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## The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia

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## THE 1951 SAN FRANCISCO PEACE TREATY WITH JAPAN AND THE TERRITORIAL DISPUTES IN EAST ASIA

Seokwoo Lee<sup>†</sup>

*Abstract:* There are currently three territorial disputes over islands in East Asia in which Japan is a disputant: against Russia, over the Kurile Islands; against China and Taiwan, over the Senkaku Islands; and against Korea, over the Liancourt Rocks. Although all the 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. The San Francisco Peace Treaty failed to define the "Kurile Islands," and further to specify the entity in whose favor Japan had renounced sovereignty over the disputed islands. Additionally, specific mention of the Senkaku Islands and the Liancourt Rocks did not appear in the territorial clauses of the San Francisco Peace Treaty. Accordingly, there is a need for a careful examination of how a series of drafts of the Treaty defined the terms of the San Francisco Peace Treaty regarding these disputed islands in East Asia. The territorial clause of the San Francisco Peace Treaty regarding the Kurile Islands can be interpreted as follows: first, the Soviet Union is the only recipient of the Kurile Islands envisaged by the Allied Powers; second, there were no agreed definitions of the "Kurile Islands" among the Allied Powers; and third, there are strong indications that the Allied Powers preferred not to resolve the matter of the ultimate disposition of the Kurile Islands in the San Francisco Peace Treaty. The Senkaku Islands were not included as either Chinese and Taiwanese or Japanese territory by the drafters of the San Francisco Peace Treaty, and Article 3 of the San Francisco Peace Treaty did not, to the point of specificity, define the territories that were placed within the area of the United Nations trusteeship with the United States as the sole administering authority. The territorial clause on the Liancourt Rocks could indicate that the San Francisco Peace Treaty assigns the Liancourt Rocks to Japan. However, due to the contradictory nature of the various drafts of the treaty, Korea may still be free to establish that the "Korea" renounced in the San Francisco Peace Treaty included the Liancourt Rocks.

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## I. INTRODUCTION

In 1895, Japan signaled its intention to join the world's great colonial powers by embarking on an aggressive campaign of territorial expansion in East Asia.<sup>1</sup> This campaign, though successful on its own terms, spread death and misery to millions of people living in the acquired territories. Finally, in 1945, Japan's empire imploded.

This Article argues that while the post-war period offered the opportunity for the complete and unambiguous resolution of territorial questions regarding Japan, the lack of precision in key diplomatic documents, especially the San Francisco Peace Treaty of 1951, allowed certain territorial disputes to arise between Japan and its neighbors. For example, Japan and Russia both claim sovereignty over the Kurile Islands, a small group of islands, currently occupied by Russia, lying to the north of Hokkaido, the northernmost of Japan's four main islands. Additionally, Japan, China, and Taiwan all claim sovereignty over eight uninhabited islands in the East China Sea known as the Senkaku Islands. Finally, Japan and Korea both claim sovereignty over the Liancourt Rocks, a pair of rocky islets in the Sea of Japan/East Sea. The Liancourt Rocks are currently occupied by Korea.

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<sup>1</sup> In this article, "East Asia" encompasses the East China Sea and the Sea of Japan/East Sea, surrounded by China, Taiwan, Japan, North Korea, South Korea [hereinafter Korea], and Russia. This article uses internationally known names of the islands in dispute or the names used by the current occupant country.

Section II examines the historical background of each dispute including the bases for the claims made by the various parties. In the case of the dispute between Russia and Japan over the Kurile Islands, treaties executed between the two countries in 1855 and 1875 are the starting point of the discussion. Questions remain as to whether the San Francisco Peace Treaty had the effect of reinstating the terms of pre-war treaties, and if so, whether the treaties themselves were precise enough to put the conflict to rest.

The claimants disagree over who first discovered and effectively occupied the Senkaku Islands and whether they were *terra nullius* when Japan incorporated the islands in January 1895. In the same context, it is also questionable whether China ceded the Senkaku Islands along with Taiwan to Japan under the Shimonoseki Treaty after being defeated in the Sino-Japanese War in May 1895. The question also remains as to whether the islands reverted to China after Japan's defeat in 1945, were incorporated into Taiwan in 1949, or were restored to Japan as part of Okinawa in 1972.

As to the Liancourt Rocks, Japan specifically affirmed its claim to the Liancourt Rocks by officially incorporating them into Shimane Prefecture in 1905. Japan opines that the Liancourt Rocks were *terra nullius* in 1905, and therefore subject to occupation, while Korea asserts that historical documentation proves that the Liancourt Rocks belonged to Korea prior to Japan's alleged 1905 incorporation, thereby refuting Japan's contentions that the Liancourt Rocks were *terra nullius*. Korea regained its independence in the aftermath of the Second World War, and Japan specifically renounced its claims to several named islands in the Sea of Japan/East Sea when it signed the San Francisco Peace Treaty. However, the treaty was silent regarding the status of the Liancourt Rocks. Thus, for almost fifty years the two sides have exchanged unilateral declarations of sovereignty over the tiny islands.

Section III analyzes the diplomatic and political maneuvering that allowed these territorial questions to remain unanswered. Included in this section is a discussion of the declarations of intent issued by the Allied Powers late in the war when it was apparent that Japan would be defeated, i.e., the Cairo Declaration, the Yalta Agreement, and the Potsdam Proclamation. These resolutions provided the general framework for the San Francisco Peace Treaty. The evolution of the San Francisco Peace Treaty itself, as revealed in a series of interim drafts, is also examined. The ongoing territorial disputes in East Asia, as this research demonstrates, involve intertwined political and legal issues. In other words, these three territorial disputes have multifaceted implications for the disputants on the one hand, and for the relations between the disputants and the interested

powers, notably the United States, on the other hand. The rivalry between the United States and the former Soviet Union in the period of the Cold War; the complicated stance of the United States in the cross-strait relations between China and Taiwan; and the hands-off policy of the United States in the territorial disputes between Korea and Japan are only partial examples of U.S. involvement in the territorial disputes in East Asia. This situation is complicated by the fact that regional stability in East Asia has been largely influenced by U.S. security interests.

Section IV offers observations regarding the future course that the disputes might take.

## II. JAPAN'S TERRITORIAL DISPUTES

There will be no complicated frontiers to define in the Japanese Peace Treaty since Japanese territories are all insular. . . . It will be for the Peace Conference to decide which of the minor islands shall remain under Japanese sovereignty and when this decision has been reached the main territorial article could be something quite simple. . . . In determining which of the minor islands shall remain under Japanese sovereignty the decisive considerations must be strategic. . . . A large number of islands in waters immediately adjacent to Japan which should clearly remain under Japanese sovereignty. A number of islands between Hokkaido and Sakhalin, between Hokkaido and the Kuriles, and *between Japan proper and Korea in regard to the disposal of which some difference of opinion may be expected. . . . Very careful drafting of this section will be necessary in order to ensure that no islands are left in disputed sovereignty* (emphasis added).<sup>2</sup>

Japan is a party to three ongoing territorial disputes that, arguably, could have been prevented by more diligent diplomacy fifty years ago:<sup>3</sup>

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<sup>2</sup> Memorandum of Conversation, Canberra Conference on Japanese Peace Treaty, State Dep't Decimal File No. 740.0011 PW (PEACE)/10-647, State Dep't Records, Record Group 59 (Oct. 6, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>3</sup> For general information on these disputes, see BORDER AND TERRITORIAL DISPUTES 438-39, 497-519 (John B. Allcock et al. eds., 3d ed. 1992); Jonathan I. Charney, *Probable Future Outcomes of Some Island Disputes around Japan*, in MARITIME BOUNDARY ISSUES AND ISLANDS DISPUTES IN THE EAST ASIAN REGION: PROCEEDINGS OF THE 1<sup>ST</sup> ANNUAL CONFERENCE 158 (Young-Koo Kim ed., 1998); David A.

against Russia, Japan continues to claim sovereignty over the Southern Kurile Islands/Northern Territories ("Kurile Islands");<sup>4</sup> against the People's Republic of China ("China") and the Republic of China ("Taiwan") over the Pinnacle Islands/Senkaku Islands/Diao-yu-tai (or Tiao-yu-tai) ("Senkaku Islands");<sup>5</sup> and against Korea over the Liancourt Rocks/Tokdo/Takeshima ("Liancourt Rocks").<sup>6</sup>

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Colson, *Island Disputes in East Asia*, in SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION (Myron Nordquist & John Norton Moore, eds. 1998); Daniel J. Dzurek, *Island Disputes in East Asia*, in SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION (Myron Nordquist & John Norton Moore eds. 1998); DOUGLAS M. JOHNSTON & MARK J. VALENCIA, PACIFIC OCEAN BOUNDARY PROBLEMS: STATUS AND SOLUTIONS 104-21 (1991); ATLAS FOR MARINE POLICY IN EAST ASIAN SEAS 25-34 (Joseph R. Morgan & Mark J. Valencia eds., 1992); THE PRACTICE OF JAPAN IN INTERNATIONAL LAW 1961-1970 44-108 (Shigeru Oda & Hisashi Owada eds., 1982); Choon-Ho Park, *Central Pacific and East Asian Maritime Boundaries* 297-302, in INTERNATIONAL MARITIME BOUNDARIES (Jonathan I. Charney & Lewis M. Alexander eds., 1993); CHOON-HO PARK, EAST ASIA AND THE LAW OF THE SEA 1-125, 209-88 (1983); J.R. VICTOR PRESCOTT, MARITIME JURISDICTION IN EAST ASIAN SEAS (Occasional Paper No. 4; The East West Environment and Policy Institute, East-West Center, 1987); SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 279-82, 291-301 (1997); ROBERT W. SMITH & BRADFORD L. THOMAS, ISLAND DISPUTES AND THE LAW OF THE SEA: AN EXAMINATION OF SOVEREIGNTY AND DELIMITATION DISPUTES 2-6 (MARITIME BRIEFING, Vol. 2, No. 4; International Boundaries Research Unit, U. Durham, 1998).

<sup>4</sup> This is a small group of islands, just north of Hokkaido, known by the Russians as the Southern Kurile (or Kuril) Islands, and known to the Japanese as the Northern Territories. Except when quoting or directly referring to sources that use the term "Kuril," this article uses the term "Kurile." For further information on this dispute, see "NORTHERN TERRITORIES" AND BEYOND: RUSSIAN, JAPANESE, AND AMERICAN PERSPECTIVES (James E. Goodby et al. eds., 1995); NORTHERN TERRITORIES ISSUE ASSOCIATION, JAPAN'S NORTHERN TERRITORIES (1974); Glen W. Price, Comment: *Legal Analysis of the Kurile Island Dispute*, 7 TEMP. INT'L & COMP. L. J. 395 (1993); DAVID REES, THE SOVIET SEIZURE OF THE KURILES (1985); Joseph L. Sutton, *Territorial Claims of Russia and Japan in the Kurile Islands*, in 1 OCCASIONAL PAPERS, CENTER FOR JAPANESE STUDIES 35 (1951); Yuichi Takano, *The Territorial Problems between Japan and the Soviet Union*, 3 JAPANESE ANNUAL INT'L L. 52-64 (1959); Kosaku Tamura, *Origins of the Northern Territorial Issue and Its Legal Status*, 2 JAPAN ANNUAL INT'L AFFAIRS 73-96 (1962).

<sup>5</sup> Japan calls these islands "Sento Shosho" or "Senkaku Retto," which means "Pinnacle Islands" as internationally recognized. China calls them "Diao-yu-tai," and Taiwan terms them "Tiao-yu-tai," using the same Chinese characters with a different romanization system.

For further information on the dispute with China and Taiwan, see K.T. Chao, *East China Sea: Boundary Problems Relating to the Tiao-Yu-T'ai Islands*, in 3 CHINESE Y'B OF INT'L L. & AFFAIRS 45 (1983); Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VIRG. J. INT'L L. 221 (1973-74); Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the T'iao-yu-tai Islets (Senkaku Gunto)*, 15 CHINESE Y'B. INT'L L. & AFFAIRS 9-31 (1996-97); Daniel J. Dzurek, *Effect of the Diaoyu/Senkaku Islands Dispute on Maritime Delimitation* 409, in BORDERLANDS UNDER STRESS (Martin A. Pratt et al. eds., 2000); JEANETTE GREENFIELD, CHINA AND THE LAW OF THE SEA, AIR, AND ENVIRONMENT 126-43 (1979); JEANETTE GREENFIELD, CHINA'S PRACTICE IN THE LAW OF THE SEA 127-29 (1992); SELIG S. HARRISON, CHINA, OIL, AND ASIA: CONFLICT AHEAD? 146-88, 213-30 (1977); Wei-Chin Lee, *Troubles Under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea*, 18 OCEAN DEV. & INT'L L. 585 (1987); Victor H. Li, *China and Off-Shore Oil: The Tiao-yü Tai Dispute*, 10 STAN. J. INT'L STUDIES 143, 151 (1975); YING-JEOU MA, LEGAL PROBLEMS OF SEABED BOUNDARY DELIMITATION IN THE EAST CHINA SEA 69, in 3(62) OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES (Hungdah Chiu et al. eds.,

Among the three disputed areas, the Kurile Islands have been considered the most important area to the Japanese.<sup>7</sup> Unlike the other two areas in dispute, the Kurile Islands dispute has significantly different features due to the large human population there.<sup>8</sup> The territorial dispute over the Senkaku Islands occupied by Japan involves a number of factors, including future offshore oil development. If considered to be “islands” as defined by the 1982 United Nations Convention on the Law of the Sea (“Law of the Sea Convention”),<sup>9</sup> sovereignty over the Senkaku Islands could

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1984); Toshio Okuhara, *The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf*, 15 JAPANESE ANNUAL INT'L L. 97 (1971); Choon-Ho Park, *Oil under Troubled Waters: The Northeast Asia Sea-Bed Controversy*, 14 HARV. INT'L L. J. 212 (1973); Thomas R. Ragland, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664 (1973); UNRYU SUGANUMA, *SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS* (2000). See also INTERNATIONAL LAW CONFERENCE ON THE DISPUTE OVER DIAOYU/SENKAKU ISLANDS 1-162 (Taiwan Law Soc. & Taiwan Institute Int'l Law eds., 1997).

For the official Japanese Government view on the Senkaku Islands dispute, refer to MINISTRY OF FOREIGN AFFAIRS, JAPAN, THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS (1972), available at <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (last visited Oct. 31, 2001). For other Internet resources, see Phil Deans, *The Diaoyutai/Senkaku Dispute: The Unwanted Controversy*, at <http://ukc.ac.uk/politics/publications/journals/kentpapers/deans.html> (last visited Oct. 27, 2001); Daniel Dzurek, *The Senkaku/Diaoyu Islands Dispute* (1996), at <http://www-ibru.dur.ac.uk/docs/senkaku.html> (last visited Nov. 10, 2000); Kiyoshi Inoue, *Japanese Militarism and the Diaoyu (Senkaku) Islands: A Japanese Historian's View*, at <http://www/io.org/~yuan/diaohist/html> (last visited Jun. 18, 1999).

<sup>6</sup> Liancourt Rocks are two tiny rocky islets are called “Tokdo” in Korean and “Takeshima” in Japanese. For further information on this dispute, see Choung Il Chee, *Legal Status of Dok Island in International Law*, 42 KOREAN J. INT'L L. 1 (1997); Han Key Lee, *Korea's Territorial Rights to Tokdo in History and International Law*, 29 KOREA OBSERVER 1 (1998); Kanae Taijudo, *The Dispute between Japan and Korea Respecting Sovereignty over Takeshima*, 12 JAPANESE ANN. INT'L L. 1 (1968).

<sup>7</sup> Memorandum of Conversation between Mr. Yoshimitsu Ando, Chief, General Affairs Section, Political Bureau, Japanese Foreign Office, and Mrs. Meredith Weatherby, Foreign Service Officer, Office of the United States Political Advisor for Japan, Japanese Peace Treaty, State Dep't Records, Record Group 59 (Sept. 26, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD). See also Office of U.S. Political Advisor for Japan, Tokyo, Comment on Draft Treaty of Peace with Japan, State Dep't Decimal File No. 740.0011 PW (PEACE)/11-1949, State Dep't Records, Record Group 59 (Nov. 19, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Comment on Draft Treaty of Peace with Japan] (“[The Kurile Islands] are of far greater navigational and fishing importance to Japan than to any other possessor”).

<sup>8</sup> For further discussion of this issue, see Seokwoo Lee & Dakas C.J. Dakas, *The Right to Self-Determination in the Context of Territorial Disputes: The Kurile Islands in Perspective*, 5 NOTTINGHAM HUMAN RIGHTS L. REV. 18-27 (2000).

<sup>9</sup> United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 121(1) 21 I.L.M. 1261, 1291 [hereinafter Law of the Sea Convention]. Article 121(1) of the Law of the Sea Convention defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.” *Id.* Under the new regime of the Convention, a state exercising territorial sovereignty over an island may declare a territorial sea extending twelve nautical miles and an exclusive economic zone (“EEZ”) that extends 200 nautical miles from the island's baseline. *Id.* arts. 2, 3, 56, 57. Within the EEZ, the controlling state has sovereign rights over the natural resources located in the water, sea-bed, and subsoil. *Id.* art. 56(1)(a). Rocks unable to sustain human habitation or economic life, however, are not



affect 20,750 square nautical miles of marine space, and the vast mineral resources in that area.<sup>10</sup> The Taiwan Straits dispute, which affects the bilateral relations between China and Taiwan, is also one of the key issues deserving attention. Unlike the disputes over the other islands, the Liancourt Rocks dilemma suffers from a paucity of scholarly research, particularly in the western world. Recently, the territorial dispute over the Liancourt Rocks re-surfaced largely as a consequence of new exclusive economic zone claims by the disputants, together with their respective ratifications of the Law of the Sea Convention. If considered to be “islands” under the Law of the Sea Convention, the Liancourt Rocks would include 16,600 square nautical miles of marine space.<sup>11</sup> Thus, national pride (as much as contestation over territory, resources, and the associated maritime area) is a typical feature of the islands in dispute.

Since the Treaty of Peace with Japan (“San Francisco Peace Treaty”) effected the final disposition of territories in East Asia following the conclusion of World War II, its text should be the starting point for research into the territorial disputes over islands in East Asia.<sup>12</sup> For that purpose, although there could be other versions, this Article examines the following treaty drafts: March 19, 1947;<sup>13</sup> August 5, 1947;<sup>14</sup> January 8, 1948;<sup>15</sup>

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entitled to an EEZ. *Id.* art. 121(3). The Convention does not explicitly define “human habitation or economic life.” Therefore, the relationship between certain rocks and “human habitation or economic life” independent of outside assistance is a pivotal matter since it was left unanswered by the Convention. For discussion on the meaning of “human habitation or economic life,” see Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT’L L. 734 (1995); Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT’L L. 863 (1999).

<sup>10</sup> JANE’S EXCLUSIVE ECONOMIC ZONES 1999-2000, 35 (Martin A. Pratt et al. eds., 1999). A nautical mile is a unit of length used in sea navigation, and equals 1,852 meters, or about 6,076 feet. See BLACK’S LAW DICTIONARY 785 (abr. 6th ed. 1991).

<sup>11</sup> JOHNSTON & VALENCIA, *supra* note 3, at 113.

<sup>12</sup> Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter San Francisco Peace Treaty], available at <http://newtaiwan.virtualave.net/sanfrancisco01.htm> (last visited Nov. 4, 2001). For the legal background of the Treaty, see D.P. O’Connell, *Legal Aspects of the Peace Treaty with Japan*, 29 BRITISH Y. B. INT’L L. 423-35 (1952). For a list of participants, agenda, rules of procedure, verbatim minutes, and treaty documents, see U.S. DEP’T OF STATE, CONFERENCE FOR THE CONCLUSION AND SIGNATURE OF THE TREATY OF PEACE WITH JAPAN: RECORD OF PROCEEDINGS (1951). For the territorial dimension of the San Francisco Peace Treaty, see Zengo Ohira, *The Territorial Problems of the Peace Treaty with Japan*, 7 THE ANNALS OF THE HITOTSUBASHI ACADEMY 115 (1957). For general information on the San Francisco Peace Treaty, see FREDERICK S. DUNN, PEACE-MAKING AND THE SETTLEMENT WITH JAPAN (1963); THE PALO ALTO PEACE CLUB, REPORT ON THE JAPANESE PEACE TREATY (Aug., 1951); STAFF OF FOREIGN RELATIONS COMM., 82D CONG., JAPANESE PEACE TREATY AND OTHER TREATIES RELATING TO SECURITY IN THE PACIFIC (Comm. Print 1951); MICHAEL M. YOSHITSU, JAPAN AND THE SAN FRANCISCO PEACE SETTLEMENT (1983).

