalized and all of the islands were declared Soviet territory.²⁷ The Soviet Constitution was amended to include the islands as part of the Soviet Union on February 25, 1947.²⁸ With only a few exceptions, the Japanese on the Kurils were repatriated in the years 1947-50.²⁹

The most recent international agreement regarding the status of the Kuril Islands is the San Francisco Peace Treaty of

Island. *See id.* at 80-81.

19. GEORGE A. LENSEN, *THE STRANGE NEUTRALITY: SOVIET-JAPANESE RELATIONS DURING THE SECOND WORLD WAR 1941-1945* (1972).

20. Soviet-Japanese Neutrality Pact, Apr. 13, 1941, art. I, *reprinted in* STEPHAN, *supra* note 4, at 239-40 (citing JAPAN, FOREIGN OFFICE, *NIHON GAIKO NENPYO NARABI SHUYO BUNSHO*, II, 491-92 (1965)) [hereinafter Neutrality Pact]. Articles I-III of the Neutrality Pact are reproduced in the appendix.

21. STEPHAN, *supra* note 4, at 144.

22. Crimea (Yalta) Conference, 1945: Entry of Soviet Union into War Against Japan, Feb. 11, 1945, 3 *Bevans* 1022 [hereinafter Yalta Agreement]. The relevant text of the Yalta Agreement is reproduced in the appendix.

23. *Id.*

24. STEPHAN, *supra* note 4, at 160.

25. *Id.* at 162-64.

26. *Id.* at 165-66.

27. *Id.* at 168.

28. *Id.* at 169.

29. *Id.* at 166-69.

1951. In that document, Japan renounced "all right, title and claim to the Kurile Islands."³⁰ The Soviet Union was not a signatory to this treaty, nor to any other treaty formally ending the war with Japan.

III. CUSTOMARY INTERNATIONAL LAW

One important source of international law is "international custom, as evidence of a general practice accepted as law."³¹ Historically, discovery, occupation, and conquest have all been recognized methods of acquiring territory under customary international law.³² In light of customary international law, the dispute over the Kurils raises two issues. The first is whether either country can validly claim sovereignty over the disputed islands based on prior discovery and occupation. The second is whether Russia may claim sovereignty over any or all of the disputed islands based on conquest.³³

A. *Prior Discovery and Occupation*

A fundamental tenet of the Japanese argument is that the four islands in dispute (Etorofu, Kunashiri, Shikotan, and the Habomai group) were discovered and settled by the Japanese and, prior to 1945, had never been occupied by any country other than Japan. A publication by the Japanese Government, seeking to rally a movement for the return of the four disputed islands, states, "Sakhalin and the Kurile Islands were known to the Japanese long before they became known to the Russians. It was Japan which actually developed these northern regions [T]he Habomais, Shikotan, Kunashiri, and Etorofu have never been the territory of a foreign country but have always been inherent Japanese territory."³⁴ Other sources also document Japan's historical claims of prior discovery and settlement.³⁵ On the other hand, the Russians discount Japan's

30. Multilateral Treaty of Peace with Japan, Sept. 8, 1951, art. II, para. c, 3 U.S.T. 3169, 3172 [hereinafter Treaty of Peace with Japan]. Article II, paragraph c of the Treaty of Peace with Japan is reproduced in the appendix. As will be noted, *infra* note 125 and accompanying text, Japan claims that the four islands in dispute are not part of the "Kurile Islands."

31. JOSEPH M. SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 2 (3d ed. 1988).

32. See *infra* part III.A-B.

33. Claims based on international agreements are examined below. See *infra* part IV.

34. JAPAN'S NORTHERN TERRITORIES, *supra* note 2, at 4, 6.

35. See, e.g., JAIN, *supra* note 2, at 52 ("Japan's position is that the [islands]

historical claims and argue that Russians were the first to discover the Kurils.³⁶

The idea that a sovereign state may obtain territory by right of discovery and occupation is hardly open to dispute. Professor Gerhard von Glahn wrote:

Discovery is the oldest and, historically, the most important method of acquiring title to territory. Up to the eighteenth century, discovery alone sufficed to establish a legal title, but since then such discovery has had to be followed by an effective occupation in order to be recognized as the basis of a title to territory.³⁷

Hugo Grotius referred to occupation of territory as "the only natural and primary mode of acquisition."³⁸ Writers of international law treatises are in unanimous agreement that "occupation" of unappropriated territory is a valid method of acquiring territory under traditional (customary) international law.³⁹

However, the requirement of occupation has not always been a part of international law. In prior centuries, mere discovery of new territory appears to have given valid title to territory.⁴⁰ It is unclear exactly when the requirement of occupation arose and whether it existed at the time the Kurils were discovered. One writer suggests that the requirement arose in the eighteenth century.⁴¹

Even if the historical law of prior discovery were clear, applying it in the case of the Kuril islands would pose great difficulty since it is unclear who discovered and occupied the

are 'inalienable' and 'inherent' Japanese lands"); STEPHAN, *supra* note 4, at 209 (popular consensus in Japan is that Kurils are historically Japanese).

36. See STEPHAN, *supra* note 4, at 31, 87. See also SWEARINGEN, *supra* note 10, at 189-90 (recounting Japanese and Soviet historical claims).

37. GERHARD VON GLAHN, *LAW AMONG NATIONS* 311 (5th ed. 1986).

38. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. III, § IV, cl. 1 (Francis W. Kelsey trans., 1925); see also E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, bk. I, § 207 (Charles G. Fenwick trans., 1916).

39. See, e.g., LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* 118-19 (1989) (occupation of unappropriated territory is a method of acquiring territory under traditional international law); 3 J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 349-53 (1970) (occupation of *terra nullius* is valid for state acquisition of territory); CHARLES G. FENWICK, *INTERNATIONAL LAW* 343-44 (3d ed. 1948) (occupation is the most important method of acquiring territory as between states).

40. See 3 VERZIJL, *supra* note 39, at 325.

41. FENWICK, *supra* note 39, at 344 (footnote omitted).

Kurils first.⁴² Given this difficulty, the best analytical solution is to resolve the issues by examining the alternatives.

To simplify the issues as much as possible, assume that whichever country first discovered the disputed islands complied with the international law sufficient to obtain title to the territory. Under this assumption, the only issue to be resolved is whether the discovering country may continue to base its claim to the territory on right of prior discovery.