<sup>13</sup> Dean G. Acheson, U.S. Secretary of State, Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty, State Dep’t Decimal File No. 740.0011 PW (PEACE)/3-2047, State

October 13, 1949;<sup>16</sup> November 2, 1949;<sup>17</sup> December 8, 1949;<sup>18</sup> December 19, 1949;<sup>19</sup> December 29, 1949;<sup>20</sup> January 3, 1950;<sup>21</sup> August 7, 1950;<sup>22</sup> September 11, 1950;<sup>23</sup> March 12, 1951;<sup>24</sup> March 17, 1951;<sup>25</sup> April 7, 1951;<sup>26</sup>

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Dep't Records, Record Group 59 (Mar. 3, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty].

<sup>14</sup> Memorandum from Hugh Borton, Acting Special Assistant to the Director, Office of Far Eastern Affairs, to Charles E. Bohlen, Counselor of the Department of State: Draft Treaty of Peace for Japan, State Dep't Decimal File No. 740.0011 PW (PEACE)/8-647 CS/W, State Dep't Records, Record Group 59 (Aug. 6, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Memorandum from Hugh Borton].

<sup>15</sup> Memorandum, Background of Draft of Japanese Peace Treaty, State Dep't Decimal File No. 740.0011 PW (PEACE)/1-3048 CS/W, State Dep't Records, Record Group 59 (Jan. 30, 1948) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>16</sup> Memorandum, Attached Treaty Draft, State Dep't Decimal File No. 740.0011 PW (PEACE)/10-1449, State Dep't Records, Record Group 59 (Oct. 14, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Memorandum, Attached Treaty Draft].

<sup>17</sup> Commentary on Treaty of Peace with Japan, State Dep't Records, Record Group 59 (Nov. 2, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>18</sup> Memorandum from Samuel W. Boggs, Special Advisor on Geography, Office of Intelligence Research, to Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, and Robert A. Fearey, Bureau of Far Eastern Affairs, Draft Treaty of Peace with Japan, Territorial Clauses, State Dep't Records, Record Group 59 (Dec. 8, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Draft Treaty of Peace with Japan, Territorial Clauses].

<sup>19</sup> Agreement respecting the Disposition of Former Japanese Territories, State Dep't Records, Record Group 59 (Dec. 19, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>20</sup> Draft Treaty of Peace with Japan on December 29, 1949, State Dep't Records, Record Group 59 (Dec. 19, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>21</sup> Memorandum from Samuel W. Boggs, Special Advisor on Geography, Office of Intelligence Research, to Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, and Robert A. Fearey, Bureau of Far Eastern Affairs, Draft Treaty of Peace with Japan, Territorial Clauses, State Dep't Records, Record Group 59 (Jan. 3, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Draft Treaty of Peace with Japan].

<sup>22</sup> Memorandum from John F. Dulles, Special Assistant to the Secretary of State, Japanese Treaty, State Dep't Decimal File No. 694.001/8-950 CS/H, State Dep't Records, Record Group 59 (Aug. 9, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Japanese Treaty].

<sup>23</sup> Memorandum from John F. Dulles, Special Assistant to the Secretary of State, to Dean G. Acheson, Secretary of State, State Dep't Decimal File No. 694.001/9-1150 CS/MD, State Dep't Records, Record Group 59 (Sep. 11, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Memorandum to Dean G. Acheson].

<sup>24</sup> Memorandum from John F. Dulles, Consultant to the Secretary of State, State Dep't Decimal File No. 694.001/3-1251, State Dep't Records, Record Group 59 (Mar. 12, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Memorandum from John F. Dulles].

<sup>25</sup> Memorandum, State Dep't Decimal File No. FW 694.001/3-1751, State Dep't Records, Record Group 59 (Mar. 17, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

May 3, 1951;<sup>27</sup> June 14, 1951,<sup>28</sup> July 3, 1951,<sup>29</sup> July 20, 1951,<sup>30</sup> and August 13, 1951.<sup>31</sup>

### A. *The Kurile Islands*

The ongoing conflict between Russia and Japan centers around three main islands: Etorofu, Kunashiri, and Shikotan, as well as around the Habomai group.<sup>32</sup> These islands are located in the southern end of the Kurile Archipelago, a chain of islands linking the northernmost of Japan's main islands, Hokkaido, with the Kamchatka peninsula in mainland Russia.<sup>33</sup>

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<sup>26</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), State Dep't Records, Record Group 59 (Apr. 7, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Provisional Draft of Japanese Peace Treaty (United Kingdom)].

<sup>27</sup> Draft Japanese Peace Treaty, Revised May 3, 1951, State Dep't Decimal File No. 694.001/5-351, State Dep't Records, Record Group 59 (May 3, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>28</sup> Draft Japanese Peace Treaty, State Dep't Decimal File No. 694.001/6-1451, State Dep't Records, Record Group 59 (Jun. 14, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>29</sup> Draft Japanese Peace Treaty, State Dep't Records, Record Group 59 (Jul. 3, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>30</sup> Draft Treaty of Peace with Japan, State Dep't Decimal File No. FW 694.001/7-2151, State Dep't Records, Record Group 59 (Jul. 20, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>31</sup> Japanese Peace Conference, San Francisco, California, Treaty of Peace with Japan, September, 1951, State Dep't Records, Record Group 59 (Aug. 13, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>32</sup> In Russia, Etorofu is known as Iturup, Kunashiri as Kunashir, and Shikotan together with the Habomai group [hereinafter Habomais] as Little (or Lesser) Kuriles. This article uses Japanese names. Etorofu's area is 3,139 square kilometers; Kunashiri's is 1,500 square kilometers; Shikotan's is 255 square kilometers; and the Habomais' is 102 square kilometers. The total area is just short of 5,000 square kilometers. The Habomai group of islets comprises Shibotsu (Zelyonyi), Taraku (Polonskogo), Yuri (Yurii), Akiyuri (Anuchina), Suisho (Tanfileva), and Kaigara (Signal'nyi). Suisho, in the Habomais, is about three miles from the tip of Cape Nosappu in Hokkaido, while Kunashiri is clearly visible from the Shiretoko Peninsula in Hokkaido. See PETER BERTON, *JAPANESE-RUSSIAN TERRITORIAL DILEMMA: HISTORICAL BACKGROUND, DISPUTES, ISSUES, QUESTIONS, SOLUTION SCENARIOS OR A THOUSAND SCENARIOS FOR THE THOUSAND ISLANDS DISPUTE* 8, 11 (Belfer Center for Science and International Affairs, Occasional Paper, 1992); Joseph S. Roucek, *Some Geographic Factors in the Strategy of the Kuriles*, 51 J. GEOGRAPHY 297 (1952).

<sup>33</sup> Generally refer to the maps in MINISTRY OF FOREIGN AFFAIRS, JAPAN, *JAPAN'S NORTHERN TERRITORIES 8-9* (1996), available at <http://www.mofa.go.jp/region/europe/russia/territory/index.html> (last visited Oct. 31, 2001).

## 1. *Pre-1945 Boundaries*

Prior to World War II, the Kurile Islands had been the subject of several treaties between Russia and Japan.

### a. *The Treaty of Shimoda and its 1875 amendment*

The Treaty of Commerce, Navigation and Delimitation between Japan and Russia established the first Russo-Japanese boundary line in the Kurile Archipelago.<sup>34</sup> The Treaty of Shimoda states:

Henceforth the frontier between Japan and Russia will run between the islands of [Etorofu and Uruppu]. The entire island of [Etorofu] belongs 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.<sup>35</sup>

Even after the conclusion of the Treaty of Shimoda, the boundary line was a source of friction between the two countries. Consequently, Japan sent Buyo Enomoto, an ambassador plenipotentiary, to Russia to conduct a series of negotiations with Sutumov, chief of the Asia Bureau there.<sup>36</sup> As a result, the Treaty of Shimoda was amended by the Treaty for the Exchange

<sup>34</sup> Jan. 26, 1855, Japan-Russ., 112 Consol. T.S. 467 [hereinafter Treaty of Shimoda].

<sup>35</sup> *Id.* art. II. Also available in STRENGTHENING DEMOCRATIC INSTITUTIONS PROJECT, INVENTORY AND EXTRACTS OF KEY DOCUMENTS PERTAINING TO THE GENESIS OF THE TERRITORIAL DISPUTE (1855-1991) 4 (Belfer Ctr. for Science and Int'l Affairs, Occasional Paper, 1991), and in GRAHAM ALLISON et al., BEYOND COLD WAR TO TRILATERAL COOPERATION IN THE ASIA-PACIFIC REGION: SCENARIOS FOR NEW RELATIONSHIPS BETWEEN JAPAN, RUSSIA, AND THE UNITED STATES 81 (Belfer Ctr. for Science and Int'l Affairs, Occasional Paper, 1992).

Significantly, the official Japanese translation of the Article II omitted the word "other" from the phrase "the other Kurile Islands," providing:

Henceforth 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.

MINISTRY OF FOREIGN AFFAIRS, JAPAN, *supra* note 33, at 4. This alteration has significant implications for a legally binding definition of the Kurile Islands. See discussion *infra* Part II.A.4.

<sup>36</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, State Dep't File No. NND760050 (Microfilm), State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD).

of Sakhalin for the Kurile Islands (“Treaty of St. Petersburg”), which provided for the mutual cession of territory between Japan and Russia.<sup>37</sup> Article II of this treaty provided:

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]. . . .<sup>38</sup>

Thus, the Treaty of St. Petersburg 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.

*b. The Treaty of Portsmouth*

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 (“Treaty of Portsmouth”) on September 5, 1905.<sup>39</sup>

*2. The Status of the Kuriles During the Second World War*

In 1941, the early part of World War II, the Soviet Union and Japan agreed on the Soviet-Japanese Neutrality Pact.<sup>40</sup> However the Soviet Union renounced the Neutrality Pact when it signed the Agreement regarding Entry of the Soviet Union into the War against Japan (“Yalta Agreement”) on

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<sup>37</sup> Apr. 25, 1875, Japan-Russ., 149 Consol. T.S. 179 [hereinafter Treaty of St. Petersburg].

<sup>38</sup> *Id.* art. II, also available in STRENGTHENING DEMOCRATIC INSTITUTIONS PROJECT, *supra* note 35, at 9.

<sup>39</sup> Sept. 5, 1905, Japan-Russ., 199 Consol. T.S. 144 [hereinafter Treaty of Portsmouth]. The Treaty provides 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, *supra* note 35, at 10.

<sup>40</sup> Pact of Neutrality between the U.S.S.R. and Japan, Apr. 14, 1941, available at <http://www.yale.edu/lawweb/avalon/wwii/sl.htm>.

February 11, 1945.<sup>41</sup> Under the Yalta Agreement, the Soviet Union promised to join the war effort against Japan within two months after Germany's surrender; in exchange, the United States and United Kingdom promised to return Sakhalin Island and the Kurile Islands to the Soviet Union.

The Soviet Union declared war on Japan on August 8, 1945.<sup>42</sup> The Russian invasion of Shimushu, the northernmost island of the Kurile Archipelago, began on August 18, three days after Japan surrendered.<sup>43</sup> On August 31, the Commander-in-Chief of the Japanese Fifth Area Army issued an order placing the 89<sup>th</sup> Division under the command of the Commander of the 91<sup>st</sup> Division to facilitate the surrender of the Kurile Islands. Etorofu was occupied even before this order was issued. Kunashiri, Shikotan and the Habomais were completely occupied by September 2, 1945 when General Order No. 1<sup>44</sup> was issued.<sup>45</sup> By September 5, Soviet troops had taken possession of the entire Kurile Archipelago, including Etorofu, Kunashiri, Shikotan, and the Habomais.<sup>46</sup>

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<sup>41</sup> Crimea (Yalta) Conference, 1945: Entry of Soviet Union into War Against Japan, Feb. 11, 1945, U.S.-U.S.S.R.-U.K., 59 Stat. 1823, 3 Bevans 1022. [hereinafter Yalta Agreement], available at <http://www.yale.edu/lawweb/avalon/wwii/yalta.htm> (last visited Nov. 10, 2000), reprinted in *Yalta Agreement on the Kuriles*, DEP'T ST. BULL., Feb. 1946, at 282.

<sup>42</sup> See *Soviet Denunciation of the Pact with Japan*, DEP'T ST. BULL., Apr. 1945, at 811 (declaring denunciation of the neutrality pact between the Soviet Union and Japan). The text is also available at <http://www.yale.edu/lawweb/avalon/wwii/s3.htm> (last modified Oct. 28, 2001). See also Press Release, President Harry S. Truman, Declaration of War on Japan by the Soviet Union, in DEP'T ST. BULL., Aug. 1945, at 207. See also <http://www.yale.edu/lawweb/avalon/wwii/s4.htm> (last modified Oct. 28, 2001).

<sup>43</sup> JOHN J. STEPHAN, *THE KURIL ISLANDS* 162-64 (1974); MINISTRY OF FOREIGN AFFAIRS, JAPAN, *supra* note 33, at 6. See generally Boris Slavinsky, *Soviet Occupation of the Kuril Islands*, STRENGTHENING DEMOCRATIC INSTITUTIONS PROJECT 42-65 (Belfer Ctr. for Science and Int'l Affairs, Occasional Paper, 1992).

<sup>44</sup> Following General Order No. 1, dated September 2, 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 91<sup>st</sup> 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. Memorandum from Robert J. McClurkin, Acting Director of the Office of Northeast Asian Affairs, to U. Alexis Johnson, Deputy Assistant Secretary of State for Far Eastern Affairs, History of Soviet Occupation of the Habomais and Shikotan at the end of World War II, State Dep't Records, Record Group 59 (Oct. 19, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>45</sup> The date of Japan's surrender has appeared differently, ranging from August 28, to September 5, 1945. SLAVINSKY, *supra* note 43, at 76-84.

<sup>46</sup> STEPHAN, *supra* note 43, at 165-66. For further details on the historical background of the Soviet Occupation of the Kurile Islands, see SLAVINSKY, *supra* note 43, at 76-84.

On September 20, all property on the islands was nationalized, 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.<sup>47</sup> In 1947, the Kurile Archipelago was incorporated into the South Sakhalin region of the Russian Soviet Federated Socialist Republic.<sup>48</sup> With only a few exceptions, the approximately 17,000 Japanese on the Kurile Islands<sup>49</sup> were repatriated before 1950.<sup>50</sup>

### 3. 1945 to the Present

The status of the Kurile Islands was addressed in the 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."<sup>51</sup> 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.<sup>52</sup> 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.

In 1956, the Soviet Union and Japan signed a Joint Declaration that terminated the state of war between them and resumed diplomatic relations.<sup>53</sup> This declaration stated that once a peace treaty was concluded, the Soviet Union would hand over Shikotan and the Habomais, the two southernmost of the four disputed islands, to Japan.<sup>54</sup> However, the proposed peace treaty has never been concluded.<sup>55</sup>

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<sup>47</sup> Decree of the Presidium of the Supreme Soviet of the U.S.S.R. on the Creation of the South Sakhalin Province (Oblast) in the RSFSR Khabarovsk Region (Krai), *reprinted in* ALLISON, *supra* note 35.

<sup>48</sup> BERTON, *supra* note 32, at 36.

<sup>49</sup> MINISTRY OF FOREIGN AFFAIRS, JAPAN, *supra* note 33, at 7.

<sup>50</sup> STEPHAN, *supra* note 43, at 166-69.

<sup>51</sup> San Francisco Peace Treaty, *supra* note 12, art. 2(c), 3 U.S.T. 3172, 136 U.N.T.S. 49

<sup>52</sup> For further details on the Allied Powers' policy on the status of Kurile Islands, see generally Fiona Hill, "A Disagreement between Allies: The United Kingdom, the United States and the Soviet-Japanese Territorial Dispute, 1945-1956," 14 J.N.E. ASIAN STUDIES 3 (1995).

<sup>53</sup> Joint Declaration of Japan and the U.S.S.R., Oct. 19, 1956, Japan-U.S.S.R., <http://www.cgjapankhabarovsk.ru/jprdv/dek1956.htm>.

<sup>54</sup> Joint Declaration of Japan and the U.S.S.R., *supra* note 53, art. 9.

<sup>55</sup> MINISTRY OF FOREIGN AFFAIRS, JAPAN, *supra* note 33, at 11.

To date, the territorial dispute over the Kurile Islands remains unresolved, notwithstanding diplomatic efforts including the visit of Presidents Mikhail Gorbachev and Boris Yeltsin to Japan in 1991 and 1993, respectively.<sup>56</sup> Remarkably, even though the territory is inhabited by thousands of people, no serious effort has been or is being made to determine the inhabitants' preference or otherwise demonstrate a serious concern for their interests.

#### 4. *Weighing the Claims*

Japan renounced its claims to the Kuriles in the San Francisco Peace Treaty. Therefore, if Russia can establish that any of the disputed islands are properly recognized as part of the Kuriles, the Russian claim to those islands would be presumptively valid. Similarly, the Japanese must establish that the disputed islands are properly seen as extensions of Hokkaido. Unfortunately for both sides, there is no definitive authority for either proposition. Lacking a contemporary, mutually recognized source for a conclusive definition, both sides have also tried to fortify their positions by arguing that the question was settled in the earlier treaties between the two.

For example, the 1855 Treaty of Shimoda states:

Henceforth the frontier between Japan and Russia will run between the islands of [Etorofu and Uruppu]. The entire island of [Etorofu] belongs to Japan and the entire island of [Uruppu], as well as the other Kuril islands to the north of that island, belong to Russia. . . .<sup>57</sup>

Thus, Russia has attempted to establish a previous Russian claim to Etorofu and Kunashiri by interpreting the Treaty of Shimoda as an agreement on the part of Russia to cede to Japan the islands south of Uruppu in the Kurile Archipelago.<sup>58</sup> Conversely, the term "the other Kuril Islands" in this

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<sup>56</sup> *Id.*

<sup>57</sup> See *supra* note 35 and accompanying text.

<sup>58</sup> A. SOLOVEV, *THE KURILE ISLANDS* 9, 11 (1945), quoted in Memorandum, Soviet Claims to Southernmost Kurile Islands, State Dep't Records, Record Group 59 (Aug. 11, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) (describing the Solovev's book as "obviously the result of considerable research, probably represent[ing] the official Soviet view or something approaching it."). See also Memorandum from Robert A. Fearey (Bureau of Far Eastern Affairs): Southern Kuriles, State Dep't Records, Record Group 59 (Sept. 10, 1947) (on file with the U.S.



provision can be, at least literally, interpreted to mean that among the currently disputed Kurile Islands—Etorofu, Kunashiri, Shikotan, and the Habomais—there are certain islands to be labeled as the single entity of the “Kurile” Islands. As mentioned earlier, the Japanese official translation of the Treaty of Shimoda omits the word “other” from the phrase “the other Kurile Islands.”<sup>59</sup> Thus, there is a strong presumption that Japan manipulated the translation for its purpose, so that the first Russo-Japanese boundary line regarding the Kurile Archipelago excluded the currently disputed Kurile Islands from the term “Kurile.” This presumption is strengthened by the fact that the translations jointly prepared by the Ministries of Foreign Affairs of Russia and of Japan,<sup>60</sup> and other translations in various materials<sup>61</sup> suggest that the Japanese translation is wrong.

The language of Article II of the Treaty of St. Petersburg 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 a certain island or islands in the currently disputed Kurile Islands or even the Kurile Islands themselves as a whole. Therefore, both treaties are evidence that Etorofu and Kunashiri, at least, are parts of the Kurile Archipelago, but neither of them gives any clear indication as to what territory is included in the Kurile Islands.

Therefore, there seems 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 of 1855, which set the

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National Archives and Records Administration in College Park, MD); Interests and Attitudes of Far East Command Powers on Questions relating to the Peace Settlement with Japan (OIR Report No. 4485: Preliminary Draft), State Dep’t Records, Record Group 59 (Aug. 27, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>59</sup> See *supra* note 35.

<sup>60</sup> Foreign Ministry of Japan and Foreign Ministry of the Russian Federation, Joint Compendium of Documents on the History of the Territorial Demarcation between Russia and Japan by the Ministries of Foreign Affairs of the Russian Federation and of Japan, Doc. No. I.7 (Belfer Center for Science and International Affairs, Occasional Paper, 1992).

<sup>61</sup> See, e.g., Treaty of Shimoda, *supra* note 34, 112 Consol. T.S. 467; *Briefing Materials for Moscow Press Working Session, For the Report: Beyond Cold War to Trilateral Cooperation in the Asia-Pacific Region*, STRENGTHENING DEMOCRATIC INSTITUTIONS PROJECT 4 (Belfer Ctr. for Science and Int’l Affairs, Occasional Paper, 1993); John A. Harrison, *JAPAN’S NORTHERN FRONTIER* 165 (1953) (“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. . . .”).

frontier in Etorofu Straits north of Etorofu, both that treaty and the Treaty of St. Petersburg of 1875 indicate that they were considered part of the Kurile Archipelago.

On the other hand, there is a sound legal basis for claiming that the Habomais are not properly part of the Kurile Archipelago. The Habomais were administered as part of Nemuro District of Hokkaido and not joined politically with the Kurile Archipelago until after Japan's surrender. While Russia had previously claimed or possessed most of the Kurile Archipelago, including Etorofu, it never before claimed any part of Shikotan or the Habomais. Although Japan maintains that Shikotan was included within the Kurile Archipelago only for the sake of convenience,<sup>62</sup> there is substantial evidence supporting the argument that the classification was proper.

In light of the historical records and other evidence, the author concludes that Etorofu, Kunashiri, and Shikotan were considered to be parts of the Kurile Archipelago, and the Habomais were recognized as being an extension of Hokkaido.

*a. Etorofu and Kunashiri*

Japanese attempts to exclude Etorofu and Kunashiri from the Kurile Archipelago are not fully supported by even Japanese authorities. For example, the 1988 edition of *Kokushi Dai Jiten* (Large Dictionary of Japanese History) defines the Kurile Archipelago as “[t]wenty-three islands stretching in one line from the Kamchatka Peninsula to the Japanese Archipelago,”<sup>63</sup> thus excluding the Kurile Islands, and more specifically, Etorofu and Kunashiri, from the Japanese Archipelago.

Remarks by Japanese officials have also suggested that Etorofu and Kunashira are properly considered as part of the Kuriles. For example, in his testimony of October 19, 1951, before the Special Committee on the Peace Treaty and the Japan-U.S. Security Treaty of the National Diet, Kumao Nishimura, Director of the Treaties Bureau of the Foreign Ministry of Japan, observed:

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<sup>62</sup> Commentary on Draft Treaty of Peace with Japan, State Dep't Records, Record Group 59 (Dec. 29, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>63</sup> 9 KOKUSHI DAI JITEN 404-05 (1988). See also BERTON, *supra* note 32, at 22.

[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.<sup>64</sup>

Japan’s efforts to exclude Etorofu and Kunashiri from the Kurile Archipelago were also damaged by former Prime Minister Shigeru Yoshida in his speech accepting the San Francisco Peace Treaty on behalf of Japan. Stressing the territorial question, in particular as to the Kurile Islands, Yoshida declared, “[Japanese] ownership of two islands of [Etorofu] and Kunashiri of the South Kurils was not questioned at all by the Czarist government.”<sup>65</sup> This reference to Etorofu and Kunashiri as “Southern Kuriles” by Prime Minister Yoshida repeatedly appeared in his memoirs; for example, “Japanese sovereignty over the Southern Kurils was a fact accepted even by Imperial Russia, while the Hobomai and Shikotan Islands formed an integral part of Hokkaido. . . .”<sup>66</sup>

Other sources that support the inclusion of Etorofu and Kunashiri in the Kurile Archipelago include:

- Administrative definitions that predominantly included Etorofu and Kunashiri in the Kurile Archipelago;<sup>67</sup>

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<sup>64</sup> BERTON, *supra* note 32, at 47.

<sup>65</sup> Sigeru Yoshida, Prime Minister and Minister of Foreign Affairs of Japan, *Verbatim Minutes of the San Francisco Peace Conference* (Sept. 7, 1951), *reprinted in* ALLISON, *supra* note 35, at 128.

<sup>66</sup> SHIGERU YOSHIDA, *THE YOSHIDA MEMOIRS: THE STORY OF JAPAN IN CRISIS* 256 (Kenichi Yoshida trans., 1962).

<sup>67</sup> Memorandum, B-29 Study and Japanese Claims to the Southern Kuriles and Habomais, State Dep’t Decimal File No. 661.9413/3-155 CS/E 1955/3/1, State Dep’t Records, Record Group 59 (Mar. 1, 1955) (on file with the U.S. National Archives and Records Administration in College Park, MD).

- A petition letter to General Douglas MacArthur from Mr. Hidetaro Bando, Chairman of the Hokkaido Prefectural Assembly, identifying Etorofu and Kunashiri as “Southern Kurile Islands;”<sup>68</sup>
- The report on the Kurile Islands, prepared by the Foreign Office of the Japanese Government, acknowledging Etorofu and Kunashiri as part of the southern zone of the Kurile Islands;<sup>69</sup>
- A memorandum of the U.S. 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, and thus indicating that they were considered to be part of the Kurile Islands;<sup>70</sup>
- A background report on the Kurile Islands, which included Etorofu and Kunashiri as part of the Kurile Archipelago, and further stated that they belonged to the “Southern Kurile Islands;”<sup>71</sup>
- The report of a Japanese historian, Irie Keisiro, as reported in *Mainichi* of May 17, 1959, to the effect that “Japan has legally given up the Southern Kurile islands;”<sup>72</sup>
- 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;”<sup>73</sup>

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<sup>68</sup> Hidetaro Bando, Chairman of Hokkaido Prefectural Assembly, to General Douglas MacArthur, Statement in Request for Return of Habomai Islands and Kurile Islands, State Dep’t Records, Record Group 59 (Mar. 3, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Statement in Request for Return of Habomai Islands and Kurile Islands].

<sup>69</sup> Foreign Office, Japanese Government, Minor Islands Adjacent to Japan Proper, Part I. The Kurile Islands, The Habomais and Shikotan (Excerpts), State Dep’t Records, Record Group 59 (Nov. 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>70</sup> Memorandum from Conrad E. Snow, Assistant Legal Advisor for Political Affairs, to Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, Southern Kurile Islands and the Shikotan Archipelago, State Dep’t Records, Record Group 59 (Nov. 25, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Southern Kurile Islands and the Shikotan Archipelago].

<sup>71</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, *supra* note 36.

<sup>72</sup> Airgram, Northern Territories’ Issues, State Dep’t File No. Pol 19 Kuril Is, State Dep’t Records, Record Group 59 (Nov. 25, 1970) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>73</sup> William J. Sebald, U.S. Political Advisor for Japan, Territorial Provisions of Japanese Peace Treaty, State Dep’t Decimal File No. 694.001/10-2650 LWC, State Dep’t Records, Record Group 59 (Oct. 26, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

- A *Mainichi* public opinion poll conducted in December 1950 indicating that an average of seventy-five percent of the respondents desired that the Kurile Archipelago be restored to Japan and lesser majorities seeking the return of the Habomais and Shikotan;<sup>74</sup>
- The resolution adopted by a Japanese national gubernatorial conference addressing the Kurile Archipelago separately from the Habomais and Shikotan;<sup>75</sup>
- Vice Foreign Minister Ryuen Kusaba's declaration before the Lower House Foreign Affairs Committee on March 14, 1951 that "only the Kurile Islands, not the Habomai Group and Shikotan Islands, were dealt with in the Yalta Agreement;"<sup>76</sup>
- A memorandum of the U.S. 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;<sup>77</sup>
- In its advice and consent to the ratification of the San Francisco Peace Treaty, the U.S. Senate mentioned "the Kurile Islands, the Habomai Islands, the island of Shikotan;"<sup>78</sup> and
- The Supreme Commander for the Allied Powers ("SCAP") issued an instruction ("SCAPIN"), No. 677, entitled "Governmental and

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<sup>74</sup> Niles W. Bond, Acting Counselor of Mission in Japan, Territorial Provisions of the Japanese Peace Treaty, State Dep't Decimal File No. 694.001/1-1551 GB, State Dep't Records, Record Group 59 (Jan. 15, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Territorial Provisions of the Japanese Peace Treaty].

<sup>75</sup> Survey of Japanese Reservations concerning the Peace Settlement (OIR Report No. 5611), State Dep't Records, Record Group 59 (Oct. 1, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>76</sup> *Territorial Aspirations*, JIJI PRESS, Mar. 14, 1951 (on file with author).

<sup>77</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

<sup>78</sup> Memorandum, Kurile Islands, State Dep't Decimal File No. 661.941/8-356, State Dep't Records, Record Group 59 (Aug. 3, 1956) (on file with the U.S. National Archives and Records Administration in College Park, MD). See also STAFF OF FOREIGN RELATIONS COMM., 82D CONG., REPORT OF THE COMMITTEE ON FOREIGN RELATIONS ON EXECUTIVES A, B, C, AND D: JAPANESE PEACE TREATY AND OTHER TREATIES RELATING TO SECURITY IN THE PACIFIC 8 (2d Sess. 1952) ("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 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. . . .").

Administrative Separation of Certain Outlying Areas from Japan” on January 29, 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.”<sup>79</sup>

b. *Shikotan and the Habomais*

At the time of Japan’s surrender, Soviet forces occupied the Kurile Archipelago, including the Habomais and Shikotan. This occupation was not protested by any Allied Government or by the SCAP, and in fact had been specifically acknowledged in the determination of the permitted Japanese fishing area.<sup>80</sup> In discussing the disposition of the Kurile Islands, S.W. Boggs, a geographer at the U.S. Department of State, stated that he had been unable to find any basis for retention of the Habomais by Japan.<sup>81</sup> He further stated that while he could present no definitive case to prove that Shikotan was not part of the Kurile Archipelago, he could present no definitive case to prove that it was part of the Kurile Archipelago either.<sup>82</sup>

It is, therefore, more complicated to determine the status of Shikotan and the Habomais than is the case with Etorofu and Kunashiri. Nonetheless, the Russian claims to these two islands are somewhat weaker than those of the Japanese. This is because it is evident that the inclusion of Shikotan and the Habomais into the Kuriles was done by the Soviet Union for the purpose of making a claim pursuant to the Yalta Agreement of 1945.<sup>83</sup> Also, Russia

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<sup>79</sup> Supreme Commander for the Allied Powers, SCAPIN No. 677, Governmental and Administrative Separation of Certain Outlying Areas from Japan, S SCAP File, State Dep’t Records, Record Group 59 (Jan. 29, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter SCAPIN No. 677]. See also *infra* Part II.A.2.

<sup>80</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

<sup>81</sup> This statement was made in reply to a suggestion to exclude 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. Disposition of the Outlying and Minor Japanese Islands, State Dep’t Records, Record Group 59 (Mar. 6, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>82</sup> Consideration, Disposition of Southern Sakhalin and the Kurile Islands; Disposition of the Outlying and Minor Japanese Islands, State Dep’t Records, Record Group 59 (Mar. 25, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>83</sup> BERTON, *supra* note 32, at 8.

never claimed or physically occupied Shikotan or the Habomais before September 1945.<sup>84</sup>

The sources supporting the inclusion of Etorofu and Kunashiri in the Kurile Archipelago, as mentioned earlier,<sup>85</sup> have the converse effect of excluding Shikotan and the Habomais from the Kurile Archipelago. There are other sources supporting this conclusion:

- Memoranda of the U.S. Department of State concluding that Shikotan and the Habomais were not historically part of the Kurile Islands;<sup>86</sup>
- The reality that the Japanese Socialist and People's Democratic parties have demanded confirmation of Japanese sovereignty over the Kurile Islands and insisted upon the return of Shikotan and the Habomais;<sup>87</sup> and
- A memorandum of the U.S. Department of State acknowledging that U.S. sponsorship of Japan's claim to Shikotan and the Habomais indicated to the Japanese the desire of the United States to support their claims in this area to the maximum extent permitted by existing international agreements.<sup>88</sup>

On the other hand, there also exist sources supporting the inclusion of Shikotan and the Habomais in the Kurile Archipelago:

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<sup>84</sup> Memorandum from Robert A. Fearey, Bureau of Far Eastern Affairs, to John F. Dulles, Consultant to the Secretary of State, Sakhalin and the Kuriles, State Dep't Records, Record Group 59 (Mar. 21, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>85</sup> Memorandum, B-29 Study and Japanese Claims to the Southern Kuriles and Habomais, *supra* note 67.

<sup>86</sup> Memorandum from Robert A. Fearey, Bureau of Far Eastern Affairs, Sakhalin, the Kurile Islands, the Habomais and Shikotan, State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Sakhalin, the Kurile Islands, the Habomais and Shikotan]; Outgoing Telegram from John F. Dulles, Secretary of State, State Dep't Decimal File No. 661.941/6-3055, State Dep't Records, Record Group 59 (July 1, 1955) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Outgoing Telegram from John F. Dulles]; Southern Kurile Islands and the Shikotan Archipelago, *supra* note 70.

<sup>87</sup> Survey of Japanese Reservations concerning the Peace Settlement, *supra* note 75. On July 31, 1952, at a Plenary Session, the Japanese House of Representatives passed the resolution on returning Shikotan and the Habomais to Japan. See Foreign Service Dispatch from U.S. Embassy in Tokyo: Accomplishments of the 13th Diet, State Dep't Decimal File No. 794.21/9-1152, State Dep't Records, Record Group 59 (Sept. 11, 1952) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>88</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

- An article in the *Oriental Economist*, known in Japan as an influential and conservative publication, regarding Russian occupation of Shikotan and the Habomais in the “Kurile group;”<sup>89</sup>
- A memorandum of the U.S. Department of State on the question of the Kurile Islands, in which the Geographer’s Office stated that there is no reason to separate the southern and central islands from the northern islands;<sup>90</sup> and
- The fact that the waters of Shikotan and the Habomais and of Etorofu and Kunashiri constitute a unit for fishing operations.<sup>91</sup>

There is a convincing argument, however, that Shikotan cannot be claimed as part of Hokkaido. Accordingly, the status of Shikotan and the Habomais are examined separately.

*i. Shikotan*

Although Japan maintains that Shikotan is geologically an extension of Cape Nosappu of Hokkaido,<sup>92</sup> many historical documents support a contrary conclusion. Administrative records of Shikotan show that it and the Kurile Archipelago were governed jointly under the Branch of the Hokkaido Administration.<sup>93</sup> For example, Shikotan was brought under the Hanasaki-gun of Nemuro-Koku in 1869, and later it was changed to Shikotan-gun, Kamichishima-Koku in 1885. The village head office of Shakotan-village (Shikotan) was established in 1887.<sup>94</sup> In July 1880, six villages were set up 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 April 1, 1923, in: Tomari village and Ruyabetsu of Kunashiri; Shakotan village (Shikotan); Rubetsu village, Sana village, and Shibetoro village of Etorofu. On November 1, 1933, the name of Shakotan village was changed to Shikotan village and in June 1943, the

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<sup>89</sup> Survey of Japanese Reservations concerning the Peace Settlement, *supra* note 75.

<sup>90</sup> Consideration, Disposition of the Parcel and Spratly Islands, State Dep’t Records, Record Group 59 (Feb. 14, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>91</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

<sup>92</sup> KOKUSHI DAI JITEN, *supra* note 63, at 405; *see also* BERTON, *supra* note 32, at 22.

<sup>93</sup> BERTON, *supra* note 32, at 25.

<sup>94</sup> Statement in Request for Return of Habomai Islands and Kurile Islands, *supra* note 68.



Hokkaido municipality system was established.<sup>95</sup> Thus, the islands of Kunashiri, Etorofu and Shikotan were under the municipality system.<sup>96</sup>

The inclusion of Shikotan in the Kurile Archipelago is also supported by:

- An office memorandum of the U.S. Department of State on substantive problems that categorized the available options as “the southern Kurils and the Habomais,” or “the lower Kurils and [the] Habomais;”<sup>97</sup>
- A background report on the Kurile Islands that referred to “Habomai islands and southern Kurile islands,” or “Habomai Island and Kurile Archipelagoes;”<sup>98</sup>
- The authoritative multi-volume Russian “Large Encyclopedia” that includes Shikotan in the Kurile Archipelago;<sup>99</sup>
- Various pre-1945 Japanese publications.<sup>100</sup>

ii. *The Habomais*

The small secondary chain of islands, immediately to the east of Hokkaido and to the south of Kunashiri, is known as the Habomai group/Habomais (also as “Suisho” or “Goyomai” Islands). The argument that the Habomais are an extension of Hokkaido is supported by the following sources:

- Mr. Dulles stated at the San Francisco Peace Conference that the U.S. interpretation of the words “Kurile Islands” excluded the Habomais;<sup>101</sup>

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<sup>95</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, *supra* note 36.

<sup>96</sup> For the argument that Shikotan was included with the southern Kurile Archipelagos for the sake of the administrative convenience, see Sakhalin, the Kurile Islands, the Habomais and Shikotan, *supra* note 86.

<sup>97</sup> Memorandum, Japanese Peace Treaty, State Dep’t Decimal File No. 740.0011 PW (PEACE)/8-3149, State Dep’t Records, Record Group 59 (Aug. 31, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>98</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, *supra* note 36.

<sup>99</sup> BERTON, *supra* note 32, at 25.

<sup>100</sup> *Id.*

- Administratively, the Habomais were part of Hokkaido since at least 1894;<sup>102</sup>
- The Habomais are geologically older than the rugged, often precipitous, Kurile Islands and apparently constitute an extension of the eastern Hanasaki Peninsula of Hokkaido;<sup>103</sup> and
- A statement by the Social Democratic Party's Secretary General, specifically demanding the return of the Habomais.<sup>104</sup>

There is also an argument that the Habomais have no relation to the phrase "The Kurile" in the Yalta Agreement, since these islands may have been under the occupation of the Supreme Commander of U.S. Army & Navy, through the General Order No. 1, as a part of the minor islands close to mainland Japan.<sup>105</sup>

### B. *The Senkaku Islands*

The Senkaku Islands are a group of eight uninhabited islands, comprising five small volcanic islands and three rocky outcroppings,<sup>106</sup> with a total land area of 6.32 square kilometers located in the East China Sea, scattered about in the area from 25° 40' to 26° North latitude and from 123° 25' to 124° 45' East longitude, approximately 200 kilometers northeast of Taiwan and 300 kilometers west of the Okinawa.<sup>107</sup> If considered to be

<sup>101</sup> See Memorandum, Kurile Islands, *supra* note 78 (mentioning Southern Kurile, Shikotan, and the Habomais, respectively, as well as Etorofu and Kunashiri, as "the fairly large islands of the Southern Kuriles"). See also Airgram to US Department of State from US Consulate in Sapporo, Value of the Southern Kuriles, Shikotan and the Habomais to Japan, State Dep't File No. Pol 32-1 Japan-USSR; Pol 2 Kuril Is, State Dep't Records, Record Group 59 (May 14, 1964) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>102</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, *supra* note 36; Sakhalin, the Kurile Islands, the Habomais and Shikotan, *supra* note 86.

<sup>103</sup> Memorandum from Samuel W. Boggs, Special Advisor on Geography, Office of Intelligence Research, Disposition of the Kuriles in the Treaty with Japan, State Dep't Records, Record Group 59 (June 23, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Disposition of the Kuriles in the Treaty with Japan].

<sup>104</sup> Territorial Provisions of the Japanese Peace Treaty, *supra* note 74.

<sup>105</sup> Explanation Asking for the Restoration of the [Habomai] Islands & the Kurile Islands, *supra* note 36.

<sup>106</sup> The term "Senkaku Islands" is the collective name for Uotsuri-shima/Tiaoyutai, Kuba-shima (or Kobi-sho)/Huangweiyu, Taisho-jima (or Akao-sho)/Chihweiyu, Kita-kojima/Beixiao Dao, Minami-kojima (or Minami-koshima)/Nanxiao Dao, Oki-no-Kita-Iwa/Dabeixiao Dao, Oki-no-Minami-Iwa/Danaxiao Dao, and Tobise/Feilai Dao. See Dzurek, *supra* note 5, at 4; SUGANUMA, *supra* note 5, at 12.

<sup>107</sup> SUGANUMA, *supra* note 5, at 11.

“islands” under the 1982 Law of the Sea Convention,<sup>108</sup> sovereignty over the Senkaku Islands could affect 20,750 square nautical miles of marine space,<sup>109</sup> and the vast mineral resources in that area. The on-going territorial dispute among Japan, China, and Taiwan<sup>110</sup> over the Senkaku Islands, which are occupied by Japan, involves a number of significant issues, including future offshore oil development. This dispute has impeded the stability of East Asia, and, in particular, Japan’s bilateral relations in the region.