In Russia's case, the historical claim fails. Any "prior discovery" claims Russia may have had to the disputed islands were bartered away in the Treaty of Shimoda in 1855.⁴³ Under the express terms of that treaty, Russia gave up all of its claims to the islands of Etorofu, Kunashiri, Shikotan, and Habomai in exchange for clear title to the northern Kuril Islands.⁴⁴ Subsequent treaties and events modified the Treaty of Shimoda and further abrogated Russia's historical claims to the disputed territories.⁴⁵

The Japanese claim of prior discovery, though slightly stronger, is not strong enough to resolve the conflict completely. Under the assumption that Japan secured title to the islands by first discovery and occupation, its title remains clear at least until World War II. However, the treaties and international agreements arising out of World War II may give Japan the same legal problems as the Treaty of Shimoda gave Russia, at least insofar as the Japanese claim to the islands is based on prior discovery. Arguably, Japan gave away its claim to the islands by accepting the Potsdam Declaration and by signing the Treaty of San Francisco. A full discussion of these agreements, including their legal effect and the weight of the argument that Japan gave away its claims to the islands, is reserved for Section IV.

42. See *supra* note 12 and accompanying text.

43. See *supra* notes 14-18 and accompanying text. It is perhaps axiomatic that international agreements such as treaties modify and preempt customary international law. As one writer notes, "States may abrogate a customary rule simply by concluding a treaty" MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 36 (1985). Villiger also argues that, while a treaty abrogates customary law, new customary law may in turn modify a treaty. *Id.*

44. Treaty of Shimoda, *supra* note 15, art. II.

45. For a discussion of subsequent treaties, see *infra* part IV.B.1.

B. Conquest

The events that occurred at the close of World War II raise the second question of whether the Soviet Union may claim title to the Northern Territories based on conquest. It is undisputed that, at the close of the war, Soviet forces invaded all of the Kurils and successfully occupied them.⁴⁶ However, the legal effect of the Soviet take-over of the islands is less clear.

The first issue to resolve is whether, in 1945, international law permitted a country to acquire title to territory by conquest. As is often the case in international law, the authorities do not provide a clear answer.⁴⁷ In the past, conquest was clearly a "common and legally recognized form of acquisition of title to territory."⁴⁸ More recently, this rule has been modified, although precisely when and to what extent the rule has changed is difficult to determine. By examining the writings of international legal scholars who wrote at or near the middle of this century, one discovers at least four different views.

First, some scholars who wrote during the 1940s and 1950s felt that conquest remained a valid way for a state to acquire new territory. One respected scholar, writing in 1952 on a conqueror's ability to annex territory, stated that "[i]nternational [l]aw sets no limit—other than that determined by compelling considerations of humanity—to the discretion of the victor in determining the conditions of the armistice."⁴⁹ However, this view ignores a trend among the family of nations by the

46. See *supra* notes 24-29 and accompanying text.

47. In addressing an unrelated international legal question, a U.S. District Court Judge lamented the difficulty that often arises in attempting to define international law. He stated, "The absence of a consensus on international law, particularly with respect to technical issues created by the wide array of legal systems in the world, makes it hard even to imagine that harmony ever would characterize this issue." *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring)).

48. SWEENEY ET AL., *supra* note 31, at 889; see also 3 VERZIJL, *supra* note 39, at 356; FENWICK, *supra* note 39, at 360.

49. 2 L. OPPENHEIM, INTERNATIONAL LAW § 265a (H. Lauterpacht ed., 7th ed. 1952); see also J.L. BRIERLY, THE LAW OF NATIONS 171-72 (Humphrey Waldock ed., 6th ed. 1963) (stating that there may be moral objections to obtaining title by conquest, but it still occurs); CHARLES G. FENWICK, INTERNATIONAL LAW 269-70 (2d ed. 1934) (recognizing conquest as a method of obtaining legal title). By 1948, Fenwick had apparently experienced a change of heart. See *infra* notes 54-56 and accompanying text.

1940s not to recognize conquest as a valid method of territorial acquisition.⁵⁰

A second view found in the writings of mid-century legal scholars is that acquisition of territory by conquest is possible, but only on condition that the conqueror formally annex the territory in question.⁵¹ "Conquest is the taking of possession of territory of an enemy state by [military] force; it becomes a mode of acquisition of territory—and hence of transfer of sovereignty—only if the conquered territory is effectively reduced to possession and annexed by the conquering state."⁵² This view has the weakness of placing form over substance. Once a state has taken territory by conquest and firmly possesses it, unilateral annexation of that territory is a mere formality. This suggested rule also lacks any sort of compelling rationale.

The third view is that the legality of acquisition of territory by conquest is, at best, questionable.⁵³ International legal scholar Charles Fenwick supported this proposition in his 1948 edition of *International Law*. Fenwick wrote, "With the adoption of the Covenant of the League of Nations in 1920 and with the formal renunciation of war as an instrument of national policy by the Kellogg Pact[,] conquest lost its validity as a [method of obtaining] legal title to territory."⁵⁴ Fenwick supported his position by noting that when hostilities erupted between Bolivia and Paraguay in 1932, nineteen American Republics announced to the two countries that "'they [would] not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force or arms.'⁵⁵ In addition, Fenwick referred to the 1940 Meeting of Foreign Ministers of the Ameri-

50. See *infra* notes 53-56 and accompanying text.

51. See 1 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 427 (1940); cf. 1 CHARLES C. HYDE, INTERNATIONAL LAW § 106 (2d ed. 1945) (property may be transferred by conquest and formal annexation but states are concerned with whether it may be done unilaterally). As previously stated, *supra* notes 26-28 and accompanying text, the Soviet Union did officially annex the territory it took from Japan by conquest at the close of World War II.

52. 1 HACKWORTH, *supra* note 51, at 427.

53. See OSCAR SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 178 (1955) ("The legality, under any and all circumstances, of the acquisition of territory through conquest and subjugation is . . . open to question.").

54. FENWICK, *supra* note 39, at 360.

55. *Id.* at 361 (quoting *Report of the League of Nations Commission on the Chaco Dispute Between Bolivia and Paraguay*, 28 AM. J. INT'L L. 137, 168 (Supp. 1934)).

can Republics at Havana, which addressed the conquests of the Axis powers in Europe. The ministers then declared that "force can not constitute the basis of rights, and [the American Republics] condemn all violence whether under the form of conquest, of stipulations which may have been imposed by the belligerents in the clauses of treaty, or by any other process."⁵⁶ Thus, Fenwick provided solid support for the proposition that, by the end of World War II, acquisition of territory by conquest was no longer recognized as a valid method of acquiring title to land.