### 1. *Territorial Status of the Senkaku Islands Prior to 1945*

Historically, as early as the Sixteenth century, three of the Senkaku Islands, namely, Uotsuri-shima, Kuba-shima, and Taisho-jima, were specifically mentioned by their Chinese names—Tiaoyutai, Huangweiyu, and Chihweiyu—in the travel accounts of the Chinese envoys sent by the Ming Dynasty to hold investiture ceremonies for the kings of the Ryukyu Islands.<sup>111</sup> The Chinese envoys usually proceeded to the Ryukyu Islands from Fuchou, via Taiwan and the islets to the northeast of Taiwan, including Tiaoyutai, Huangweiyu, and Chihweiyu.<sup>112</sup> These Tiaoyutai islets were then considered the boundary separating Taiwan from the Ryukyu Islands.<sup>113</sup>

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<sup>108</sup> See *supra* note 9 and accompanying text. The dates of ratification of the Law of the Sea Convention by the disputants over the Senkaku Islands are as follows: China (June 7, 1996, with declaration), Japan (June 20, 1996). See *Chronological List of Ratifications, Accessions and Successions to the Convention and their Regional Groups, as at 30 November 1998*, 38 LAW OF THE SEA BULLETIN 4 (1999). It is interesting to note that Article 3 of China’s declaration states: “The People’s Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in Article 2 of the Law of the People’s Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992.” U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982, at 23 (1997).

<sup>109</sup> JANE’S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 35.

<sup>110</sup> Without prejudice to their respective claims, this article treats China and Taiwan as separate entities.

<sup>111</sup> JANE’S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 49.

<sup>112</sup> For details of the Chinese investiture mission to the Ryukyu Islands during the Ming and Qing Dynasties, see SUGANUMA, *supra* note 5, at 45-87; A Note to U.S. Secretary of State from Chow Shu-kai, Taiwanese Ambassador in U.S., State Dep’t File No. Pol 32-6 Senkaku Is, State Dep’t Records, Record Group 59 (May 14, 1964) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>113</sup> SUGANUMA, *supra* note 5, at 49-85.

As a result of its defeat in the Sino-Japanese War, China ceded Taiwan to Japan under the Treaty of Shimonoseki in May 1895.<sup>114</sup> Article II of the Treaty of Shimonoseki provided that “China cedes to Japan in perpetuity and full sovereignty the following territories: . . . (b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa. . . .”<sup>115</sup> In the meantime, following a January 14, 1895 Japanese Cabinet Decision to erect a marker on the Senkaku Islands, the islands were formally incorporated into Yaeyama County, Okinawa Prefecture.<sup>116</sup> Since 1896, they have been a part of Ishigaki City.

## 2. *Postwar Disposition of the Senkaku Islands*

Taiwan was returned to China at the end of World War II in 1945, based upon the 1943 Cairo Declaration and the 1945 Potsdam Proclamation. Japan accepted the terms of the Cairo Declaration to the effect that “Japan shall be stripped of . . . all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, [which] shall be restored to the Republic of China.”<sup>117</sup> In the Potsdam Proclamation, the signatories affirmed that the terms of the Cairo Declaration would be carried out and limited Japanese sovereignty to the four major islands of Japan and to “such minor islands as we determine.”<sup>118</sup>

Although the Allied Powers did not specifically mention disposition of the Senkaku Islands in the territorial clause of the San Francisco Peace Treaty, they did decide to place the Senkaku Islands under U.S. administration. Article 2(b) of the San Francisco Peace Treaty, signed by neither China nor Taiwan, simply states that “Japan renounces all right, title and claim to Formosa and Pescadores.”<sup>119</sup> Article 3 provided:

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<sup>114</sup> Apr. 17, 1895, Japan-China, 181 Consol. T.S. 217 [hereinafter Treaty of Shimonoseki], available at <http://newtaiwan.virtualave.net/shimonoseki01.htm>.

<sup>115</sup> 181 Consol. T.S. at 218. “Formosa” is the old name of Taiwan. Today, the term is sometimes used with reference to the main island of Taiwan.

<sup>116</sup> MINISTRY OF FOREIGN AFFAIRS, JAPAN, *supra* note 5.

<sup>117</sup> First Cairo Conference, Dec. 1, 1943, 3 Bevens 858, *reprinted in* U.S. DEP’T OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: 1941-1949, BASIC DOCUMENTS 20 (1950) [hereinafter A DECADE OF AMERICAN FOREIGN POLICY], available at <http://www.yale.edu/lawweb/avalon/wwii/cairo.htm>. [hereinafter Cairo Declaration].

<sup>118</sup> Terms for Japanese Surrender, July 26, 1945, para. 8, 3 Bevens 1204 [hereinafter Potsdam Proclamation].

<sup>119</sup> San Francisco Peace Treaty, *supra* note 12, art. 2(b), 3 U.S.T. 3172, 136 U.N.T.S. 49.

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands). . . . Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.<sup>120</sup>

The term "Nansei Shoto" was understood by the United States and Japan to include the Senkaku Islands, which were being administered as a part of Okinawa Prefecture. The U.S. Civil Administration Proclamation No. 27, of December 25, 1953, further defined the territorial jurisdiction of the U.S. Civil Administration of the Ryukyu Islands and the Government of the Ryukyu Islands as "those islands, islets, atolls and reefs as well as their territorial waters" within specific geographic coordinates that included the Senkaku Islands.<sup>121</sup>

The status of the Senkaku Islands received little attention in the 1950s and 1960s. That changed when the Economic Commission for Asia and the

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<sup>120</sup> *Id.* art. 3, 3 U.S.T. 3172, 136 U.N.T.S. 51

<sup>121</sup> Proclamation No. 27, (Dec. 25, 1953), On the Geographical Boundary of the Ryukyu Islands, provides:

To the inhabitants of the Ryukyu Islands, I, Major General David Ogden, Deputy President of United States Civil Administration in the Ryukyu Islands acting under the authority of the President of the Civil Administration, bearing in mind the necessity, arising from the provisions of the Treaty of Peace with Japan, which was signed on 8 September 1951 and the Agreement with Japan on the Amami Islands, which enters into force on 25 December 1953, to redefine the geographical boundary of United States Civil Administration and the Government of Ryukyu, which has so far been determined by proclamations, orders and regulations of the Civil Administration, hereby proclaim as follows:

1. The jurisdiction of United States Civil Administration in the Ryukyu Islands and the Government of Ryukyu is redefined to be limited to those islands, islets, atolls and reefs as well as their territorial waters within the following geographical boundary, which starts from 28 Degrees North, 124 Degrees 40 Minutes East; going through 24 Degrees North, 122 Degrees East; 24 Degrees North, 133 Degrees East; 27 Degrees North, 131 Degrees 50 Minutes East; 27 Degrees North, 128 Degrees 18 Minutes East; 28 Degrees North, 128 Degrees 18 Minutes East, and comes back to the starting point.

2. Any proclamation, order, regulation, directive or any other provision of United States Civil Administration in the Ryukyu Islands, which has set up a boundary or ordered the exercise of its jurisdiction beyond the said boundary, shall be amended following the previous section.

3. This proclamation enters into force on 25 December 1953.

Far East of the United Nations Economic and Social Council suggested the possible existence of large hydrocarbon deposits in the waters off the Senkaku Islands. After extensive surveys in 1968 and 1969, it was reported that the shallow sea floor between Japan and Taiwan might contain substantial deposits of petroleum, perhaps comparable to the Persian Gulf area.<sup>122</sup> The prospect of oil moved the three nations to declare the priority of their claims.<sup>123</sup>

The end of the American occupation of Okinawa also served to escalate the war of words. The Agreement Concerning the Ryukyu Islands and Daito Islands,<sup>124</sup> signed by the United States and Japan on June 17, 1971, included the Senkaku Islands as part of Okinawa. Both China and Taiwan challenged the legitimacy of the transfer.

Recently, there have been occasional flare-ups in the dispute, sparked by actions such as provocative visits to the disputed islands by nationals of the claimants. Japan and China sought to defuse the dispute by signing a provisional fisheries agreement in November 1997.<sup>125</sup> Though it resulted in a harsh reaction by Taiwan, it was agreed that formal delimitation of the exclusive economic zone would be deferred, joint management of the area between 30° 40' North and 27° North and beyond 52 nautical miles from the coasts of Japan and China would be provided, and traditional fishing activities would be continued in the vicinity of the disputed islands, with joint setting of fishing quotas for that area.<sup>126</sup>

### C. *The Liancourt Rocks*

The Liancourt Rocks include two tiny rocky islets, the East Island (Tongdo/Onnajima) and the West Island (Sodo/Otokojima), as well as numerous small reefs. The Liancourt Rocks are located 93 kilometers east

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<sup>122</sup> *Report of the Sixth Session of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas*, U.N. Doc. E/CN.11/L.239 (1970), at 51-67; see also Park, *supra* note 4, at 248-49; SUGANUMA, *supra* note 5, at 129-31.

<sup>123</sup> Memorandum to Ambassador Johnson from Winthrop G. Brown, Chronology of Events relating to Status of the Senkaku Islands, State Dep't File No. Pol 32-6 Senkaku Is; XR Pol 19 Ryu Is, State Dep't Records, Record Group 59 (June 7, 1971) (on file with the U.S. National Archives and Records Administration in College Park, MD). See also SUGANUMA, *supra* note 5, at 131-35.

<sup>124</sup> Agreement Concerning the Ryukyu Islands and the Daito Islands, June 17, 1971, U.S.-Japan, 23 T.I.A.S. 475.

<sup>125</sup> Agreement on Fisheries, Nov. 11, 1997, China-Japan, *reprinted* in 41 JAPANESE ANNUAL INT'L L. 122 (1998).

<sup>126</sup> JANE'S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 102-03.

of Korea's Ullung Island and 157 kilometers northwest of Japan's Oki Islands. Korea and Japan have contested the ownership of Liancourt Rocks, which are currently occupied by Korea, since the end of World War II. Korea's status as a former colony of Japan has complicated the dispute because after 1910 there was no border between the two countries. Therefore, in contrast to the disputes over the Kuriles and the Senkakus, the two parties have relied on the priority of their historical claims, rather than invoking the favorable interpretation of treaties.

Under the terms of the Law of the Sea Convention, the outcome of maritime boundary disputes often depends on the ownership and classification of islands or rocks capable of sustaining human habitation or economic life.<sup>127</sup> As a result, sovereignty over the Liancourt Rocks has become increasingly important, although the size of their territory is relatively small.<sup>128</sup> If considered to be "islands" under the Law of the Sea Convention, ownership of the Liancourt Rocks could affect 16,600 square nautical miles of marine space.<sup>129</sup> Thus, the issues at stake in the Liancourt Rocks dispute go beyond mere national pride.

### 1. *The Status of the Liancourt Rocks Prior to 1945*

Japan annexed Korea in the aftermath of the Russo-Japanese War in a series of agreements made between 1904 and 1910.<sup>130</sup> During this period,

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<sup>127</sup> Law of the Sea Convention, *supra* note 9, art. 121(1), 21 I.L.M. at 1291.

<sup>128</sup> The total area is 186,121 square meters. See Lee, *supra* note 6, at 4.

<sup>129</sup> JANE'S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 171; see also JOHNSTON & VALENCIA, *supra* note 3, at 113.

<sup>130</sup> Protocol Concluded between Japan and Korea, Regarding the Situation of Korea, Feb 23, 1904, Japan-Korea, reprinted in JOHN M. MAKI, CONFLICT AND TENSION IN THE FAR EAST: KEY DOCUMENTS, 1894-1960 23-24 (1961), provides:

Article I. [T]he Imperial Government of Korea shall place full confidence in the Imperial Government of Japan and adopt the advice of the latter in regard to improvements in administration . . . Article IV. In case the welfare of the Imperial House of Korea or the territorial integrity of Korea is endangered by aggression of a third Power or by internal disturbances, the Imperial Government of Japan shall immediately take such necessary measures as the circumstances require, and in such cases the Imperial Government of Korea shall give full facilities to promote the action of the Imperial Japanese Government: The Imperial Government of Japan may, for the attainment of the above-mentioned objects, occupy, when the circumstances require it, such places as may be necessary from strategical [sic] points of view.

The Treaty of Annexation, Aug. 22, 1910, Japan-Korea, reprinted in MAKI, *supra*, at 24-25, provides:

Japan specifically laid its claim to the Liancourt Rocks by officially incorporating them into Shimane Prefecture. A Cabinet Decision on January 28, 1905 and the Shimane Prefecture Notice 40, issued on February 22, 1905, declared that the island 85 miles northwest of the Oki Islands should be designated as “*Takeshima*” and be placed under the jurisdiction of the head of Oki Islands.<sup>131</sup> During World War II, the 1943 Cairo Declaration<sup>132</sup> primarily decided the terms of territorial disposition with respect to Korea. The Potsdam Proclamation,<sup>133</sup> in stating: “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu and Shikoku, and such minor islands as we determine,” indicated that other minor Japanese islands might be detached from Japan, at the discretion of the Allied Powers.<sup>134</sup>

## 2. *The Postwar Status of the Liancourt Rocks*

The status of the Liancourt Rocks was not addressed in Article 2(a) of the San Francisco Peace Treaty.<sup>135</sup> Instead, the treaty provided that “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of *Quelpart*,<sup>136</sup> *Port Hamilton*<sup>137</sup> and *Dagelet*.”<sup>138</sup> Following Japan’s surrender, the Supreme Commander for the Allied Powers removed the Liancourt Rocks from Japanese jurisdiction, and U.S. armed forces controlled and used the area as a bombing range.<sup>139</sup>

On January 18, 1952, President Syngman Rhee of Korea issued the Korean Presidential Proclamation of Sovereignty over the Adjacent Sea, creating the so-called “*Peace Line*” or “*Syngman Rhee Line*,” which claimed

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Article I. His Majesty the Emperor of Korea makes complete and permanent cession to His Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea. Article II. His Majesty the Emperor of Japan accepts the cession mentioned in the preceding article, and consents to the complete annexation of Korea to the Empire of Japan.

<sup>131</sup> Kazuo Hori, *Japan’s Incorporation of Takeshima into Its Territory in 1905*, 28 KOREA OBSERVER 524 (1997); Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 456-61 (1997).

<sup>132</sup> Cairo Declaration, *supra* note 117, 3 Bevens 858.

<sup>133</sup> Potsdam Proclamation, *supra* note 118, 3 Bevens 1205.

<sup>134</sup> *Id.* para 8.

<sup>135</sup> San Francisco Peace Treaty, *supra* note 12, art. 2(a), 3 U.S.T. 3172, 136 U.N.T.S. 49.

<sup>136</sup> Cheju Island in Korean.

<sup>137</sup> Keomun Island in Korean.

<sup>138</sup> Ullung Island in Korean.

<sup>139</sup> Division of Research for Far East, Office of Intelligence Research, DRF Information Paper No. 326, Notes on Certain Islands Adjacent to or Formerly Occupied by Japan (Unedited Draft), State Dep’t Records, Record Group 59 (Apr. 19, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).



Korean jurisdiction over waters within a line running an average of 60 nautical miles from the Korean coast.<sup>140</sup> Aimed principally at excluding the Japanese from the Sea of Japan/East Sea, the Rhee Line explicitly stated Korea's claim to the Liancourt Rocks. Japan responded by protesting Korea's unilateral proclamation of jurisdiction over the high seas, and by declaring its non-recognition of the Korean claim to the Liancourt Rocks.<sup>141</sup>

Korea has taken numerous steps to develop the disputed area since 1952, including the recent construction of a wharf on the Liancourt Rocks. There has also been the continuous Korean presence on the Liancourt Rocks of at least one or two fishing families and a permanent coastguard.

Despite disagreement over the ownership of the Liancourt Rocks, the two claimants signed the Treaty on Basic Relations between Korea and Japan on June 22, 1965, which normalized their diplomatic relations.<sup>142</sup> The treaty did not address the status of the Liancourt Rocks.<sup>143</sup>

The territorial dispute over the Liancourt Rocks resurfaced in 1996 as a consequence of new, revised and modified exclusive economic zone ("EEZ") claims<sup>144</sup> by both sides in the wake of the ratification of the Law of the Sea Convention.<sup>145</sup> In particular, Japan's declaration of an EEZ represented a marked departure from its previous policy of restraint regarding territorial issues.<sup>146</sup> Japan's EEZ claims were construed by Korea

<sup>140</sup> The full text reprinted in CHI YOUNG PAK, *THE KOREAN STRAITS* 126 (1988). For a map, *see id.* at 16-20.

<sup>141</sup> *THE PRACTICE OF JAPAN IN INTERNATIONAL LAW 1961-1970*, *supra* note 3, at 67-71.

<sup>142</sup> Treaty on Basic Relations between Korea and Japan, June 22, 1965, Korea-Japan, 583 U.N.T.S. 33.

<sup>143</sup> *See id.*

<sup>144</sup> For the most recent EEZ claims by the disputants over the Liancourt Rocks, refer to the following legislation: Exclusive Economic Zone Act, No. 5151 (1996) (Korea), *reprinted in JANE'S EXCLUSIVE ECONOMIC ZONES*, *supra* note 10, at 171; Law on the Exclusive Economic Zone and the Continental Shelf, No. 74 (1996) (Japan), *reprinted in 35 LAW OF THE SEA BULLETIN* 94 (1997).

<sup>145</sup> 21 I.L.M 1261, *supra* note 9. *See supra* note 144 for the dates of ratification.

<sup>146</sup> Law on the Exclusive Economic Zone and the Continental Shelf, No. 74, states that Japan's EEZ:

[C]omprises the areas of the sea extending from the baseline of Japan . . . to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea) and its subjacent seabed and subsoil. Provided that, where any part of that line lies beyond the median line . . . as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line) shall be substituted for that part of the line.

*See supra* note 144. The law defines the median line as "the line every point of which is equidistant from the nearest point on the baseline of Japan and the nearest point on the baseline from which the breadth of the territorial sea pertaining to the foreign coast of Japan is measured." *Id.*

as an attempt to usurp Korean sovereignty over the disputed territory, and provoked a harsh response.

More recently, Korea and Japan signed a fisheries agreement, which took effect on January 22, 1999.<sup>147</sup> This agreement sets quotas for each state's fishermen in the other's EEZ and establishes a joint fishing zone around the Liancourt Rocks.<sup>148</sup>

### 3. *Competing Claims to the Liancourt Rocks*

The official Korean position is that at one time the Liancourt Rocks were part of the Kingdom of Korea.<sup>149</sup> Korea's claims are based on numerous Korean historical records, including some written in the eighth century, indicating that the Liancourt Rocks became part of Korea in 512 A.D. Additionally, Korea asserts that various maps verify its title to both the Liancourt Rocks and Ullung Island, of which, Korea argues, the Liancourt Rocks are appendages.<sup>150</sup>

On the other hand, Japan's historical claims are based on records documenting Japanese ownership of the Liancourt Rocks from 1650, which indicate the granting of the Liancourt Rocks to what is known today as Tottori Prefecture.

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Japan established straight baselines around much of its coast by means of its Law Amending the Law on the Territorial Sea and the Contiguous Zone (1996). Some of these straight baselines are in excess of 50 nautical miles in length and connect islands, which are arguably remote from the mainland coastline. Japan has not, however, provided details of the precise extent of its EEZ claim. See BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, 120 LIMITS IN THE SEAS 3-18 (1998). For charts showing Japanese territorial seas and straight baselines, see <http://www.jhd.go.jp/cue/ENGAN/ryokai/tokutei/tokutei2.html> (last visited Jan. 7, 2001), <http://www.jhd.go.jp/cue/ENGAN/ryokai/kakudai2/itiran2.html> (last visited Jan. 7, 2001); and see also JANE'S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 102-03.

<sup>147</sup> Agreement on Fisheries, Jan. 22, 1999, Japan-Korea, *reprinted in* HEE KWON PARK, *THE LAW OF THE SEA AND NORTHEAST ASIA* 215-23 (2000).

<sup>148</sup> JANE'S EXCLUSIVE ECONOMIC ZONES, *supra* note 10, at 171.

<sup>149</sup> For further information on the historical background of Korea, see generally HORACE H. ALLEN, *A CHRONOLOGICAL INDEX: SOME OF THE CHIEF EVENTS IN THE FOREIGN INTERCOURSE OF KOREA FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE TWENTIETH CENTURY* (1901); 1-2 HOMER B. HULBERT, *THE HISTORY OF KOREA* (1905); YOSHI S. KUNO, *JAPANESE EXPANSION ON THE ASIATIC CONTINENT* (1937-1940); M. FREDERICK NELSON, *KOREA AND THE OLD ORDERS IN EASTERN ASIA* (1945).

<sup>150</sup> See generally Hoon Lee, *Dispute over Territorial Ownership of Tokdo in the Late Choson Period*, 28 *KOREA OBSERVER* 389-92 (1997); Yong-Ha Shin, *A Historical Study of Korea's Title to Tokdo*, 28 *KOREA OBSERVER* 333-48 (1997). See also John M. Steeves, First Secretary of US Embassy in Japan, Foreign Service Despatch [sic] from US Embassy, Japan, Koreans on Liancourt Rocks, State Dep't Decimal File No. 694.9513/10-352, State Dep't Records, Record Group 59 (Oct. 3, 1952) (on file with the U.S. National Archives and Records Administration in College Park, MD).

Japan also relies on other pre-nineteenth century documents providing evidence of Japanese fishermen's use of the Liancourt Rocks during the seventeenth and nineteenth centuries, and Japanese hunting of sea lions on the Liancourt Rocks during the early twentieth century.<sup>151</sup>

### III. TERRITORIAL DISPOSITIONS AND THE SAN FRANCISCO PEACE TREATY WITH JAPAN OF 1951

#### A. *The Wartime Declarations*

There was general agreement that the San Francisco Peace Treaty could only endorse the territorial agreements made at Cairo, Yalta, and Potsdam.<sup>152</sup> In fact, the territorial dispositions of the San Francisco Peace Treaty followed the terms of these agreements and U.S. studies and policy decisions relating to the implementation of these agreements.<sup>153</sup>

The pertinent provisions of these agreements are: "Japan will . . . be expelled from all other territories which she has taken by violence and greed" in the Cairo Declaration on December 1, 1943;<sup>154</sup> "The Kuril islands shall be handed over to the Soviet Union" in the Yalta Agreement of February 11, 1945;<sup>155</sup> "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine" in the Potsdam Proclamation of July 26, 1945;<sup>156</sup> and "[Japan] . . . accept[s] the provisions set forth in the [Potsdam Proclamation]" in the Japanese government's statement accepting U.S. terms of surrender, dated August 14, 1945.<sup>157</sup>

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<sup>151</sup> See generally Hori, *supra* note 131, at 477-88; Kajimura, *supra* note 131, at 423-35.

<sup>152</sup> Oral communication from Hubert Graves, Counselor, British Embassy, to Hugh Borton, Acting Special Assistant to the Director, Office of Far Eastern Affairs, State Dep't Decimal File No. 740.0011 PW (PEACE)/10-847, State Dep't Records, Record Group 59 (Oct. 8, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>153</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

<sup>154</sup> See Cairo Declaration, *supra* note 117, 3 Bevans 858.

<sup>155</sup> Yalta agreement, *supra* note 41, 59 Stat. 1823, 3 Bevans 1022, art. 3.

<sup>156</sup> Potsdam Proclamation, *supra* note 118, para. 8, 3 Bevans 1205.

<sup>157</sup> Press Release, President Harry S. Truman, Japanese Acceptance of Potsdam Declaration, *in* DEP'T ST. BULL., Aug. 1945, at 255.

### 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,” although it did add “Japan will also be expelled from all other territories which she has taken by violence and greed.”<sup>158</sup> 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.”<sup>159</sup>

It is quite correct to say that Japan did not acquire the Kurile Islands by violence, but it might be well to remember that they were, for a century, a matter of dispute with Russia. Moreover, the 1855 Treaty of Shimoda set the frontier between the two countries 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.

### 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 Yalta Agreement made by 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.

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<sup>158</sup> See Cairo Declaration, *supra* note 117, 3 Bevens 858.

<sup>159</sup> William J. Sebald, U.S. Political Advisor for Japan, Views on Peace Treaty with Japan, State Dep't Records, Record Group 59 (Feb. 10, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

A report on the discussions at Yalta concerning the Kurile Archipelago by Charles E. Bohlen<sup>160</sup> notes a conversation between Roosevelt and Stalin on February 8, 1945, in the following terms:

MARSHAL STALIN said that he would like to discuss the political conditions under which the U.S.S.R. 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. . . .<sup>161</sup>

A memorandum by Mr. W. Averell Harriman<sup>162</sup> concerning the events of February 10, 1945, contained the following statement:

Mr. Molotov<sup>163</sup> . . . handed me an English translation of the draft of Marshal Stalin's political conditions for Russia's entry in the war against Japan as discussed with the President in February. . . . 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.<sup>164</sup>

In that context, it could be argued that, on a historical basis, certain 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. Furthermore, there is no distinct evidence that the minds of any of the negotiators at Yalta were ever directed to the term "Kuril Islands." The question is therefore a legal one. The definition of the words "Kuril Islands" should be determined on the basis of all relevant 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

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<sup>160</sup> Counselor of the Department of State.

<sup>161</sup> Memorandum, Yalta Discussions concerning the Kuriles, State Dep't File No. RM-54/2, State Dep't Records, Record Group 59 (July 20, 1953) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>162</sup> U.S. Ambassador to the Soviet Union.

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

<sup>164</sup> Memorandum, Yalta Discussions concerning the Kuriles, *supra* note 161.

Yalta Agreement.<sup>165</sup> It should be also noted 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.

### 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 should 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 Japanese government’s statement accepting U.S. terms of surrender it appears that the power of the Potsdam signatories to determine which islands should remain under Japanese sovereignty rested not upon legal rights, but upon 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 limits of its territory.

### 4. *Competing Interpretations Regarding the Legal Effect of the Wartime Resolutions*

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. Was it a simple statement of common purpose arrived at by the heads of three Great Powers, or did it have certain legal effects on the issue of transferring territories?

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<sup>165</sup> Southern Kurile Islands and the Shikotan Archipelago, *supra* note 70.

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.<sup>166</sup> 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. However, “[t]he Soviet Union could . . . acquire sovereignty over those territories on an independent basis of occupation, control, and effective administration, or it could acquire prescriptive title.”<sup>167</sup>

As to the question of whether the United States agreed in the Yalta Agreement that these islands belonged to the 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 in 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.”<sup>168</sup>

At a meeting of the Japanese Foreign Affairs Committee of the House of Representatives, Mr. Kawamura, Parliamentary Vice Minister of Foreign

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<sup>166</sup> Hill, *supra* note 52, at 9-14. For further information on the United Kingdom and other Commonwealth countries’ opinions on this issue, see Incoming Telegram from Ambassador Butler in Canberra, to Secretary of State, State Dep’t Decimal File No. 740.0011 PW (PEACE)/9-247, State Dep’t Records, Record Group 59 (Sept. 2, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) (“Despite secrecy of Yalta [A]greement it looks as though it must be accepted.”); Memorandum of Conversation, British Commonwealth Conference on Japanese Treaty, State Dep’t Records, Record Group 59 (Sept. 11, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) (“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 at Rio de Janeiro, Copy of a Telegram received from Department of External Affairs, Canberra, by Australian Minister at Rio de Janeiro at 13:00 on September 2, 1947, State Dep’t Decimal File No. 740.0011 PW (PEACE)/9-347, State Dep’t Records, Record Group 59 (Sept. 3, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>167</sup> Memorandum from Arthur R. Ringwalt, U.S. Embassy in London, United States Department of State, to Noel Hemmendinger, Acting Director of the Office of Northeast Asian Affairs, United States Department of State, State Dep’t Decimal File No. 661.94/8-2856, State Dep’t Records, Record Group 59 (Oct. 28, 1956) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>168</sup> Telegram, Guidance on Northern Islands, State Dep’t File No. Pol 19 Kuril Is; XR Pol 19 Ryu Is; Tokyo 3312, State Dep’t Records, Record Group 59 (Apr. 3, 1972) (on file with the U.S. National Archives and Records Administration in College Park, MD).

Affairs, and Mr. Nishimura, Chief of the Treaty Bureau of the Foreign Office, replied to questions from Democratic Liberal Mr. Morio Sasaki and Socialist Madam Satoko Toganai as to whether it was permitted to interpret the Yalta Agreement as not binding on Japan. Their response was 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. . . .<sup>169</sup>

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 just what islands were included in the Kurile Islands, nor was there any means to clarify it. He further added that it was up to the Allied Powers to define what the Kurile Islands were.<sup>170</sup>

Japan further argues that, in any case, it 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 did accept. In addition, the Yalta Agreement could not have been the determination referred to in paragraph 8 of the Potsdam Proclamation, since it was concluded after the Potsdam Proclamation.<sup>171</sup>

It is also, however, difficult to totally disregard the legal weight of the Yalta Agreement, since the drafters of the San Francisco Peace Treaty took this instrument into consideration throughout the drafting 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

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<sup>169</sup> *Japan May Claim Territorial Rights to South Kuriles, Bonins, Okinawas & Iojima, State Gov't Spokesmen*, NIHON KEIZAI SHIMBUN, Dec. 22, 1949 (on file with author).

<sup>170</sup> *Kurile Islands Said Indefinable*, JIJI PRESS, Feb. 1, 1950 (on file with author).

<sup>171</sup> Outgoing Telegram from John F. Dulles, *supra* note 86.



Yalta Agreement.<sup>172</sup> At a meeting between Mr. Matsumoto and Mr. Malik in London concerning the normalization of relations between Russia and Japan, Mr. Malik made the following statement on the territorial issues:

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

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, both of which left the question of Japanese territorial determination, over the Kurile Islands in particular, for subsequent consideration, rather than attempting to carry out the vague provision of the Cairo Declaration regarding territories taken by violence and greed.

In principle, the San Francisco Peace Treaty superseded all the instruments previously made among the Allied Powers concerning Japan, including the Potsdam Proclamation. *Vis-à-vis* the United States and the other Allied Powers which signed and brought into force the San Francisco

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<sup>172</sup> Inter-Divisional Area Committee on the Far East, Consideration, Disposition of the Ryukyu (Liuchiu) Islands; Disposition of Southern Sakhalin and the Kurile Islands, State Dep't Records, Record Group 59 (Feb. 12, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>173</sup> Incoming Telegram from John M. Allison, U.S. Ambassador to Japan, State Dep't Decimal File No. 661.941/6-3055, State Dep't Records, Record Group 59 (June 30, 1955) (on file with the U.S. National Archives and Records Administration in College Park, MD). 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." Incoming Telegram from William J. Sebald, U.S. Political Advisor for Japan, State Dep't Decimal File No. 694.001/11-650 GB, State Dep't Records, Record Group 59 (Nov. 6 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD). 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 Agreement, the U.S. Government remained consistently of the opinion that its territorial provisions would need to be implemented in the San Francisco Peace Treaty. Draft Reply to Soviet Aide-Memoire of November 20, 1950 on Japanese Peace Treaty, State Dep't Records, Record Group 59 (Dec. 19, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

Peace Treaty, Japan renounced all claims to the Kurile Islands and had no power to affect sovereignty over them. Therefore, if there is any discrepancy between the Potsdam Proclamation and the San Francisco Peace Treaty, the latter would prevail.

On the other hand, Japan and the Allied Powers that signed Japan's Instrument of Surrender, but did not participate in the San Francisco Peace Treaty, such as Russia, continued to be reciprocally bound by the terms of the Instrument of Surrender. Thus, because the Instrument of Surrender remained in force as between Japan and Allied Powers not participating in the San Francisco Peace Treaty,<sup>174</sup> the relationship between them and Japan did not revert to the status prior to Japan's surrender. As the formal state of war continues, however, they may assert their right to continue the 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, 1955,<sup>175</sup> was to abide by the terms of the Instrument of Surrender, which incorporated the Potsdam Proclamation.<sup>176</sup> In turn, the Potsdam Proclamation 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

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<sup>174</sup> 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, the promise given in the Potsdam Declaration that the Japanese Military Forces would be permitted to return to their homes remained in force 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. Niles W. Bond, Acting Counselor of Mission in Japan, Foreign Service Dispatch from U.S. Political Advisor, Tokyo, Japanese Interpretation of Certain Legal Problems Raised by a Majority Peace Settlement, State Dep't Decimal File No. 694.001/8-251, State Dep't Records, Record Group 59 (Aug. 2, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>175</sup> The date of the entry into force of the San Francisco Peace Treaty. See San Francisco Peace Treaty, 3 U.S.T. 3169, 136 U.N.T.S. 45, *supra* note 12.

<sup>176</sup> Japan's Instrument of Surrender, State Dep't Records, Record Group 59 (Sept. 2, 1945), <http://www.nara.gov/exhall/wwii/surrender/surrender.html>; Potsdam Proclamation, *supra* note 118, para. 8, 3 Bevans 1205.

not required, *vis-à-vis* the Soviet Union, to act as if it had renounced its claim to the Kurile Islands.

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.<sup>177</sup>

*B. Interpretation of the Supreme Commander for the Allied Powers' Instructions*

The General Headquarters of the Supreme Commander for the Allied Powers gave an instruction No. 677 entitled "Governmental and Administrative Separation of Certain Outlying Areas from Japan" on January 29, 1946,<sup>178</sup> 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."<sup>179</sup> It further stated, "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 1000 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."<sup>180</sup>

This instruction has been considered one of the significant legal instruments deciding the destiny of the Kurile Islands especially favoring Russia. Russia continuously maintains that SCAPIN No. 677 decreed the cessation of Japanese administration over various non-adjacent territories, including the Kurile Islands, and this is a strong indication of what the Allied Powers desired. In response to this Russian claim, Japan argues that

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<sup>177</sup> See discussion *infra* Part II.

<sup>178</sup> SCAPIN No. 677, *supra* note 79. There were other relevant instructions, such as SCAPIN No. 677/1: Governmental and Administrative Separation of Certain Outlying Areas from Japan (Dec. 5, 1951); SCAPIN No. 841: Governmental and Administrative Separation of Certain Outlying Areas from Japan (Mar. 22, 1946); SCAPIN No. 1033: Area Authorized for Japanese Fishing and Whaling (June 22, 1946); SCAPIN No. 1033/1: Area Authorized for Japanese Fishing and Whaling (Dec. 23, 1948); SCAPIN No. 1033/2: Japanese Fishery Inspection System, June 30, 1949. See S SCAP File, State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>179</sup> SCAPIN No. 677, *supra* note 79, art. 1.

<sup>180</sup> *Id.* art. 3.

SCAPIN No. 677 suspended only Japanese administration of various island areas, including the Kurile Islands, and it did not preclude Japan from exercising sovereignty over this area permanently.

The United States recognized that the question of international sovereignty was outside SCAP's authority. As SCAPIN No. 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."<sup>181</sup> The United States also pointed out that in all SCAPINs to the Japanese Government regarding authorization of areas for Japanese fishing and whaling which were established under SCAP, there appeared a statement providing essentially that "the present authorization 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."<sup>182</sup> Therefore, it was the U.S. position that SCAPIN No. 677 was an operational directive to the Japanese Government tentative in character and that specifically stated it was not an Allied policy determination of Japanese territory.<sup>183</sup> In the same vein, the SCAP General Order No. 1 merely stated that Japanese troops in Sakhalin and the Kurile Archipelago should surrender to the Commander of the Soviet Forces Far East, and it did not and was not intended to touch upon the final disposition of these islands.<sup>184</sup>

There is also, however, a report, titled "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 No. 677, which "[d]efines present area of Japanese jurisdiction and provides a starting point for decisions on details of territorial adjustments."<sup>185</sup>

SCAPIN No. 677 further stated, "For the purpose of this directive, Japan is defined to include the four main islands of Japan . . . and the approximately 1,000 smaller adjacent islands . . . and excluding . . .

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<sup>181</sup> *Id.* art. 6.

<sup>182</sup> SCAPIN No. 1033, Area Authorized for Japanese Fishing and Whaling, art. 5, DC/S SCAP File Room 600-I, State Dep't Records, Record Group 59 (June 22, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter SCAPIN No. 1033].

<sup>183</sup> Outgoing Telegram from John F. Dulles, *supra* note 86.

<sup>184</sup> *Id.*

<sup>185</sup> An Analysis of Far East Command Policy Statements and SCAP Directives Suggesting Their Disposition in the Peace Settlement with Japan, State Dep't Records, Record Group 59 (1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

Liancourt Rocks. . . .”<sup>186</sup> This instruction is also considered one of the significant legal instruments that could decide the destiny of the Liancourt Rocks in favor of Korea. Korea continuously maintains that SCAPIN No. 677 decreed the cessation of Japanese administration over various non-adjacent territories, including the Liancourt Rocks, and this is a strong indication of what the Allied Powers desired to remove from Japanese jurisdiction.<sup>187</sup> In response to this Korean claim, Japan argues that SCAPIN No. 677 suspended only Japanese administration of the various island areas, including the Liancourt Rocks, and it did not preclude Japan from exercising sovereignty over this area permanently, as the United States also opined in the same vein.<sup>188</sup>

A later instruction, SCAPIN No. 1778 of September 16, 1947, designated the islets as a bombing range for the Far East Air Force and further provided that use of the range would be made only after notification through Japanese civil authorities to the inhabitants of the Oki Islands and certain ports on Western Honshu.<sup>189</sup> The action of the U.S.-Japan Joint Committee in designating these rocks as a facility of the Japanese Government is therefore justified according to Japanese interpretation.<sup>190</sup> Again, SCAPIN No. 677 did not purport to express Allied policy as to the “ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.”<sup>191</sup> SCAPIN No.

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<sup>186</sup> *Id.* art. 3.

<sup>187</sup> Incoming Telegram to Secretary of State from Muccio, U.S. Ambassador in Korea, State Dep’t Decimal File No. 694.95B/11-2851, State Dep’t Records, Record Group 59 (Nov. 28, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD). (“YONHAP November 27 carries report from Tokyo correspondent that SCAP will punish members of Asahi party who sailed to [Tokdo] without authorization, concludes this proves island not Japanese territory.”)

<sup>188</sup> Letter from Mr. Kenneth T. Young, Jr., Director of Office of Northeast Asian Affairs, to U.S. Embassy in Korea, State Dep’t Records, Record Group 59 (Nov. 5, 1952) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Letter from Mr. Kenneth T. Young, Jr.].

<sup>189</sup> General Headquarters, SCAP, SCAPIN No. 1778, Memorandum for Japanese Government: Liancourt Rocks Bombing Range, State Dep’t Records, Record Group 59 (Sept. 16, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD) (“1. The islands of Liancourt Rocks (or Take Shima), located 37° 15’ north, 131° 50’ east, are designated as a bombing range. 2. The inhabitants of Oki-Retto (Oki-Gunto) and the inhabitants of all the ports on the west coast of the island of Honshu north to the 38th parallel, north latitude, will be notified prior to each actual use of this range.”).

<sup>190</sup> *Id.* (“This information will be disseminated through Military Government units to local Japanese civil authorities.”).

<sup>191</sup> SCAPIN No. 1033, *supra* note 182, art. 5. See also Letter to Mr. E. Allan Lightner, Jr., Charge d’Affaires, ad interim in US Embassy in Korea, from Lt. Gen. Doyle O. Hickey, General Staff, Chief of Staff, Headquarters of the Far East Command (Nov. 27, 1952) (on file with author). For the skeptical U.S. response against Korean claims, see Use of Disputed Territory (Tokto Island) as Live Bombing Area, State

1033 of June 22, 1946, also provided that “3(b) Japanese vessels or personnel thereof will not approach closer than twelve (12) miles to Takeshima (37° 15’ North Latitude, 131° 53’ East Longitude) nor have any contact with said island. . . . The present authorization 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.”<sup>192</sup>

C. *Draft Clauses Concerning the Disposition of the Kurile Islands*

[Mr. Hugh Borton]<sup>193</sup> 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. Emerson]<sup>194</sup> 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 (emphasis added).<sup>195</sup>

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.”<sup>196</sup> Since the San Francisco Peace Treaty provides only for a renunciation of Japanese sovereignty over the Kurile Islands without

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Dep’t Records, Record Group 59 (Oct. 15, 1952) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>192</sup> SCAPIN No. 1033, *supra* note 182.

<sup>193</sup> Hugh Borton was the Acting Special Assistant to the Director of the Office of Far Eastern Affairs.

<sup>194</sup> John K. Emerson was a member of the Office of Far Eastern Affairs.

<sup>195</sup> Inter-Divisional Area Committee on the Far East, Consideration, Disposition of the Outlying and Minor Japanese Islands, State Dep’t Records, Record Group 59 (Feb. 1, 1946) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>196</sup> San Francisco Peace Treaty, *supra* note 12, art. 2(c), 3 U.S.T. 3172, 136 U.N.T.S. 49.

mentioning by name who should own them, a clarification of the meaning of the legal disposition of these territories is required.