The fourth mid-century view of conquest as a claim to territory holds that, in a real world sense, the issue presents a "political rather than a legal question."⁵⁷ Under this view, whether territory may be taken by conquest distills into a political question of whether territory is taken by "aggrandizement" or in good faith to defend oneself against the aggressor state.⁵⁸ While this theory may reflect the real world of international relations,⁵⁹ it does not resolve the question of whether Russia is obligated, under international law, to return to Japan the islands conquered by the Soviet Union at the end of World War II.

The third view stated above is probably the most accurate summation of the state of the law at the end of World War II. Fenwick gives persuasive examples to support the view that, by mid-century, conquest of territory was not a legally recognized method of obtaining title to lands. In fact, the examples cited by Fenwick show that acquisition of territory by forceful conquest was condemned by the international community.

Sound policy considerations also dictate that conquest should not be recognized as a method of obtaining title to lands. By not recognizing conquest as a valid means of acquiring lands, the nations of the world announce that they will allow other countries to "seek no aggrandizement, territorial or other."⁶⁰ This position furthers the desirable policy of protecting territorial integrity.

56. *Id.* at 361 (quoting DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, at 373 (Supp. I 1940)).

57. *Id.*

58. *Id.* at 361-62.

59. See 3 VERZIJL, *supra* note 39, at 357-58 (citing several examples of "unlawful" annexations by conquest that have occurred in our century).

60. Atlantic Charter, Aug. 14, 1941, U.S.-U.K., 55 Stat. 1603 (1942).

This analysis shows that any Soviet claim to the disputed islands based on "conquest" is, at best, questionable. First, the legality of title by conquest under any circumstances is doubtful. Second, the Soviet takeover of the islands violated the policy of territorial integrity. Prior to 1945, the Soviet Union had no claim to the Northern Territories.⁶¹ Because the Soviet invasion of the islands occurred after Japan had unconditionally surrendered,⁶² the Soviet invasion fails to satisfy the principle of "no aggrandizement."⁶³

IV. INTERNATIONAL AGREEMENTS

A. *Certain Background Rules Governing International Agreements*

Before analyzing specific international agreements relating to the four disputed islands, this section will examine some basic ground rules regarding the international law of treaties. This subsection will discuss rules regarding (1) the binding effects of international agreements on third parties, and (2) the interpretation of international agreements. Once these basic ground rules are set forth, the next subsection will examine, chronologically, the conflicting claims under the relevant international agreements.

1. The binding effect of international agreements on third parties

Articles 34, 35, and 36 of the Vienna Convention on the Law of Treaties set forth the rules regarding the effect of an international agreement on states not parties to the agreement.⁶⁴ Article 34 states the general rule that "[a] treaty does not create either obligations or rights for a third State

61. See *infra* notes 78-81 and accompanying text.

62. Japanese Emperor Hirohito broadcast Japanese acceptance of the Potsdam Declaration on August 15, 1945. The Soviet invasion began three days later. The disputed islands were all conquered by September 4, 1945. STEPHAN, *supra* note 4, at 160-66.

63. Atlantic Charter, *supra* note 60, at 1603.

64. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention entered into force on January 27, 1980. Although the Convention was not in force at the time the relevant treaties discussed in the text were concluded, the Convention does provide solid evidence of governing customary law. See SWEENEY ET AL., *supra* note 31, at 993. Articles 31 and 32 of the Vienna Convention are reproduced in the appendix.

without its consent."⁶⁵ However, this general principle is modified by Articles 35 and 36.

Article 35 explains when an international agreement can create obligations on the part of States not a party to the agreement. The article reads, "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."⁶⁶ This language establishes two prerequisites for a treaty to be binding on a third party. First, the parties to the treaty must *intend* to create an obligation on the part of the non-participating state. Second, the non-party state must expressly *accept* the obligation in writing. The wording of the Convention requires that both of these prerequisites be satisfied.

Article 36 explains when a state not a party to an international agreement may obtain rights under the agreement. In relevant part, the article states:

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.⁶⁷

Again, the parties to the treaty must have *intended* to create a right in the non-party state. The second prerequisite requires the non-party state to agree to receive the right given it by the treaty. Unlike Article 35, however, Article 36 states that this second element will be *presumed* as long as there is no contrary indication from the non-party state. Commentators generally agree that these rules correctly state the effect of international agreements on third parties.⁶⁸

65. Vienna Convention, *supra* note 64, art. 34.

66. *Id.* art. 35.

67. *Id.* art. 36.

68. See, e.g., VON GLAHN, *supra* note 37, at 505; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 622-25 (4th ed. 1990); cf. 1 OPPENHEIM, *supra* note 49, §§ 522-22a (treaty cannot give rights to non-party except by unanimous implied consent of all concerned and noting that the League of Nations could impose duties on non-member states); BRIERLY, *supra* note 49, at 325-27 (parties to treaty may confer a right on non-party if intent is shown); 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 458-61 (3d ed. 1957) (rights and duties may be imposed on

2. Interpretation of international agreements

With respect to the rules governing the interpretation of treaties, commentators take two polar positions.⁶⁹ One side holds that "the text of an international agreement speaks for itself, and the task of interpretation is simply to give it a 'plain and ordinary' meaning."⁷⁰ Others argue that external evidence, such as the context of the treaty, its objects and purposes, and the preparatory work of the treaty, should be accorded equal weight with the text.⁷¹

Articles 31 and 32 of the Vienna Convention represent neither a strictly textual nor a strictly contextual approach. Rather, those articles combine the essential elements of both theories of interpretation. Article 31 provides that the starting point for treaty interpretation is the "ordinary meaning" of the text contained in the agreement.⁷² In addition, the context of the treaty shall be considered as it is contained in the preamble, annexes, and related agreements of the parties or agreements accepted by the parties. These extraneous agreements, if any, must have been made "in connection" with the treaty being interpreted. Article 31 also stipulates that consideration shall be given to subsequent agreements, subsequent practice, or rules of international law. Furthermore, the parties may give a special meaning to any term.⁷³ In the event interpretation under Article 31 leaves the meaning ambiguous or is absurd, Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."⁷⁴

Although commentators do not agree on the proper rules of treaty interpretation, "[m]ost modern writers agree that two principles govern . . . in the interpretation of treaties."⁷⁵ These principles are: "(1) the subject of interpretation [i.e., the text] is to determine the real meaning of the parties[] accepting the

non-parties with their consent or acquiescence).

69. See generally SWEENEY ET AL., *supra* note 31, at 1017-35 (setting forth the arguments for and against using extrinsic sources to interpret treaties).

70. CHEN, *supra* note 39, at 278.

71. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 519-20 (1970).

72. Vienna Convention, *supra* note 64, art. 31.

73. *Id.*

74. *Id.* art. 32.

75. VON GLAHN, *supra* note 37, at 502.

instrument; and (2) . . . a treaty must be assumed not to be intended to be without effect or even to be absurd."⁷⁶ Therefore, in interpreting international agreements regarding the Russo-Japanese territory dispute, this comment looks first at the "ordinary meaning" of the text of the agreements, and then, if necessary, to other related agreements, subsequent agreements, subsequent behavior, and the circumstances surrounding the making of the agreement.

B. International Agreements Relevant to the Russo-Japanese Boundary Dispute

The last 150 years have witnessed a complex series of agreements between Japan, Russia, and other interested nations, many of which have important ramifications in any attempt to resolve the boundary dispute between Russia and Japan. The most useful way to analyze these agreements is to approach them in chronological order. Accordingly, this section is divided into the following subsections: (1) the early agreements (1855-1905); (2) the Russo-Japanese Neutrality Pact (1941); (3) the Cairo Declaration (1943); (4) the Yalta Agreement of the major allied powers of World War II (1945); (5) the Potsdam Declaration of the major allied powers (1945); and (6) the San Francisco Peace Treaty (1951).

1. The early agreements (1855-1905)

This subsection briefly discusses the legal effects of three treaties between Japan and Russia, namely, the Treaty of Shimoda (1855), the Treaty of St. Petersburg (1875), and the Treaty of Portsmouth (1905). As explained earlier,⁷⁷ the 1855 Treaty of Shimoda drew a Russo-Japanese boundary line between the islands of Etorofu and Uruppu. This is the same boundary the Japanese seek to establish today. Some Japanese go so far as to propose that this treaty should be recognized today. For example, one historian recently stated, "The dispute has come full circle—back to that original Shimoda [T]reaty signed by the shogun and the czar in 1855 The question now is how the two sides can save face while essentially agreeing to recognize a treaty signed 136 years ago."⁷⁸

76. *Id.*

77. See *supra* notes 14-15 and accompanying text.

78. Yates, *supra* note 5, § 1, at 21, 24 (quoting Japanese historian Yumiko

Although such an argument may seem to be good policy, it is not good law because the 1855 Treaty can no longer have any binding effect. Under international legal rules, it is clear that the 1875 Treaty of St. Petersburg extinguished the 1855 Treaty of Shimoda at least insofar as the two treaties set boundaries in the Kuril Islands. Article 59 of the Vienna Convention on the Law of Treaties aptly expresses the rule:

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.⁷⁹

Comparison of the relevant provisions of the 1855 treaty with the relevant provisions of the 1875 treaty plainly illustrates that the two are incompatible. The Treaty of Shimoda established a boundary "between the islands of Etorofu and Uruppu," with Japan owning all islands from Etorofu south.⁸⁰ In the later treaty of St. Petersburg, Russia expressly ceded all "the Kuril islands which [it] possess[ed]" and placed the boundary line "between . . . Kamchatka and the islands of Shimushu."⁸¹ The result was to give Japan title to the entire Kuril chain. These separate provisions cannot co-exist. Consequently, the former is abrogated by the contents of the latter. The relevant provision of the Treaty of Shimoda must be considered as having no legal effect after 1875, except insofar as the 1855 treaty can give meaning (i.e., by interpretation) to later treaties.

The 1905 Treaty of Portsmouth has nothing more than historical significance in the present debate. That treaty simply gave the Southern half of Sakhalin to Japan, but did not affect Japan's sovereignty over all of the Kurils granted under the terms of the Treaty of St. Petersburg. In sum, the net effect of the early treaties between Japan and Russia was to give Japan

Noda).

79. Vienna Convention, *supra* note 64, art. 59. In addition, it is probably axiomatic that a later treaty must govern over an inconsistent prior treaty.

80. Treaty of Shimoda, *supra* note 15, art. II; *see also* Map, *supra* part I.

81. Treaty of St. Petersburg, *supra* note 16, art. II; *see also* Map, *supra* part I.

full legal title not only to the four disputed islands, but to *all* of the Kuril Islands, together with the southern half of Sakhalin.

2. *The Russo-Japanese Neutrality Pact*

By signing the Russo-Japanese Neutrality Pact⁸² on April 14, 1941, Japan and Russia mutually promised to maintain peaceful relations with each other, to remain neutral in case either party should become involved in hostilities with any other party, and to respect each other's territorial integrity. By its terms, the pact was to remain in force for five years from the date of ratification, and it was to be automatically renewed for an additional five years unless one of the parties denounced the pact "one year before the expiration of the term."⁸³ On April 5, 1945, Russian Commissar of Foreign Affairs Viacheslav Molotov announced the Soviet Union's intent not to renew the treaty.⁸⁴ By declaring war against Japan on August 9, 1945, the Soviets made it clear that either the pact was no longer in force or the Soviets would no longer abide by it even if it were in force.

"Japanese and Russians still disagree on whether the pact was or was not in effect after [April 5, 1945]."⁸⁵ The Russians claim that Japan forfeited all assurances contained in the pact "[b]y renegeing on [its separate] promise to liquidate north Sakhalin oil and coal concessions and by aiding Germany in an aggressive war against the Soviet Union."⁸⁶ However, this argument is flawed because the oil and coal concessions were actually made in a separate agreement and were not part of the Neutrality Pact.⁸⁷ According to international law, the material breach of an agreement gives the injured party the right to cancel the agreement.⁸⁸ However, the breach of one agreement does not grant the injured party the right to cancel a separate agreement. Given this principle, the Soviet entry into

82. Neutrality Pact, *supra* note 20.

83. *Id.* art. III.

84. STEPHAN, *supra* note 4, at 205 n.16.

85. *Id.*

86. *Id.* at 204; *see also* LENSEN, *supra* note 19, at 127-29, 279-81.

87. *See* LENSEN, *supra* note 19, at 277-81. The concessions were part of an agreement entitled the "Protocol on the Liquidation of the Japanese Oil and Coal Concessions in North Sakhalin." This agreement came as a result of efforts to implement the understanding reached and embodied in the Neutrality Pact. The "Protocol" was signed in Moscow on March 30, 1944. *Id.* at 279-81.

88. 2 OPPENHEIM, *supra* note 49, § 547.

the war was a flagrant breach of the terms of its Neutrality Pact with Japan.