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.<sup>197</sup> The determination of whether Etorofu, Kunashiri, Shikotan, and the Habomais are part of the Kurile Archipelago or part of Hokkaido is critical. 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. 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.<sup>198</sup> For that purpose, Japan cites the Treaty of St. Petersburg as proof; since only eighteen islands were enumerated in Article II of the Treaty of St. Petersburg, Etorofu, Kunashiri, Shikotan, and the Habomais do not belong to the Kurile Archipelago.<sup>199</sup>

The current official Japanese view on the Kurile Archipelago, that Etorofu, Kunashiri, Shikotan, and the Habomais are not included in the terminology of "Kuriles," has been articulated since 1956. On February 11, 1956, Mr. Morishita, the Deputy Minister of Foreign Affairs, replied to 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,<sup>200</sup> and therefore, neither Shikotan nor the Habomais were included. The Japanese do not generally consider Shikotan and the Habomais part of Kurile Archipelago, but part of Hokkaido.

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<sup>197</sup> Memorandum, B-29 Study and Japanese Claims to the Southern Kuriles and Habomais, *supra* note 67.

<sup>198</sup> BERTON, *supra* note 32, at 8-9.

<sup>199</sup> *Id.* at 21-22.

<sup>200</sup> Answer by Japanese Deputy Foreign Minister Morishita (Feb. 11, 1956), *reprinted in* ALLISON, *supra* note 35, at 130. *See also* Airgram from the U.S. Dep't of State to U.S. Embassy in Tokyo, Kunashiri and Etorofu Islands, State Dep't File No. SCI 25 Japan; Pol 32-6 Japan-USSR, State Dep't Records, Record Group 59 (Aug. 28, 1964) (on file with the U.S. National Archives and Records Administration in College Park, MD). ("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.").

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”).<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup>

To define the term “Kurile Islands” as renounced by Japan in the San Francisco Peace Treaty is also very important in the sense that it is highly likely that in any future negotiations between Russia and Japan over the Kurile Islands, the Japanese will not seek in their discussions with the Russians to repudiate the renunciation of interest in the “Kurile Islands,” which is contained in the San Francisco Peace Treaty. Rather, it is likely that they will seek to define their renunciation 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 extremely vague, it may be difficult to produce a mutually acceptable interpretation. Since the question is what Japan intended to relinquish by the words “Kurile Islands” in the San Francisco Peace Treaty, Japanese usage and administrative history, as well as the Japanese cultural and economic history in this area is of great importance, coupled with evidence produced by Russia, and certain geological and geographical aspects. To further clarify the term “Kurile Islands,” this article divides them into two groups: Etorofu and Kunashiri, and Shikotan and the Habomais.

Since the San Francisco Peace Treaty provides only for renunciation of Japanese sovereignty over the Kurile Islands, without naming those who should own them, a clarification of the effect of the legal disposition of these territories is required. Thus, each draft of the territorial clauses of the San Francisco Peace Treaty will be examined for that purpose.

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<sup>201</sup> BERTON, *supra* note 32, at 8.

<sup>202</sup> Airgram, Northern Territories' Issues, *supra* note 72.

<sup>203</sup> *Id.*



1. *Draft Dated March 19, 1947*<sup>204</sup>

The territorial clause on the Kurile Islands in the first draft of the San Francisco Peace Treaty provided, "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. . . . Japan . . . cedes to the Soviet Union in full sovereignty the Kurile Islands, lying between Kamchatka and Hokkaido."<sup>205</sup>

Thus, the draft dated March 19, 1947, concluded that the currently disputed Kurile Islands were to be handed over to the Soviet Union. This is the outcome of U.S. commitment in the Yalta Agreement to hand over the Kurile Islands to the Soviet Union,<sup>206</sup> and also a reflection of U.S. policy and security considerations such as weighing the vital strategic importance of the specific territories.<sup>207</sup>

There was, however, a memorandum recommending that the Kurile Islands should be retained by Japan, or alternatively divided and retained by Japan through the various 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.<sup>208</sup> This memorandum further clarified the reason for the suggestion: The United States favored 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 the smallest width being about twenty-two nautical miles, and the latter is twelve nautical miles wide and is also clear of dangers.<sup>209</sup> This memorandum also recommended the retention of the Kurile Islands by Japan on the following grounds: to Japan these islands were the home of resident

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<sup>204</sup> The text of this draft is reproduced in Memorandum to General MacArthur, *supra* note 13.

<sup>205</sup> Memorandum to General MacArthur, *supra* note 13, ch. I, arts. 1, 3(2).

<sup>206</sup> Consideration, Disposition of Southern Sakhalin and the Kurile Islands; Disposition of the Outlying and Minor Japanese Islands, *supra* note 82.

<sup>207</sup> *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 Memorandum of Conversation, Canberra Conference on Japanese Peace Treaty, *supra* note 2.

<sup>208</sup> Disposition of the Kuriles in the Treaty with Japan, *supra* note 103.

<sup>209</sup> *Id.*

Japanese,<sup>210</sup> and the area was important 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.

2. *Draft Dated August 5, 1947*<sup>211</sup>

The territorial clause on the Kurile Islands in the draft dated August 5, 1947, provided, "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. . . . 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."<sup>212</sup>

Consequently, this draft concluded that the currently disputed Kurile Islands should 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. The United States adjudged that ethnically, economically, and historically these islands have always been part of Japan.<sup>213</sup>

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<sup>210</sup> *Id.* This memorandum also reported that the permanent population of the whole Kurile Archipelago (approximately 18,000 in 1940) is almost entirely Japanese. About 90 percent live in the southernmost islands: Kunashiri 9,000 in Kunashiri, 5,100 in Etorofu, 1,500 in Shikotan, 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. *Id.*

<sup>211</sup> This draft is excerpted in Memorandum from Hugh Borton, *supra* note 14.

<sup>212</sup> Memorandum from Hugh Borton, *supra* note 14, ch. I, arts. 1(1), 3(2).

<sup>213</sup> U.S. Dep't of State, Working Group on Japan Treaty, Notes of Meeting on Friday, August 1, 1947, State Dep't Records, Record Group 59 (Aug. 1, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD); George F. Kennan, Results of Planning Staff Study of Questions Involved in the Japanese Peace Settlement, State Dep't Decimal File No. 740.0011 PW (PEACE)/10-2447, State Dep't Records, Record Group 59 (Oct. 14, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

3. *Draft Dated January 8, 1948*<sup>214</sup>

The territorial clause on the Kurile Islands in the draft dated January 8, 1948, provided that "Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands."<sup>215</sup> This draft did not specify which of the Kurile Islands Japan should cede to the Soviet Union. This draft mentioned the sources for the territorial clauses, which were based largely on international agreements made at Cairo, Yalta and Potsdam, and further mentioned the Yalta Agreement as the sole source for the disposition of the Kurile Islands, in particular.<sup>216</sup> The draft 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.<sup>217</sup> 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.<sup>218</sup>

4. *Draft Dated October 13, 1949*<sup>219</sup>

The territorial clause on the Kurile Islands in the draft dated October 13, 1949, provided: "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. . . . Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands."<sup>220</sup> 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 of this draft also envisaged the possibility that the Soviet Union would not sign the San Francisco Peace Treaty. In that situation, this Note mentioned that "it

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<sup>214</sup> This draft is excerpted in Memorandum, Background of Draft of Japanese Peace Treaty, *supra* note 15.

<sup>215</sup> *Id.* art. 3(2).

<sup>216</sup> Memorandum, Background of Draft of Japanese Peace Treaty, *supra* note 15.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> This draft is excerpted in Memorandum, Attached Treaty Draft, *supra* note 16.

<sup>220</sup> Memorandum, Attached Treaty Draft, *supra* note 16, ch. I, arts. 1(1), 3(2).

would be the U.S. 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.”<sup>221</sup>

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 U.S. Department of State summarized the response of the individual countries to the issue of the Kurile Islands in particular. The report raised the question 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. . . .”<sup>222</sup>

5. *Draft Dated November 2, 1949*<sup>223</sup>

The territorial clause on the Kurile Islands in the draft dated on November 2, 1949, provided:

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. longitude; thence by a rhumb line in a southeasterly direction to a point in 43° 20' N. latitude, 146°

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<sup>221</sup> *Id.* ch. I, art. 3, n.I.

<sup>222</sup> Interests and Attitudes of Far East Command Powers on Questions relating to the Peace Settlement with Japan, *supra* note 58. For the report on the position of individual states, i.e., Australia, see Office of Intelligence Research, Division of Research for Europe, OIR Report No. 4485.2; for China, Office of Intelligence Research, Division of Research for Far East, OIR Report No. 4485.4; for India, USDOS, Office of Intelligence Research, Division of Research for Near East and Africa, OIR Report No. 4485.6; and for the Soviet Union, Office of Intelligence Research, Division of Research for Europe, OIR Report No. 4485.10, State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>223</sup> This draft is excerpted in *Commentary on Treaty of Peace with Japan*, *supra* note 17.

E. longitude; thence due east to a point in 149° E. longitude; thence due south to 37° N. latitude.<sup>224</sup>

It further provided that "Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands."<sup>225</sup> Again, in this draft, Etorofu, Kunashiri, Shikotan, and the Habomais, the currently disputed Kurile Islands, were to be excluded from Japanese territory and ceded to the Soviet Union.

Accompanying Note I to Article 5 is identical to Note I to Article 3 in the draft dated October 13, 1949.<sup>226</sup> Note II to Article 5 stated that the decision whether the United States would propose the retention by Japan of Etorofu, Kunashiri, Shikotan, and the Habomais had not been made.<sup>227</sup> The Note also acknowledged the difficult position of the United States, considering its relationship with Japan. It suggested that it might be advisable for the United States to propose that the Soviet Union place the Kurile Islands under the trusteeship system.<sup>228</sup>

The territorial dispositions of the Kurile Islands as set out in this draft, however, brought about many repercussions within the U.S. Department of State. These resulted in a different provision, as shown below, in subsequent drafts. In that sense, internal memoranda by William J. Sebald, the U.S. Political Advisor for Japan, should be noted, considering their important and influential nature. His comments concerning Article 5(2) were: Japan unquestionably advanced a strong claim to Etorofu, Kunashiri, Shikotan, and the Habomais; the United States should support that claim and make due allowance in drafts for peculiarities in this case; and the United States considered this issue highly important in view of questions regarding permanent boundaries and fisheries.<sup>229</sup> His other comments on a draft dated November 2, 1949, with regard to the disposition of the Kurile Islands were as follows:

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<sup>224</sup> Commentary on Treaty of Peace with Japan, *supra* note 17, ch II, art. 3(1).

<sup>225</sup> *Id.* art. 5(2).

<sup>226</sup> Both notes contemplate the U.S. course of action in case the Soviet Union does not sign the treaty. *See id.* ch. II, art 5 n.I; *see also supra* note 221 and accompanying text.

<sup>227</sup> Commentary on Treaty of Peace with Japan, *supra* note 17, ch. II, art 5 n.II.

<sup>228</sup> *Id.*

<sup>229</sup> Incoming Telegram from William J. Sebald to Secretary of State, State Dep't Decimal File No. 740.0011 PW (PEACE)/11-1449, State Dep't Records, Record Group 59 (Nov. 14, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

[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.<sup>230</sup>

6. *Draft Dated December 8, 1949*<sup>231</sup>

The territorial clause on the Kurile Islands in the draft dated December 8, 1949 provided, “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. . . .”<sup>232</sup>

This draft was largely influenced by the suggestion of William Sebald, as the accompanying memorandum referred to “a revision of Article 3 ‘in positive terms’ as proposed by William Sebald.”<sup>233</sup> It is also noted, however, that the drafter questioned the desirability of this revision due to its problematic nature, in particular the existence of disagreement about the fact that William Sebald intimated the possibility of the Soviet Union’s concession of the Kurile Islands to Japan.<sup>234</sup>

<sup>230</sup> Comment on Draft Treaty of Peace with Japan, *supra* note 7.

<sup>231</sup> This draft is excerpted in Draft Treaty of Peace with Japan, Territorial Clauses, *supra* note 18.

<sup>232</sup> Draft Treaty of Peace with Japan, Territorial Clauses, *supra* note 18, ch. II, art. 3.

<sup>233</sup> Draft Treaty of Peace with Japan, Territorial Clauses, *supra* note 18.

<sup>234</sup> *Id.*

7. *Draft Dated December 19, 1949*<sup>235</sup>

The draft dated December 19, 1949, was named "Agreement Respecting the Disposition of Former Japanese Territories on December 19, 1949." The territorial clause on the Kurile Islands in this draft provided, "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."<sup>236</sup> 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.

8. *Drafts Dated December 29, 1949,*<sup>237</sup> *and January 3, 1950*<sup>238</sup>

The territorial clauses on the Kurile Islands in the drafts dated December 29, 1949, and January 3, 1950, provided: "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. . . . Japan hereby cedes to the Union of Soviet Socialist Republics in full sovereignty the Kurile Islands."<sup>239</sup> Two groups influenced the territorial disposition of the Kurile Islands in these drafts. One group advocated recognizing Etorofu and Kunashiri as the Kurile Islands, thus requiring their cession to the Soviet Union; while the other supported inclusion of Shikotan and the Habomais as Japanese territory. This revision was based on the memorandum of December 8, 1949.<sup>240</sup>

The accompanying commentary to the draft dated December 29, 1949, stated that an earlier draft's proposal, in which 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, the U.S. Political Advisor for Japan, who believed that a figurative fencing about of Japan was psychologically undesirable.<sup>241</sup> This

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<sup>235</sup> Agreement respecting the Disposition of Former Japanese Territories, *supra* note 19.

<sup>236</sup> *Id.* art. 2.

<sup>237</sup> This draft is excerpted in Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

<sup>238</sup> This draft is excerpted in Draft Treaty of Peace with Japan, *supra* note 21.

<sup>239</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62, ch. II, art. 3(1); Draft Treaty of Peace with Japan, *supra* note 21, ch. II, art. 3.

<sup>240</sup> Draft Treaty of Peace with Japan, *supra* note 21.

<sup>241</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

commentary also noted that Mr. Sebald further suggested that, to spare Japan having or renounce by name a long list of former territories and territorial claims, the chapter should be reduced to two simple articles. The first article would list the territories Japan was to retain. In the second article, Japan would renounce all its other territories and territorial claims to the Allied and Associated Powers for disposition under a separate agreement among themselves. The renounced territories would not be mentioned by name.

This proposal was rejected after careful consideration. The drafters feared that if the Soviet Union and China did not sign the treaty or a separate agreement, the final disposition of Formosa, Southern Sakhalin and the Kurile Islands would be postponed, and the rights of the United States and its Allies in the final disposition of these territories would be weaker as a result of the territories' 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. The drafters also thought that the United States might find it difficult to justify such a proposal to the Allies, with the only reason for the proposal being to spare Japanese sensibilities.<sup>242</sup>

9. *Drafts Dated August 7, 1950,<sup>243</sup> and September 11, 1950<sup>244</sup>*

The territorial clauses on the Kurile Islands in the drafts dated August 7, 1950 and September 11, 1950 provided:

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.<sup>245</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> Japanese Treaty, *supra* note 22.

<sup>244</sup> Memorandum to Dean G. Acheson, *supra* note 23.

<sup>245</sup> Japanese Treaty, *supra* note 22, ch. IV, ¶ 5. The draft dated September 11, 1950, provided:

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.



This draft was created as a possible alternative to the long form previously drafted, on the theory that circumstances may make it desirable to expeditiously establish peace with Japan on the basis of a simple treaty.<sup>246</sup> This provision stated Japanese acceptance of the territorial disposition over the Kurile Islands, but failed to clarify the meaning of "the Kurile Islands".

10. *Drafts Dated March 12, 1951,<sup>247</sup> and March 17, 1951<sup>248</sup>*

The territorial clause on the Kurile Islands in the draft dated March 12, 1951, provided: "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. . . ."<sup>249</sup>

This provision manifested the cession of the Kurile Islands to the Soviet Union, but it did not clarify what was included in the definition of the Kurile Islands.<sup>250</sup> This draft closely followed the approach of the draft of September 11, 1950.<sup>251</sup> The drafters also envisaged an alternative mechanism to resolve the issue of territorial disposition over the Kurile Islands by suggesting that the Kurile Islands may be defined by bilateral agreement or by judicial decision. The drafters would provide the Soviet Union no benefits unless it accepted the treaty, and if it was apparent in advance that the Soviet Union would definitely not sign the treaty, the drafters would be further prepared to reconsider whether reference to the Kurile Islands should be totally eliminated from the treaty.<sup>252</sup>

This idea of an alternative mechanism was deleted in the draft dated March 17, 1951,<sup>253</sup> which provided that "Japan will return to the Union of

Memorandum to Dean G. Acheson, *supra* note 23, ch. IV. ¶ 5.

<sup>246</sup> Japanese Treaty, *supra* note 22.

<sup>247</sup> This draft is excerpted in Memorandum from John F. Dulles, *supra* note 24.

<sup>248</sup> This draft is excerpted in Memorandum, *supra* note 25.

<sup>249</sup> Memorandum from John F. Dulles, *supra* note 24, ch. III ¶ 5.

<sup>250</sup> See Memorandum from John F. Dulles, *supra* note 24.

<sup>251</sup> See Memorandum to Dean G. Acheson, *supra* note 23.

<sup>252</sup> Outgoing Telegram from Dean G. Acheson, Secretary of State, to William J. Sebald, U.S. Political Advisor for Japan, State Dep't Decimal File No. 694.001/3-1451 CS/H, State Dep't Records, Record Group 59 (Mar. 14, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>253</sup> Memorandum, *supra* note 25.

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.”<sup>254</sup>

11. *Draft Dated April 7, 1951*<sup>255</sup>

The territorial clause on the Kurile Islands in the draft dated April 7, 1951, provided:

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. . . .<sup>256</sup>

It further stated: “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.”<sup>257</sup> Thus, as the territorial disposition of the Kurile Islands in the previous drafts dated December 29, 1949, and January 3, 1950, provided, this draft also counted Etorofu and Kunashiri as part of the Kurile Islands to be ceded to the Soviet Union, but Shikotan and the Habomais would be retained by Japan.

12. *Draft Dated May 3, 1951*<sup>258</sup>

The territorial clause on the Kurile Islands in the draft dated May 3, 1951, provided: “Japan cedes to the Union of Soviet Socialist Republics the

<sup>254</sup> *Id.* ch. III ¶ 5.

<sup>255</sup> This draft is excerpted in Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26.

<sup>256</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26, pt. I, art. 1.

<sup>257</sup> *Id.* art. 3.

<sup>258</sup> Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27.

Kurile Islands, and that portion of South Sakhalin and the islands adjacent to it over which Japan formerly exercised sovereignty."<sup>259</sup> Except manifesting Japanese cession of the Kurile Islands to the Soviet Union, this draft again left open the question of the Kurile Islands' definition. This issue would be further affected by the response of the individual countries to this draft, expressed notably in a memorandum from Canada to the United States. Canada suggested that Japan 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.<sup>260</sup> The United States responded that this suggestion could, with advantage, be further considered if and when the ultimate attitude of the Soviet Union toward the treaty was made apparent.<sup>261</sup>

This idea—that Japan would not cede the Kurile Islands specifically to the Soviet Union, but would simply renounce its title to them—was further pursued in the U.S. response to an inquiry from New Zealand. In view of the need to ensure that none of the islands near Japan was left in disputed sovereignty, New Zealand favored the idea of 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, then under Russian occupation, would remain with Japan.<sup>262</sup> On the first point, the United States pointed out the psychological disadvantages of seeming to fence Japan in by a continuous line. On the second point, with regard to Shikotan and the Habomais, it seemed to the United States more realistic, with the Soviet Union in occupation of the islands, not to specifically stipulate their return to Japan.<sup>263</sup> In sum, it must be 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.

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<sup>259</sup> *Id.* ch. II, art. 4.

<sup>260</sup> Reply Memorandum from John F. Dulles, Consultant to the Secretary of State, to Hume Wrong, Canadian Ambassador in the United States, State Dep't Decimal File No. 694.001/5-151 CS/H, State Dep't Records, Record Group 59 (May 8, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>261</sup> *Id.*

<sup>262</sup> Japanese Peace Treaty, Working Draft and Commentary, State Dep't Decimal File No. 694.001/6-151, State Dep't Records, Record Group 59 (June 1, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>263</sup> *Id.*

13. *Drafts Dated June 14, 1951,<sup>264</sup> July 3, 1951,<sup>265</sup> and July 20, 1951<sup>266</sup>*

The territorial clause on the Kurile Islands in the drafts dated June 14, 1951, July 3, 1951, and July 20, 1951, stated: "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."<sup>267</sup> These drafts had been prepared by the United States and the United Kingdom using a previous draft by the United States that was circulated to the governments of the countries most closely concerned with the war against Japan, a 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.<sup>268</sup> Thus, as mentioned earlier, these drafts would be the reflection of the U.S. and other interested countries' stance, on the territorial disposition of the Kurile Islands.