3. *The Cairo Declaration*

The Cairo Declaration was not a treaty per se, but was simply a statement of common purposes by the United States, Great Britain, and China regarding Japan.⁸⁹ Japan and the Soviet Union were not parties to this agreement, although Stalin later expressed full approval of the Declaration.⁹⁰ The declaration expressed the parties' intent to expel Japan from certain territories which it had taken "by violence and greed."⁹¹ As a mere statement of common purpose, the Declaration did not confer any rights or impose any obligations on any party.⁹²

Some debate exists as to whether Japan took the Kuril Islands by "violence and greed." However, according to the plain meaning of that phrase, Japan's conquest of the Kurils cannot be described as one involving "violence and greed." Japan received title to the entire chain of the Kuril Islands by the Treaty of St. Petersburg in 1875.⁹³ That treaty was concluded by mutual negotiation and involved no violence.

However, some indication exists that the parties to the Cairo Declaration intended to include the Kurils in the phrase "all other territories . . . taken by violence and greed." Some historians suggest that U.S. President Roosevelt was either completely ignorant concerning Japanese possession of the Kurils or he was willing to sacrifice an enemy's territory to encourage Soviet participation in the war. "[T]he President was still under the misapprehension that Japan had wrenched the Kurils from Russia in 1905 'by violence and greed', thereby making the arc subject to the principle of territorial alienation enunciated in the Cairo Declaration."⁹⁴ If such misunder-

89. This is self-evident from the language of the Declaration. See First Cairo Conference, Dec. 1, 1943, 3 Bevens 858 [hereinafter Cairo Declaration]. The relevant text of the Cairo Declaration is reproduced in the appendix.

90. STEPHAN, *supra* note 4, at 152.

91. Cairo Declaration, *supra* note 89.

92. It is worth emphasizing that Japan could not be obligated under the Declaration simply because it was not a party to and did not assent to the terms of the Declaration. See *supra* text accompanying note 66.

93. See *supra* text accompanying notes 16-17.

94. STEPHAN, *supra* note 4, at 154-55 (citing CHARLES E. BOHLEN, WITNESS TO HISTORY 1929-1969, at 196-97 (1973)).

standing existed, President Roosevelt committed "a grievous error for which Japan paid dearly."⁹⁵ In the final analysis, since the Declaration was not legally binding on any party, whether or not the Kurils were taken "by violence and greed" is legally immaterial except insofar as the Cairo Declaration helps interpret later agreements.

4. *The Yalta Agreement*

As with the Cairo Declaration, Japan was not a party to the Yalta Agreement. By the secret Yalta Agreement, signed on February 11, 1945, the United States, Great Britain, and the Soviet Union agreed that within two or three months after Germany had surrendered, the Soviet Union would enter the war against Japan. As a condition for the Soviet assistance in the Far East, the parties agreed that "[t]he former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored."⁹⁶ More specifically, the agreement stated that "[t]he Kurile Islands shall be handed over to the Soviet Union."⁹⁷

In 1956, the United States stated that it regarded the Yalta Agreement, like the Cairo Declaration, as "simply a statement of common purposes . . . and not as a final determination by those powers or of any legal effect in transferring territories."⁹⁸ This position seems rather dubious for two reasons. First, the statement was made long after the Agreement was concluded and seems to have been a shift in policy. Second, the statement contradicts the United States' and Great Britain's commitment at Yalta that the "claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated."⁹⁹ This shifting of position by the United States appears to result from political tap dancing rather than from sound international law.¹⁰⁰

The integral question is whether the Yalta Agreement has any binding force relating to the transfer of territory from Ja-

95. *Id.* at 155.

96. Yalta Agreement, *supra* note 22, cl. 2.

97. *Id.* cl. 3.

98. U.S. Position on Soviet-Japanese Peace Treaty Negotiations, DEP'T ST. BULL., Sept. 1956, at 484.

99. Yalta Agreement, *supra* note 22.

100. For a more complete summary of the U.S. position regarding the Yalta Agreement, see SWEARINGEN, *supra* note 10, at 190-92; STEPHAN, *supra* note 4, at 153-55.

pan to Russia. The answer is that it does not. As discussed above, the Yalta Agreement could impose no obligation on Japan to give up title to the islands unless the parties to the Agreement intended to impose an obligation on Japan and Japan gave its express consent.¹⁰¹ Russia may be able to claim that the former requirement was met, but no one can plausibly argue that Japan consented to receiving such an obligation.¹⁰² In short, the Yalta Agreement, the Cairo Declaration, and the Neutrality Pact all fell short of conveying, or imposing on Japan an obligation to convey, title to the disputed islands to Russia.

5. *The Potsdam Declaration*

The Potsdam Declaration may have succeeded where the Cairo Declaration and Yalta Agreement failed. The Potsdam agreement, concluded in 1945 for the purpose of setting the terms for Japanese surrender, was approved by the United States, Great Britain, China, and the Soviet Union.¹⁰³ Japan accepted the Potsdam Declaration on August 14, 1945.¹⁰⁴ Clause 8 of the Potsdam Declaration states, "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."¹⁰⁵ Accordingly, the question raised is whether Etorofu, Kunashiri, Shikotan, and the Habomai Islands are considered a part of the other minor islands as later determined.

Under a strict reading of the text of the Potsdam Declaration, the Soviet Union may have a good argument that Japan gave up its title at least to Etorofu and Kunashiri. The declaration restricted Japan's territory to "such minor islands" as the parties should determine at a later date. On September 8, 1951, Japan renounced its right and title to the Kuril Islands.¹⁰⁶ Therefore, if any of the disputed islands are part

101. See *supra* text accompanying note 66.

102. However, one may plausibly argue that Japan consented to give the Kurils away by signing the San Francisco Peace Treaty in 1951. For a discussion on the effects of the 1951 treaty, see *infra* part IV.B.6.

103. Terms for Japanese Surrender, July 26, 1945, 3 Bevens 1204 [hereinafter Potsdam Declaration]. Clause 8 of the Potsdam Declaration is reproduced in the appendix. See also STEPHAN, *supra* note 4, at 245.

104. STEPHAN, *supra* note 4, at 198.

105. Potsdam Declaration, *supra* note 103, cl. 8 (emphasis added).

106. Treaty of Peace with Japan, *supra* note 30, art. II, para. c.

of the Kuril Islands, the terms of the Potsdam Declaration certify that those islands are no longer part of Japan.¹⁰⁷

The relevant terms of the Potsdam Declaration are fairly ambiguous, especially when taken in the context of the later Treaty of San Francisco. But to the extent the language of the Potsdam Declaration remains unclear (what are "minor islands" and who is to make this determination), international law dictates that one consider the intent of the parties as facets of the "preparatory work of the treaty and circumstances of its conclusion."¹⁰⁸ Historian John J. Stephan argues that Japan did not intend to give up its claim to the Southern Islands by accepting the Potsdam Declaration. He states:

In accepting the Potsdam Declaration . . . Japan's leaders anticipated deprivation of the empire's conquests and annexations made since 1895. It is problematic whether they envisaged the imminent loss of the Kurils . . . They felt that the southern Kurils had always been Japanese and that the central and northern parts of the chain had been peacefully obtained in 1875 . . . But Japan's leaders were not aware of what had transpired at Yalta. Moreover, Soviet troops did not land on the Kurils until 18 August.¹⁰⁹

Japan's claim that Shikotan and the Habomais are included in "other minor islands" may survive its acceptance of the Potsdam Declaration. But in light of the fact that Japan gave up its claims to the "Kurile Islands" in the 1951 San Francisco Peace Treaty, the Japanese hold on Etorofu and Kunashiri becomes more tenuous.

6. *The San Francisco Peace Treaty*

At the end of World War II, after the Japanese had surrendered and after the Soviet Union had taken possession of the four disputed islands, Japan signed the San Francisco Peace Treaty on September 8, 1951.¹¹⁰ Other signatories to the treaty included the United States and Great Britain. The Soviet

107. *But see* JAPAN'S NORTHERN TERRITORIES, *supra* note 2, at 8 (arguing that the Potsdam Declaration is not valid and that, even if it were valid, the disputed islands are included in the phrase "such minor islands as we determine"). The question of what islands make up the "Kurile Islands" is addressed below. *See infra* part IV.B.6.c.

108. Vienna Convention, *supra* note 64, art. 32.

109. STEPHAN, *supra* note 4, at 198.

110. Treaty of Peace with Japan, *supra* note 30.

Union refused to sign the treaty, reasoning that, among other things, the treaty would lead to a new war in the Far East.¹¹¹ Regrettably, a peace treaty between Japan and the Soviet Union was left to later negotiations between the two countries.

By signing the treaty, Japan formally renounced "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 5 September 1905."¹¹² The language and circumstances of this treaty raise three important issues. First, who was to acquire sovereignty over the territory that Japan renounced? Second, did the Soviet Union obtain legal rights from the treaty even though it refused to sign? Third, what are the "Kurile Islands"?

a. Who was to obtain the Kurils renounced by Japan? In arguing that Japan has legal rights to the four disputed islands, the Japanese note that the San Francisco Peace Treaty "contained no provision indicating to which country these areas should finally belong."¹¹³ They hold that the Soviet Union's "unilateral measures" of exercising its authority over the islands "have no legal effect in transferring title to the Soviet Union."¹¹⁴ However, this argument does little to help Japan's cause. Regardless of which country was to exercise sovereignty over the Kurils, the fact remains that Japan at least gave them away to *some other entity*.

The history of the prior international agreements and negotiations leading to the San Francisco Treaty leave no doubt that the "other entity" that was to obtain the Kuril Islands was actually the Soviet Union. The Yalta Agreement, wherein the Soviet Union secretly agreed to assist the United States and Great Britain in the war against Japan, expressly stated that the Kuril Islands would be handed over to the Soviet Union.¹¹⁵ In fact, Soviet assistance against Japan was at least partially conditioned on the "return" of the Kurils to Japan, a condition to which the United States agreed.¹¹⁶ As a practical matter, "renunciation of the Kuriles and the southern

111. See SWEARINGEN, *supra* note 10, at 76-79.

112. Treaty of Peace with Japan, *supra* note 30, art. II, para. c.

113. JAPAN'S NORTHERN TERRITORIES, *supra* note 2, at 9.

114. *Id.*

115. See *supra* notes 22-23, 96-97 and accompanying text.

116. See *supra* notes 22-23, 96-97 and accompanying text; see also STEPHAN, *supra* note 4, at 153.

part of Sakhalin was tantamount to *de facto* recognition that these territories had been ceded to the Soviet Union which occupied them at the time."¹¹⁷

b. Did the Soviet Union gain any rights under the San Francisco Peace Treaty? As previously established, Japan cannot rightfully claim ownership to the islands that it expressly ceded in the 1951 treaty. And while it is incomprehensible that any state other than the Soviet Union could have been the intended beneficiary of the cession, it does not necessarily follow that the Soviet Union gained, by virtue of a treaty it refused to sign, automatic rights to claim the territory.

Under international law,¹¹⁸ the Soviet Union could obtain rights to the Kurils under the San Francisco Treaty only if "the parties to the treaty intend[ed] the provision to accord that right" and the Soviet Union "assent[ed] thereto."¹¹⁹ There is a presumption of assent.¹²⁰ The actions of Russia are consistent with this presumption because it has not refused to take title to the Kurils and because it has continued to occupy and govern the islands to the exclusion of all other countries.

However, the parties to the San Francisco Treaty did not intend to give the Soviet Union a right to claim the Kuril Islands. As explained above,¹²¹ all parties who signed the treaty knew that, by default, the Soviet Union would continue to occupy and govern the Kurils. But that is not to say that the parties intended to give the Soviets the right to claim legal title to the Kurils *based on* the San Francisco Treaty. Rather, the fact that the parties to the treaty left final disposition of the Kurils ambiguous suggests that they did not intend to confer such a right on the Soviet Union.

The ratification proceedings in the United States Senate lend concrete support to the argument that the San Francisco Treaty was not intended to bestow on Russia any right to claim the disputed islands. Attached to the resolution of ratification was a reservation that stated, in part, as follows:

117. L. JEROLD ADAMS, *THEORY, LAW AND POLICY OF CONTEMPORARY JAPANESE TREATIES* 74 (1974); see also BERNARD C. COHEN, *THE POLITICAL PROCESS AND FOREIGN POLICY: THE MAKING OF THE JAPANESE PEACE SETTLEMENT* 17 (1957).

118. See *supra* text accompanying notes 67-68.

119. Vienna Convention, *supra* note 64, art. 35.

120. *Id.*

121. *Supra* notes 115-117 and accompanying text.