It was the U.S. view that Japan should be required to renounce its rights to 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 Kurile Islands undetermined is that it was considered undesirable that the Soviet Union should have its title to these territories cleared by a treaty that it would almost certainly refuse to sign.<sup>269</sup> Thus, the U.S. view was that it was better to leave the issue of what was a correct definition of the Kurile

<sup>264</sup> Draft Japanese Peace Treaty, *supra* note 28.

<sup>265</sup> Draft Japanese Peace Treaty, *supra* note 29.

<sup>266</sup> Draft Treaty of Peace with Japan, *supra* note 30.

<sup>267</sup> See Draft Japanese Peace Treaty, *supra* note 28, ch. II, art. 2(c); Draft Japanese Peace Treaty, *supra* note 29, ch. II, art. 2(c); Draft Treaty of Peace with Japan, *supra* note 30, ch. II, art. 2(c).

<sup>268</sup> See Draft Japanese Peace Treaty, *supra* note 28. The suggestion to simply renounce Japan's 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 Check List of Positions Stated by the U.S. and the U.K. at April 25-27 Meetings, State Dep't Decimal File No. 694.001/4-2751, State Dep't Records, Record Group 59 (Apr. 27, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Check List of Positions Stated by the U.S. and the U.K.] For the response of France, see Ambassador David Bruce, U.S. Embassy in France, Conversations of John Foster Dulles, Consultant to the Secretary of State, with Foreign Office Officials Regarding Japanese Peace Treaty, June 11, 1951, State Dep't Decimal File No. 694.001/6-1451, State Dep't Records, Record Group 59 (June 14, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Conversations of John Foster Dulles].

<sup>269</sup> Memorandum from Robert A. Fearey, Bureau of Far Eastern Affairs, Sakhalin, the Kurile Islands, the Habomais and Shikotan, State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD).

Islands to subsequent arbitration or International Court of Justice decision rather than to settle the issue in the San Francisco Peace Treaty itself, particularly since the Russians were already in occupation of the disputed Kurile Islands.<sup>270</sup>

14. *The Implications of Drafts on the Territorial Disposition of the Kurile Islands in the San Francisco Peace Treaty*

The territorial clause of the San Francisco Peace Treaty, "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,"<sup>271</sup> can be interpreted as follows. (1) Various wartime resolutions, in particular the Yalta Agreement, had significant legal weight for effecting territorial dispositions of the Kurile Islands; (2) The Soviet Union was the only recipient of the Kurile Islands envisaged by the Allied Powers; (3) there were no agreed definitions of the "Kurile Islands" among the Allied Powers, or even within the U.S. Department of State; (4) Fourth, due to the significantly contradictory nature of the various drafts of the treaty, and other relevant instruments, the question of what exactly constituted "the Kurile Islands" remains unclear; (5) There are strong indications that the Allied Powers preferred not to resolve the matter of the ultimate disposition of the Kurile Islands in the San Francisco Peace Treaty and, instead, left it to the future to resolve this issue through other international mechanisms.

D. *Draft Clauses Regarding the Disposition of the Senkaku Islands*

The United States Government is aware that a dispute exists between the governments of the Republic of China and Japan regarding the sovereignty of the Senkaku Islands. The United States believes that a return of administrative rights over those islands to Japan from which those rights were received can in no way prejudice the underlying claims of the Republic of China. *The United States cannot add to the legal rights Japan possessed before it transferred administration of the islands to*

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<sup>270</sup> Conversations of John Foster Dulles, *supra* note 268.

<sup>271</sup> San Francisco Peace Treaty, *supra* note 12, art. 2(c), 3 U.S.T. 3172, 136 U.N.T.S. 49.

*the United States nor can the United States by giving back what it received diminish the rights of the Republic of China (emphasis added).*<sup>272</sup>

The term “Senkaku Islands,” or any Chinese or western name corresponding to the name conventionally used, did not appear specifically in the territorial clauses of the San Francisco Peace Treaty. Further, the Senkaku Islands were not mentioned specifically in any international agreement, and apparently were ignored internationally until the awakening of interests in oil explorations of the continental shelf in 1968. However, the drafts of the San Francisco Peace Treaty still shed some light on the issue. As to the Senkaku Islands, the territorial provisions in the San Francisco Peace Treaty can be categorized into two issues: one concerns the territorial limits of Japan and territorial disposition of Taiwan; and the other, the U.N. trusteeship over the Senkaku Islands.

### *1. Draft Clauses Limiting Japanese Territory*

In the San Francisco Peace Treaty, the provision on the territorial limits of Japan, which confined Japanese territory to the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor islands, was consistently maintained throughout the earlier drafts with slight modifications. The provision, which expressly defined the territorial limits of Japan was, however, discontinued. The pattern manifesting territorial disposition of the specific territories that Japan should renounce was then further emphasized.

The distinctive draft in the first category on the territorial limits of Japan, which had certain implications on the territorial disposition over the Senkaku Islands, is the first available draft of the San Francisco Peace Treaty, dated March 19, 1947.<sup>273</sup> This draft provided:

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<sup>272</sup> Telegram, State Dep't File No. Pol 32-6 Senkaku Is, Taipei 2946, State Dep't Records, Record Group 59 (June 17, 1971) (on file with the U.S. National Archives and Records Administration in College Park, MD); *see also* Senkakus Dispute, State Dep't File No. Pol 32-6 Senkaku Is 051921, State Dep't Records, Record Group 59 (Mar. 27, 1972) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>273</sup> Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty, *supra* note 13.

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, but including the Ryukyu Islands forming part of Kagoshima Prefecture.<sup>274</sup>

As this draft stated that the “territorial limits of Japan shall be those existing on January 1, 1894,” and Japan did not claim the Senkaku Islands until the Cabinet Decision of January 14, 1895, the drafters of the San Francisco Peace Treaty did not envision Japan as the rightful owner of the Senkaku Islands. Specific mention of the date “January 1, 1894,” however, did not appear in subsequent drafts. This clause further provided inclusion of the Ryukyu Islands, forming part of Kagoshima Prefecture, rather than Okinawa Prefecture, into Japanese territory.

## 2. *Draft Clauses Defining Taiwan's Territorial Claims*

Meanwhile, the drafts in the second category on the territorial disposition of Taiwan had provided that “Japan renounces all right, title and claim to Formosa and the Pescadores,” with some modifications throughout the drafts. The basic format among others appeared in the drafts dated August 5, 1947, and January 8, 1948, which provided:

Japan hereby cedes to China in full sovereignty the island of Taiwan (Formosa) and adjacent minor islands, including Agincourt (Hoka Sho), Crag (Menka Sho), Pinnacle (Kahei Sho), Samasana (Kasho To), Botel Tobago (Koto Sho), Little Botel Tobago (Shokoto Sho), Vele Reti Rocks (Shichisei Seki), and Lambay (Ryukyu Sho); together with the Pescadores Islands (Hoko Shoto); and all other islands to which Japan had acquired title within a line beginning at a point in 26° N. latitude, 121° E. longitude and proceeding due east to 122° 30' E. longitude, thence due south to 21° 30' N. latitude, thence due west through the Bashi Channel to 119° E. longitude, thence

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<sup>274</sup> *Id.* ch. I, art. 1.

due north to a point in 24° N. latitude, thence northeasterly to the point of beginning.<sup>275</sup>

By mentioning the specific islands Japan should cede to China, and delineating Taiwan through latitude and longitude, the drafters of the San Francisco Peace Treaty did not include the Senkaku Islands within Chinese/Taiwanese territory. In other words, putting aside the question whether the drafters designated the Senkaku Islands as part of the Ryukyu Islands, it is manifested that the Senkaku Islands were not envisioned as Chinese/Taiwanese territory.

### 3. *Draft Clauses Defining the Terms of the United Nations Trusteeship*

In the San Francisco Peace Treaty, the provision on the Senkaku Islands dealt more with the introduction of U.N. trusteeship over the islands rather than with their territorial disposition. The first available draft of the San Francisco Peace Treaty, dated March 19, 1947, provided that "Japan hereby renounces all rights and titles to the Ryukyu Islands forming part of Okinawa Prefecture, and to Daito and Rasa Islands."<sup>276</sup> By this draft, Japan also renounced the Senkaku Islands, since the Senkaku Islands are part of the Ryukyu Islands, in particular Okinawa Prefecture.

Japan's renunciation of the Ryukyu Islands south of 29° North latitude, which are manifestly inclusive of the currently disputed Senkaku Islands, was provided within the envisioned system of the U.N. trusteeship in subsequent drafts, with some modifications. In particular, the drafts dated October 13, 1949, and November 2, 1949, provided:

Japan hereby renounces all rights and titles to the Ryukyu Islands south of 29° North latitude. The Allied and Associated Powers undertake to support an application by the United States for the placing of these islands under trusteeship, in association with Articles 77, 79, and 85 of the Charter of the United

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<sup>275</sup> Memorandum from Hugh Borton, *supra* note 14, art. 2(1). For Article 2 in the draft dated January 8, 1948, see Memorandum, Background of Draft of Japanese Peace Treaty, *supra* note 15.

<sup>276</sup> Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty, *supra* note 13, art. 7.



Nations, the trusteeship agreement to provide that the United States shall be the administering authority.<sup>277</sup>

The draft dated December 8, 1949, provided:

Japan hereby cedes and renounces all territory and all mandate and concession rights, titles and claims outside the territorial area described in Article 3, and accepts the disposition of these territories that has been made or that may be made by the parties concerned, or by the United Nations in accordance with the trusteeship provisions of Articles 77, 79, and 85 of the Charter of the United Nations.<sup>278</sup>

Article 3 was the provision confining Japanese territory to the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido, and all minor islands. The draft dated December 29, 1949, also provided for Japanese renunciation of all rights and titles to the Ryukyu Islands south of 29° North latitude, and placed them within the U.N. trusteeship, with the United States as the sole administering authority.<sup>279</sup>

Subsequent drafts, from the one dated December 19, 1949, adopted a similar format, which envisaged U.N. trusteeship with the United States as the sole administering authority over the Ryukyu Islands south of 29° North latitude, as appeared in Article 3 of the San Francisco Peace Treaty. However, the other key element of this provision, which specifically provided that "Japan hereby renounces all rights and titles to the Ryukyu Islands south of 29° N. latitude" was not mentioned in the December 19, 1949, draft and other subsequent drafts, except the draft dated December 29, 1949.

#### 4. *Appraisal*

With regard to the Senkaku Islands, as defined in the San Francisco Peace Treaty, the following points can be made: (1) As mentioned earlier, the term "Senkaku Islands," or any Chinese or western name corresponding

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<sup>277</sup> Memorandum, Attached Treaty Draft, *supra* note 16, art. 6. See Commentary on Treaty of Peace with Japan, *supra* note 17, Article 8 in the draft dates Nov. 2, 1949.

<sup>278</sup> Draft Treaty of Peace with Japan, *supra* note 18, art. 4.

<sup>279</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62, art. 7.

to the name conventionally used, did not appear specifically in the territorial clauses of the San Francisco Peace Treaty; (2) The Senkaku Islands were not included as either Chinese/Taiwanese or Japanese territory by the drafters of the San Francisco Peace Treaty; (3) Article 3 of the San Francisco Peace Treaty did not define the territories that were placed within the area of the U.N. trusteeship with the United States as the sole administering authority, due to the fact that the boundaries of the Ryukyu Islands had never been legally defined before the treaty negotiations. Further, the precise demarcation and delineation of the area of the Ryukyu Islands has also been subject to disputes between claimants and interested parties; (4) Throughout the drafts, in particular in the earlier drafts, there are strong presumptions that Japan would renounce all rights and titles to the Ryukyu Islands south of 29° North latitude, an area that includes the disputed Senkaku Islands.

*E. Draft Treaty Clauses Concerning the Disposition of the Liancourt Rocks*

In the course of private talks on other matters, [U.S. Secretary of State Dean Rusk] referred to the Korea-Japan negotiations, and said that [the United States] hoped for an early conclusion. . . . [President Chung-Hee Park of Korea] stated that one of the irritating problems, *although it was a small one*, in the negotiations was Tokto Island (Takeshima). These are uninhabited rocks in the Sea of Japan that are claimed by both Korea and Japan. Korean security forces actually guard them, and the Koreans believe that they historically belong to Korea. The Japanese believe they have a like claim. President Park said *he would like to bomb the island out of existence to resolve the problem*. Secretary Rusk . . . suggested that perhaps a joint Korean-Japanese commanded light house be set up and *the problem of to whom it belonged left unanswered, letting it die a natural death*. President Park commented that a joint lighthouse with Korea and Japan just would not work (emphasis added).<sup>280</sup>

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<sup>280</sup> Memorandum of Conversation, Korea-Japan Negotiations, State Dep't Records, Record Group 59 (May 18, 1965) (on file with the U.S. National Archives and Records Administration in College Park, MD). See also Memorandum from W. Averell Harriman, Assistant Secretary to Secretary of State, Your Meeting with Director Kim Jong Pil of the Korean CIA: Monday, October 29, 4:00 p.m., State Dep't Decimal File

The terms of the territorial disposition regarding Korea followed the terms of the Cairo Declaration of December 1, 1943, confirmed at Potsdam on July 26, 1945, to the effect that "Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent."<sup>281</sup> It also declared that Quelpart Island, Port Hamilton, Dagelet (Utsuryo) Island, and all the other offshore Korean islands were naturally to be included in the new independent Korea, for they were historically and administratively part of Korea and were inhabited primarily by Koreans.<sup>282</sup> The Potsdam Proclamation in stating, "[t]he 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,"<sup>283</sup> indicated that other minor Japanese islands may 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 as to their status following such renunciation. Further, Japan accepted the terms of the Potsdam Proclamation.<sup>284</sup>

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No. 694.95B/10-2762, State Dep't Records, Record Group 59 (Oct. 27, 1962) (on file with the U.S. National Archives and Records Administration in College Park, MD); Memorandum of Conversation, State Dep't Decimal File No. 694.95B/10-2962, State Dep't Records, Record Group 59 (Oct. 29, 1962) (on file with the U.S. National Archives and Records Administration in College Park, MD) (concerning the Liancourt Rocks, Director Jong-Pil Kim of the Korean CIA also suggested to the Japanese that it would be blown up); Memorandum of Conversation, September 7, 1954: Japan-ROK Problems, State Dep't Decimal File No. FW 694.95B/9-954, State Dep't Records, Record Group 59 (Oct. 29, 1962) (on file with the U.S. National Archives and Records Administration in College Park, MD) ("Couldn't the U.S. Air Force or someone blow up the island and thus dispose of the problem once and for all?").

<sup>281</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26.

<sup>282</sup> PUBLIC INFORMATION DIVISION, MINISTRY OF FOREIGN AFFAIRS, TOKYO, JAPAN, EXPLANATORY STUDY OF DRAFT JAPANESE PEACE TREATY (1951). *See also* Japanese Treaty, *supra* note 22. According to another U.S. memorandum, the master paper on "Disposition of the Outlying and Minor Japanese Islands" was never prepared in final form. State Department Papers on the Disposition of Japanese Outlying Possessions, State Dep't Records, Record Group 59 (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>283</sup> Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27.

<sup>284</sup> President Harry S. Truman, Japanese Acceptance of Potsdam Declaration, *supra* note 157.

1. *Drafts Dated March 19, 1947, August 5, 1947, January 8, 1948, October 13, 1949, and November 2, 1949*

The first available draft of the territorial clause on the Liancourt Rocks dated March 19, 1947,<sup>285</sup> provided: "Japan hereby renounces all rights and titles to Korea and all minor offshore Korean islands, including Quelpart Island, Port Hamilton, Dagelet (Utsuryo) Island and Liancourt Rock (Takeshima)."<sup>286</sup> This inclusion of the Liancourt Rocks as Korean territory continued throughout the drafts of August 5, 1947,<sup>287</sup> January 8, 1948,<sup>288</sup> October 13, 1949,<sup>289</sup> and November 2, 1949.<sup>290</sup>

There were very slight differences among these drafts, but the main contents were identical. The territorial clause on the Liancourt Rocks in the draft dated August 5, 1947, provided: "Japan hereby renounces all rights and titles to Korea (Chosen) and all offshore Korean islands, including Quelpart (Saishu To); the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai); Dagelet Island (Utsuryo To, or Matsu Shima); Liancourt Rocks (Takeshima). . . ."<sup>291</sup> In the draft dated January 8, 1948, it provided "Japan hereby renounces in favor of the Korean people all rights and titles to Korea (Chosen) and all offshore Korean islands, including Quelpart (Saishu To); the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai); Dagelet Island (Utsuryo To, or Matsu Shima); Liancourt Rocks (Takeshima)."<sup>292</sup> In the draft dated October 13, 1949, it stated "Japan hereby renounces in favor of Korea all rights and titles to the Korean peninsula and offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima). . . ."<sup>293</sup> Finally, in the draft dated November 2, 1949, the territorial clause provided "Japan hereby renounces in favor of

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<sup>285</sup> This draft is excerpted in Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty, *supra* note 13.

<sup>286</sup> Memorandum to General MacArthur, Outline and Various Sections of Draft Treaty, *supra* note 13, art. 4.

<sup>287</sup> This draft is excerpted in Memorandum from Hugh Borton, *supra* note 14.

<sup>288</sup> This draft is excerpted in Memorandum, Background of Draft of Japanese Peace Treaty, *supra* note 15.

<sup>289</sup> This draft is excerpted in Memorandum, Attached Treaty Draft, *supra* note 16.

<sup>290</sup> This draft is excerpted in Commentary on Treaty of Peace with Japan, *supra* note 17.

<sup>291</sup> Memorandum from Hugh Borton, *supra* note 14, art. 4.

<sup>292</sup> Memorandum, Background of Draft of Japanese Peace Treaty, *supra* note 15, art. 4.

<sup>293</sup> Memorandum, Attached Treaty Draft, *supra* note 16, art. 4.

Korea all rights and titles to the Korean mainland territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima)."<sup>294</sup>

Concerning the above provisions, William J. Sebald, the U.S. Political Advisor for Japan, recommended a reconsideration of the Liancourt Rocks:

[I]t is suggested that Liancourt Rocks . . . be specified in our proposed Article 3 as belonging to Japan. Japan's claim to these islands is old and appears valid, and it is difficult to regard them as islands off the shore of Korea. Security considerations might also conceivably render the provision of weather and radar stations on these islands a matter of interest to the United States.<sup>295</sup>

Though the effect of this memorandum on the territorial disposition of the Liancourt Rocks was not obviously addressed in other diplomatic documents, the position of the drafters of the San Francisco Peace Treaty favored Japan in the subsequent drafts.

Other memoranda emphasize that territorial dispositions should favor Japan. First, Professor Reischauer of Harvard stressed the psychological approach to the Japanese.<sup>296</sup> Second, William Sebald suggested that the idea of drawing straight lines should be eliminated, for the reason that a figurative fencing of Japan was psychologically undesirable.<sup>297</sup> He further suggested that it was unnecessary since, from the earlier draft, post-treaty Japan was supposed to be circumscribed by a continuous line described in the territorial clause of the treaty and drawn on the map accompanying that treaty.<sup>298</sup> Third, to spare Japan the trouble of having to cede or renounce by name a long list of former territories and territorial claims, Mr. Sebald also suggested that the territorial chapter should be reduced merely to two simple

<sup>294</sup> Commentary on Treaty of Peace with Japan, *supra* note 17, art. 6(1).

<sup>295</sup> Comment on Draft Treaty of Peace with Japan, *supra* note 7.