As part [of ratification] the Senate states that nothing the treaty contains is deemed to diminish or prejudice, in favor of the Soviet Union, the right, title, and interest of Japan, or the Allied Powers as defined in said treaty, in and to . . . the Kurile Islands, the Habomai Islands, the Island of Shikotan or any other territory, rights or interests . . . or to confer any right, title, or benefit therein or thereto on the Soviet Union¹²²

This reservation clearly states the Senate's intent that the San Francisco Treaty not confer any rights on the Soviet Union, including claims to the Kuril Islands. The resolution passed the Senate by a vote of 66-10.¹²³ In short, although the parties knew that the Soviets would effectively retain control of the Kurils, they did not intend for the Peace Treaty to confer an absolute Soviet *right* to control the islands.¹²⁴

c. *What are the "Kurile Islands"?* Perhaps the most fundamental tenet of the Japanese claim is that "the Habomais, Shikotan, Kunashiri and Etorofu are not included in the term 'Kurile Islands.'"¹²⁵ Japan contends that the Peace Conference at San Francisco was aware of Japan's position and that "[t]his understanding is also in accordance with other international arrangements binding on Japan."¹²⁶ Japan further emphasizes that the geography, including the flora and fauna of Kunashiri and Etorofu, is different from that of the islands to the north.¹²⁷

122. Treaty of Peace with Japan, *supra* note 30, at 3300 (U.S. Declaration).

123. 98 CONG. REC. 2594 (1952).

124. This distinction is probably the result of the "give and take" policy of the United States, which entered the Yalta Conference uninformed regarding the Kurils and then shifted its position on the islands in the late 1940s. This shift in position was due, in major part, to the onslaught of the Cold War and a reevaluation of the words and deeds at Yalta. See SWEARINGEN, *supra* note 10, at 190-92.

125. JAPAN'S NORTHERN TERRITORIES, *supra* note 2, at 10.

126. *Id.*

127. *Id.* at 3, 10. The Japanese publication cited gives no verifiable information regarding the dissimilar geographic conditions of the various islands. An unscientific (but fairly extensive) review by the author of several physical, geographic, and geologic maps revealed that Kunashiri and Etorofu are hard to distinguish from the islands to the north. The review did suggest that Shikotan and the Habomais may be quite distinguishable from Kunashiri, Etorofu, and the other Kuril Islands. See, e.g., INTERNATIONAL SOCIETY FOR EDUCATIONAL INFORMATION, ATLAS OF JAPAN—PHYSICAL, ECONOMIC, AND SOCIAL 10-11 (1974) (showing that the geologic makeup of Shikotan and the Habomais is different from that of Kunashiri); see also STEPHAN, *supra* note 4, at 11-21.

If these arguments are correct, the four named islands should be considered "minor islands" that the Potsdam Declaration left to Japan. However, Japan has no legal claim to any island that is part of the "Kuriles" because Japan unequivocally gave up all right and title to the Kuril Islands at San Francisco.¹²⁸

On the basis of the historical evidence, Shikotan and the Habomai Island group should not be considered part of the Kurils and were not considered such by the parties to the Peace Treaty. Therefore, they should be returned to Japan. On the other hand, Kunashiri and Etorofu should be regarded as part of the Kurils to which Japan has no legal claim.¹²⁹

The text of the San Francisco Treaty does not define or declare exactly what islands are included in the Kurils. Accordingly, legal analysts must resort to other sources of interpretation, such as other relevant agreements, the intent of the parties to the treaty, and the historical definition of the Kurils.

Early agreements that set a boundary between Japan and Russia are of little help in defining the "Kuriles" because the relevant phrases of the agreements are subject to multiple interpretations. The Treaty of Shimoda gave "Etorofu . . . and the other Kuril Islands to the north . . . [to] Russia."¹³⁰ "Other" in this phrase could mean either those Kuril Islands other than Etorofu or those Kuril Islands other than those given to Japan. Unfortunately, the language is inconclusive.

Likewise, the relevant language of the Treaty of St. Petersburg is unclear. That agreement gave to Japan "the group of Kuril islands which [Russia] possesses."¹³¹ This phrase may suggest that Japan was receiving only that portion of the Kurils which Russia then possessed. On the other hand, the phrase could also be read to mean that Russia previously possessed all of the Kuril Islands, but was now giving all of them to Japan. In short, prior agreements on the boundary issue do not clarify the definition of the "Kuriles."

The records of the negotiation and ratification of the Peace Treaty provide some evidence of what the parties meant by

128. See *supra* text accompanying note 112.

129. This comment does not discuss whether it might be politically wise for Russia to make concessions on Kunashiri and Etorofu to obtain badly needed economic assistance from Japan.

130. Treaty of Shimoda, *supra* note 15, art. II.

131. Treaty of St. Petersburg, *supra* note 16, art. II.

"Kuriles." These records suggest that the parties included Kunashiri and Etorofu, but not Shikotan and the Habomais, in the definition of Kurils. For example, a statement given by Japanese Prime Minister Yoshida at the San Francisco Conference suggests that he knew Japan was, at a minimum, renouncing title to Kunashiri and Etorofu.¹³² After expressing his hope that the United States and Great Britain would quickly return the administration of the Ryukyu Islands to Japan, the Prime Minister spoke of the "Southern Kuriles" that were occupied by the Soviet Union as of September 20, 1945. Although Prime Minister Yoshida made no request for the return of the Southern Kurils, he did specifically mention Habomai and Shikotan by name and reaffirmed Japan's claim to these two islands.¹³³ Yoshida's lack of any reference to Kunashiri and Etorofu indicates that he considered those islands part of the previously mentioned "Southern Kuriles."

At the same conference, John Foster Dulles, the U.S. representative, expressly stated the U.S. view that the Habomai Islands were not included in the geographical name "Kurile Islands" as used in article 2(c) of the treaty.¹³⁴ Dulles' statement did not clarify whether the other disputed islands were part of the Kurils.

The reservation attached to the treaty by the United States Senate also supports the proposition that the United States defined the Kurils to include Kunashiri and Etorofu, but not Shikotan and the Habomais.¹³⁵ The reservation expressed the Senate's intent that the treaty not give the Soviets any new rights to "the Kurile Islands, the Habomai Islands, [or] the Island of Shikotan."¹³⁶ This language clearly distinguishes Shikotan and the Habomais from the Kurils. Since the Senate made no express reference to Kunashiri and Etorofu, it can be presumed that the Senate intended to include those islands in the term "Kurile Islands."

132. JAPAN, MINISTRY OF FOREIGN AFFAIRS, JAPANESE PEACE CONFERENCE PROVISIONAL VERBATIM MINUTES 327-32 n.23 (undated), reprinted in RAJENDRA K. JAIN, JAPAN'S POSTWAR PEACE SETTLEMENTS 369-73 (1978).

133. *Id.* at 370.

134. Statement by John Foster Dulles, DEP'T ST. BULL., Sept. 17, 1951, at 452, 454.

135. Since the assent of the United States Senate was required to bind the United States to the terms of the treaty, the meaning attached to the treaty by the Senate is relevant to interpreting any ambiguities in the treaty.

136. Treaty of Peace with Japan, *supra* note 30, at 3300 (U.S. Declaration).

Also persuasive is the argument that "[w]hen Japan renounced all rights to the 'Kurile Islands' at San Francisco, 'Kurile' was *universally understood* to include Kunashiri and [Etorofu]."¹³⁷ By the time the treaty was signed in 1951, the Soviet Union had occupied the entire chain of Kurils, including Etorofu and Kunashiri, for six years. It is illogical for Japan to cede a chain of islands that have the same geographic and geologic characteristics¹³⁸ and that are all occupied by a foreign power, and then later contend that the two southernmost islands are not part of that chain.

Japan legitimately claims that Shikotan and the Habomai Islands are distinct from the Kurils. Geographically, those islands are separated from the chain of Kurils and seem to be more closely associated with Hokkaido than with the Kurils.¹³⁹ Even the Russians have historically called these islands the "Little Kurils" as distinct from the "Kurils."¹⁴⁰ By ceding the "Kuriles," Japan did not cede islands that are not part of the "Kuriles." No evidence exists that Shikotan and the Habomai group have historically been considered part of the Kuril chain or that the signatories to the San Francisco Treaty considered them to be so.

V. CONCLUSION

The dispute over a small number of islands off the coast of Hokkaido has caused a rift in Russo-Japanese relations since the end of World War II. To this day the disagreement continues to be a barrier to a Russo-Japanese Peace Treaty which would officially end the war.

Under customary international law of prior discovery and conquest, neither country can legally claim title to the disputed islands. Conquest was not recognized as a legal method of acquiring title to land in 1945. Therefore, Russia cannot base its claim to the disputed territories on the legal theory of conquest. As for the right to the territory by prior discovery, it is unclear who initially discovered and settled the Kuril Islands. Regardless of which party was first, the status of the territories has been modified by treaty.

137. STEPHAN, *supra* note 4, at 211 (emphasis added).

138. *Id.* at 11-21.

139. See Map, *supra* part I.

140. STEPHAN, *supra* note 4, at 11.

Japan and Russia have been parties to several international agreements concerning the boundary between the two nations. Under the terms of the early agreements, Japan had clear title to the islands in dispute until 1945, when it accepted the terms of the Potsdam Declaration. By expressly accepting the Potsdam Declaration and later expressly ceding the "Kuriles," Japan gave away its right to claim any islands that are part of the "Kuriles." Examination of the intent of the parties to the San Francisco Treaty, the historical treatment of the islands and their geography and geology, conclusively indicates that Etorofu and Kunashiri are part of the Kuril Islands, but that Shikotan and the Habomai group are not. Accordingly, Russia has rightful title to Etorofu and Kunashiri, but should be required to return Shikotan and the Habomais to Japan.

Keith A. Call

Appendix

Relevant Treaties and Agreements

I. ARTICLES 31 AND 32 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES¹⁴¹

Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

141. Vienna Convention, *supra* note 64, arts. 31-32.

(b) Leads to a result which is manifestly absurd or unreasonable.

II. TREATY OF SHIMODA (FEB. 7, 1855)¹⁴²

Article II

Henceforth the boundaries between Russia and Japan will pass between the islands Etorofu and Uruppu. The whole island of Etorofu belongs to Japan and the whole island of Uruppu and the other Kuril Islands to the north constitute possessions of Russia. As regards the island Karafuto (Sakhalin), it remains unpartitioned between Russia and Japan, as has been the case up to this time.

III. TREATY OF ST. PETERSBURG (MAY 7, 1875)¹⁴³

Article II

In exchange for the cession to Russia of the rights on the island of Sakhalin, stipulated in the first article, His Majesty the Emperor of all the Russias, for Himself and His descendants, cedes to His Majesty the Emperor of Japan the group of the Kuril islands which he possesses at present, together with all the rights of sovereignty appertaining to this possession, so that henceforth the said group of Kuril islands shall belong to the Empire of Japan. This group comprises the following eighteen islands: [eighteen islands from Uruppu north to Araido are specifically named], so that the boundary between the Empires of Russia and Japan in these areas shall pass through the Strait between Cape Lopatka of the peninsula of Kamchatka and the island of Shimushu.

IV. SOVIET-JAPANESE NEUTRALITY PACT (APR. 13, 1941)¹⁴⁴

Article I

Both contracting parties undertake to maintain peaceful and friendly relations between themselves and mutually to respect the territorial integrity and inviolability of the other contracting party.

142. Treaty of Shimoda, *supra* note 15, art. II.

143. Treaty of St. Petersburg, *supra* note 16, art. II.

144. Neutrality Pact, *supra* note 20, arts. I-III.

Article II

Should one of the contracting parties become the object of hostilities on the part of one or several third Powers, the other contracting party will observe neutrality throughout the entire duration of the conflict.

Article III

The present pact comes into force from the day of its ratification by both contracting parties and shall remain valid for five years. Should neither of the contracting parties denounce the pact one year before expiration of the term, it will be considered automatically prolonged for the following five years.

V. RELEVANT TEXT OF THE CAIRO DECLARATION
(NOV. 27, 1943)¹⁴⁵

The three great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all islands in the Pacific which she has seized and occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

VI. YALTA AGREEMENT (FEB. 11, 1945)¹⁴⁶

The leaders of three Great Powers—the Soviet Union, the United States of America and Great Britain—have agreed that in two or three months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies on condition that:

....
2. The former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored, viz:

145. Cairo Declaration, *supra* note 89.

146. Yalta Agreement, *supra* note 22.

a. The southern part of Sakhalin as well as all islands adjacent to it shall be returned to the Soviet Union.

....

3. The Kuril Islands shall be handed over to the Soviet Union.

....

The Heads of the three Great Powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated.

VII. THE POTSDAM DECLARATION (JULY 26, 1945)¹⁴⁷

8. The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

VIII. THE SAN FRANCISCO PEACE TREATY (SEPT. 8, 1951)¹⁴⁸

Article II

(c) 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.

147. Potsdam Declaration, *supra* note 103, cl. 8 (footnote omitted).

148. Treaty of Peace with Japan, *supra* note 30, art. II, para. c.