<sup>296</sup> Notes on Discussion of Draft Treaty of Peace with Japan, State Dep't Decimal File No. 740.0011 PW (PEACE)/10-2149, State Dep't Records, Record Group 59 (Oct. 21, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>297</sup> See Memorandum from Mr. Boggs, Special Advisor on Geography, Office of Intelligence Research, to Mr. Fearey, Bureau of Far Eastern Affairs, Division of Northeast Asian Affairs, State Dep't Decimal File No. 740.0011 PW (PEACE)/7-2447, State Dep't Records, Record Group 59 (July 24, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>298</sup> Commentary on Draft Treaty of Peace with Japan, *supra* note 62.

articles; one would list the territories to be retained by Japan, while in the other Japan would renounce all other former territories and territorial claims, which would not be mentioned by name, to the Allied Powers for disposition under a separate agreement concluded among themselves.<sup>299</sup> Fourth, the U.S. drafters considered the idea of a separate document for the reason that in the case of cessions of Japanese territory, the absence of “cession to” clauses in the treaty would be of psychological benefit to Japan.<sup>300</sup>

There was a difference of opinion among the drafters at the U.S. Department of State and the Commonwealth Japanese Treaty Working Party as to how the territorial clause would be formulated. While the former opined, “Provision for the disposition of Formosa, the Pescadores, Southern Sakhalin, the Kuriles, the Central and Southern Ryukyus, the Bonin and Volcano Islands . . . should be made in the treaty itself. Tsushima, Takeshima . . . and thousands of other islands in the Inland Sea and elsewhere close to Japan which have long belonged to Japan would be assumed to remain Japanese without mention in the treaty,”<sup>301</sup> the latter generally agreed that “Japan might merely renounce all claims to the ceded territories in the treaty, disposition of the territories being made in a separate agreement or agreements.”<sup>302</sup>

## 2. *Draft Dated December 8, 1949*

The territorial clause on the Liancourt Rocks in the draft dated on December 8, 1949,<sup>303</sup> provided:

The territory of Japan shall comprise the four principal Japanese home islands of Honshu, Kyushu, Shikoku and

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<sup>299</sup> *Id.* This proposal was rejected after careful consideration because it was feared that, as was probable, the U.S.S.R. and China would not sign the treaty or separate agreement, and present an unfeasible outcome for the final disposition of Formosa. *Id.*

<sup>300</sup> Memorandum from Mr. Jack B. Tate, Legal Advisor, to Mr. Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, Territorial Clauses of Draft Japanese Peace Treaty, State Dep’t Records, Record Group 59 (Dec. 19, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD). The Legal Advisor responded: “While the assessment of such a rationale is not the function of this Office, it would appear to be difficult to appreciate since the territory will in any event be lost—in two documents instead of one.” *Id.*

<sup>301</sup> Memorandum of Conversation, British Commonwealth Conference on Japanese Treaty, *supra* note 166.

<sup>302</sup> *Id.*

<sup>303</sup> This draft is excerpted in Draft Treaty of Peace with Japan, Territorial Clauses, *supra* note 18.

Hokkaido and all adjacent minor islands, including the islands of the Inland Sea (Seto Naikai); Tsushima, Takeshima (Liancourt Rocks), Oki Retto, Sado, Okujiri, Rebus, Riishiri and all other islands in the Japan Sea (Nippon Kai) within a line connecting the farther shores of Tsushima, Takeshima and Rebus.<sup>304</sup>

From this draft, it is apparent that the drafters of the San Francisco Peace Treaty began to recognize Japanese ownership of the Liancourt Rocks. Also, it should be noted that there was a U.S. memorandum providing: "The basic concept of the San Francisco Peace Treaty is that the treaty should be as brief and general as possible."<sup>305</sup> This seems to be reflected in the subsequent drafts.

### 3. *Draft Dated December 19, 1949*

The draft dated December 19, 1949<sup>306</sup> was drafted as the "Agreement respecting the Disposition of Former Japanese Territories on December 19, 1949." The territorial clause on the Liancourt Rocks in this draft provided:

The Allied and Associated Powers agree that there shall be transferred in full sovereignty to the Republic of Korea all rights and titles to the Korean mainland territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Degelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima).<sup>307</sup>

Thus, the ownership of the Liancourt Rocks was given to Korea.

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<sup>304</sup> Draft Treaty of Peace with Japan, Territorial Clauses, *supra* note 18, art. 3.

<sup>305</sup> Memorandum from Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, in DOS/FE, State Dep't Records, Record Group 59 (Nov. 7, 1949) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>306</sup> This draft is excerpted in Memorandum, *supra* note 25.

<sup>307</sup> Memorandum, *supra* note 25, art. 3.

4. *Drafts Dated December 29, 1949, and January 3, 1950*

The territorial clause on the Liancourt Rocks in the drafts dated December 29, 1949,<sup>308</sup> and January 3, 1950,<sup>309</sup> provided:

The territory of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including the islands of the Inland Sea (Seto Naikai); Tsushima, Takeshima (Liancourt Rocks), Oki Retto, Sado, Okujiri, Rebun, Riishiri and all other islands in the Japan Sea (Nippon Kai) within a line connecting the farther shores of Tsushima, Takeshima and Rebun.<sup>310</sup>

Japan hereby renounces in favor of Korea all rights and titles to the Korean mainland territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), and all other offshore Korean islands and islets to which Japan had acquired title.<sup>311</sup>

Like the draft dated December 8, 1949, the drafts dated December 29, 1949, and January 3, 1950, recognized Japanese ownership of the Liancourt Rocks. In conjunction with the above-mentioned memorandum by Mr. Sebald, this stance was reflected in the "Commentary on Draft Treaty of Peace with Japan," which provided:

Takeshima (Liancourt Rocks) . . . were formally claimed by Japan in 1905, apparently without protest by Korea, and placed under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture. [R]ecords show that for a long time Japanese fisherman migrated there during certain seasons. Unlike Dagelet Island a short distance to the west, Takeshima

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<sup>308</sup> This draft is excerpted in Provisional Draft of Japanese Peace Treaty, *supra* note 26.

<sup>309</sup> Draft Japanese Peace Treaty (United Kingdom), *supra* note 26.

<sup>310</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26, art. 3(1); Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27, art. 3(1).

<sup>311</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26, art. 6; Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27, art. 6.



has no Korean name and does not appear ever to have been claimed by Korea. The islands have been used by U.S. forces during the occupation as a bombing range and have possible value as a weather or radar station site.<sup>312</sup>

In the meantime, the drafters changed the pattern of designating either Korea or Japan as the recipient of the Liancourt Rocks, and the subsequent drafts made no reference to the Liancourt Rocks. This has led to self-serving interpretations by the claimants. The adoption of this pattern was the reflection of compromise, as shown below, between the Commonwealth Japanese Treaty Working Party and the U.S. Department of State's new stance, including Mr. Dulles' proposed shortened version of the draft.

Among the list of general areas of agreement reached by the Commonwealth Japanese Treaty Working Party in London is an item titled "Territories to be taken from Japan need not be mentioned in a Peace Treaty."<sup>313</sup> On other territorial issues, it was generally agreed by the Commonwealth Japanese Treaty Working Party that: first, Japanese sovereignty would be confined to the four main islands and to a number of adjacent minor islands whose precise definition would be a matter for the Peace Conference; and second, the disposition of the territories to be ceded by Japan need not be dealt with in the San Francisco Peace Treaty itself. Japan might merely renounce all claims to the ceded territories.<sup>314</sup>

##### 5. *Drafts Dated August 7, 1950, and September 11, 1950*

The territorial clause on Korea in the draft dated August 7, 1950,<sup>315</sup> provided: "Japan recognizes the independence of Korea and will base its relation with Korea on the resolutions adopted by the United Nations

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<sup>312</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26.

<sup>313</sup> Memorandum from John M. Allison, U.S. Delegation to the United Nations, State Dep't Records, Record Group 59 (May 25, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD); Memorandum from Maxwell M. Hamilton, U.S. Representative on the Far Eastern Commission, Territorial Provisions in Japanese Peace Treaty, State Dep't Records, Record Group 59 (May 26, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>314</sup> British Embassy in Washington, DC, USA, to Commonwealth Working Party on Japanese Peace Treaty, Report of the Commonwealth Working Party, State Dep't Decimal File No. 694.001/9-2050 CS/H, State Dep't Records, Record Group 59 (Sept. 20, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>315</sup> This draft is excerpted in Draft Japanese Peace Treaty, *supra* note 28.

Assembly on December, 1948.”<sup>316</sup> There is a memorandum in regard to Article 4 of the clause on Korea, which suggests modification of the last clause, as to state: “[Japan] will base its relations with Korea on the actions taken by the United Nations with respect to Korea.” This took account of Security Council and General Assembly resolutions subsequent to December 1948.<sup>317</sup> Accordingly, the draft dated September 11, 1950,<sup>318</sup> further provided that “Japan recognizes the independence of Korea and will base its relation with Korea on the resolutions of the United Nations General Assembly and Security Council with respect to Korea.”<sup>319</sup> The draft dated September 11, 1950, was created to serve as a basis for further consideration and informal discussion with other members of the Allied Powers, though its text was purely tentative.<sup>320</sup> In conjunction with suggestions agreed to by the Commonwealth Japanese Treaty Working Party, this short version of the territorial disposition over Korea served as the basic framework throughout the remaining subsequent drafts, with some changes in style. As a result, the drafters’ intention over the territorial disposition of the Liancourt Rocks became unclear.

As evidenced by the memoranda and notes within the U.S. Department of State, the drafters weighed the gains and the losses of adopting a short version versus a long one. Those in favor of a long version expressed concerns about possible loss in precision and comprehensiveness of the treaty, saying that “the omission of a given Article or paragraph or the substitution of single sentence for an Article or Annex will leave uncovered matters which in consequence will become the source of confusion and disputes.”<sup>321</sup> This group further raised some substantive issues, such as the

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<sup>316</sup> Draft Japanese Peace Treaty, *supra* note 28, ch. IV.

<sup>317</sup> Memorandum from Adrian S. Fisher, Legal Advisor, to John F. Dulles, Special Assistant to the Secretary of State, Short Form of Japanese Peace Treaty, State Dep’t Records, Record Group 59 (Aug. 16, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Short Form of Japanese Peace Treaty].

<sup>318</sup> This draft is excerpted in Draft Japanese Peace Treaty, *supra* note 29.

<sup>319</sup> Draft Japanese Peace Treaty, *supra* note 29, ch. IV.

<sup>320</sup> Memorandum from John F. Dulles, Special Assistant to the Secretary of State, Office of the Secretary, State Dep’t Decimal File No. 694.001/9-1150 CS/H, State Dep’t Records, Record Group 59 (Sept. 11, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD). It appears that other drafts were made between August 7, 1950, and September 11, 1950, as this memorandum also indicated that “It reflects certain of the points of view put forward by the . . . Department since the circulation of the prior draft of August 18, 1950.” *Id.*

<sup>321</sup> Memorandum from Mr. Fearey, Bureau of Far Eastern Affairs, Division of Northeast Asian Affairs, to Mr. Allison, U.S. Delegation to the United Nations, Japanese Treaty, State Dep’t Decimal File No. 694.001/8-950 CS/W, State Dep’t Records, Record Group 59 (Aug. 9, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

following question: "Are the territorial dimensions of the new Japan sufficiently clear, for example, offshore islands like Sado and islands to which title may be disputed such as Tsushima and Takeshima?"<sup>322</sup> It further pointed out that the only advantage of a very short treaty was that it could be more quickly negotiated if the other Allied Powers were willing to go along with such a treaty or, if they were not, the United States was willing to proceed without them.<sup>323</sup>

In general, it was agreed that a long draft created less danger of future disputes.<sup>324</sup> Mr. Adrian S. Fisher, the Legal Advisor of the U.S. Department of State, also opined, "In light of the inter-Allied agreements on Japan made from 1943 to 1945, I believe the Japanese Peace Treaty ought not only to contain a definite statement of what territory shall henceforth be Japan but also clear provisions as to how all detached territories shall be disposed of."<sup>325</sup> In the same vein, as to the chapter on territorial settlements, it was suggested that a reference be made to an annex to the treaty in which precise descriptions of the territories of Japan, Korea, Formosa and the Pescadores, and Sakhalin, could be set forth, and that the annex might appropriately contain the provisions set forth in the longer form of the draft treaty.<sup>326</sup>

Eventually, the drafters preferred to adopt the short version due to the advantage of making negotiations with other Allied Powers a great deal quicker.<sup>327</sup> It is also interesting to note that very few officers of the U.S. Department of State participated in the drafting work. Thus, a memorandum by a Department of State official stated: "[t]o my knowledge, the Draft Treaty has not been widely circulated in the Department. In fact, I do not know what progress has been made on the project."<sup>328</sup>

In the meantime, in response to the Australian Government's request for clarification of certain questions arising out of the position of the United

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Memorandum from Mr. Hamilton, U.S. Representative on the Far Eastern Commission, Short Version of Japanese Peace Treaty, State Dep't Records, Record Group 59 (Aug. 10, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Short Version of Japanese Peace Treaty].

<sup>325</sup> Short Form of Japanese Peace Treaty, *supra* note 317.

<sup>326</sup> *Id.*

<sup>327</sup> Short Version of Japanese Peace Treaty, *supra* note 324.

<sup>328</sup> Memorandum from Paul T. Meyer, Assistant Secretary of State, Japanese Peace Treaty, State Dep't Decimal File No. 694.001/9-150 CS/B, State Dep't Records, Record Group 59 (Sept. 9, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

States,<sup>329</sup> concerning the disposition of former Japanese territories in particular, the United States answered: "It is thought that the islands of the Inland Sea . . . [Liancourt Rocks], all long recognized as Japanese, would be retained by Japan."<sup>330</sup>

#### 6. *Drafts Dated March 12, 1951, and March 17, 1951*

The territorial clause on Korea in the drafts dated March 12, 1951,<sup>331</sup> and March 17, 1951,<sup>332</sup> provided that "Japan renounces all rights, titles and claims to Korea."<sup>333</sup> These drafts are the shortest versions of the San Francisco Peace Treaty with respect to territorial dispositions over Korea. It is also unclear from these drafts how the drafters viewed the territorial disposition of the Liancourt Rocks.

#### 7. *Draft Dated April 7, 1951*

The territorial clause on Korea in the draft dated April 7, 1951<sup>334</sup> provided:

Japanese sovereignty shall continue over all the islands and adjacent islets and rocks lying within an area bounded by a line from latitude 30° N. in a north-westerly direction to . . . the south-east and Take Shima to the north-west curving with the coast of Honshu.<sup>335</sup>

Japan hereby renounces any claim to sovereignty over, and all right, title and interest in Korea, and undertakes to recognize

<sup>329</sup> Letter from D.W. McNicol, Second Secretary of the Australian Embassy to the U.S., to John M. Allison, United States Delegation to the United Nations, State Dep't Decimal File No. 694.001/10-1950 CS/H, State Dep't Records, Record Group 59 (Oct. 19, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>330</sup> Answers to Questions submitted by the Australian Government arising out of the Statement of Principles regarding a Japanese Treaty prepared by the United States Government, State Dep't Decimal File No. 694.001/10-2650, State Dep't Records, Record Group 59 (Oct. 26, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>331</sup> This draft is excerpted in Memorandum from John F. Dulles, *supra* note 24.

<sup>332</sup> This draft is excerpted in Memorandum, *supra* note 25.

<sup>333</sup> Memorandum from John F. Dulles, *supra* note 24, ch. III; Memorandum, *supra* note 25, ch. III.

<sup>334</sup> This draft is excerpted in Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26.

<sup>335</sup> Provisional Draft of Japanese Peace Treaty (United Kingdom), *supra* note 26, pt. I, art. 1

and respect all such arrangements as may be made by or under the auspices of the United Nations regarding the sovereignty and independence of Korea.<sup>336</sup>

Like the drafts dated December 8, 1949, December 29, 1949, and January 3, 1950, the draft dated April 7, 1951, recognized Japanese ownership of the Liancourt Rocks.

Meanwhile, the United Kingdom proposed that the islands between Korea and Japan should be disposed of by specific reference. For example, "including Quelpart" could be inserted after "Korea" in the territorial clause,<sup>337</sup> as was reflected in subsequent drafts.

#### 8. *Draft Dated May 3, 1951*

The territorial clause on Korea in the draft dated May 3, 1951<sup>338</sup> provided:

Japan renounces all right, title and claim to Korea, including Quelpart, Port Hamilton and Dagelet, and agree to recognize and respect all arrangements which may be made by or under the auspices of the United Nations regarding the sovereignty and independence of Korea.<sup>339</sup>

Again, the reference to the Liancourt Rocks disappeared. Thus, it became unclear how the drafters viewed the territorial disposition of the Liancourt Rocks. This lack of clarity is also evidenced in the draft dated May 3, 1951, in which the provisions on the territorial dispositions with respect to Japan also disappeared.

In the meantime, New Zealand asserted: "In view of the need to ensure that none of the islands near Japan is left in disputed sovereignty, the New Zealand Government favors the precise delimitation by latitude and longitude of the territory to be retained by Japan as suggested in Article 1 of the United Kingdom's draft. The adoption of this device could . . . make it

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<sup>336</sup> *Id.* pt. I, art. 2.

<sup>337</sup> Check List of Positions Stated by the U.S. and the U.K, *supra* note 268

<sup>338</sup> This draft is excerpted in Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27.

<sup>339</sup> Draft Japanese Peace Treaty, Revised May 3, 1951, *supra* note 27, ch. II, art. 2(a).

clear.”<sup>340</sup> With respect to this suggestion, the United States responded in the following negative terms:

In the discussions at Washington the British agreed to drop this proposal when the United States pointed to the psychological disadvantages of seeming to fence Japan in by a continuous line around Japan. The Japanese had objected to the British proposal when it was discussed with them in Tokyo. U.S. willingness to specify in the treaty that Korean territory included Quelpart, Port Hamilton and Dagelet also helped to persuade the British.<sup>341</sup>

France also raised the question of whether it would be desirable to include a reference to the resolution of the territorial problems by the United Nations. In response, the United States stated that, since exchanges of views already had indicated strong opposition to this solution, it seemed better to limit the treaty to liquidating the Japanese interests and to avoid the question of how to deal with the future.<sup>342</sup> As subsequent drafts demonstrate, the United States also maintained that it was dangerous to impose upon the United Nations, by treaty, a responsibility so heavy that it might even disrupt the United Nations itself<sup>343</sup>.

#### 9. *Drafts Dated June 14, 1951, July 3, 1951, and July 20, 1951*

The territorial clause on Korea in the drafts dated June 14, 1951,<sup>344</sup> July 3, 1951,<sup>345</sup> and July 20, 1951<sup>346</sup> provided: “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.”<sup>347</sup>

As to these drafts, in particular regarding the draft dated July 3, 1951, there appeared amendments proposed by Korea for the territorial disposition

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<sup>340</sup> Japanese Peace Treaty, Working Draft and Commentary, *supra* note 262.

<sup>341</sup> *Id.*

<sup>342</sup> Conversations of John Foster Dulles, *supra* note 268.

<sup>343</sup> *Id.*

<sup>344</sup> This draft is excerpted in Draft Japanese Peace Treaty, *supra* note 28.

<sup>345</sup> This draft is excerpted in Draft Japanese Peace Treaty, *supra* note 29.

<sup>346</sup> This draft is excerpted in Draft Treaty of Peace with Japan, *supra* note 30.

<sup>347</sup> Draft Japanese Peace Treaty, *supra* note 28, ch. II, art. 2(a); Draft Japanese Peace Treaty, *supra* note 29, ch. II, art. 2(a); Draft Treaty of Peace with Japan, *supra* note 30, ch. II, art. 2(a).

over Korea, including the Liancourt Rocks. Korea proposed the following revisions in the draft dated July 3, 1951:

Revision of Article 2(a) to provide that Japan "confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part of Korea prior to its annexation by Japan, including the islands Quelpart, Port Hamilton, Dagelet, Dokdo and Parangdo."<sup>348</sup>

As to Dokdo or Tokdo, which is the Korean name for the Liancourt Rocks, Mr. Boggs, a geographer in the Department of State, reported that Japan formally claimed it in 1905, apparently without protest by Korea, which appeared never to have claimed it before, though this report was subject to further research.<sup>349</sup> This memorandum, however, recognized that the issue of the Liancourt Rocks was one of several remaining problems, and further proposed that "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including Quelpart, Port Hamilton and Dagelet,"<sup>350</sup> as Article 2(a) provided.

Nevertheless, as other U.S. memoranda on the Liancourt Rocks indicated, the final disposition over the Liancourt Rocks was not completely decided by the U.S. drafters. There were a few U.S. memoranda which favored Korean ownership over the Liancourt Rocks. As one memorandum provided, "If it is decided to give them to Korea, it would be necessary only to add "and Liancourt Rocks" at the end of Article 2, par. (a)."<sup>351</sup> Another memorandum further clarified this issue as follows:

The Liancourt Rocks . . . were among the islands to which, in a 1949 draft treaty, Japan would have renounced claim to Korea. In a Japanese Foreign Office publication, entitled "Minor

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<sup>348</sup> Memorandum from Allison, U.S. Delegation to the United Nations, to Dulles, Consultant to the Secretary of State, Unresolved Treaty Provisions, State Dep't Decimal File No. 694.001/5-2951 CS/JEC, State Dep't Records, Record Group 59 (May 29, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> Memorandum, Spratly Island and the Paracels in Draft Japanese Peace Treaty (July 16, 1951) State Dep't Decimal File No. FW 694.001/7-1351 CS/CVE, State Dep't Records, Record Group 59 (July 16, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

Islands Adjacent to Japan Proper,<sup>352</sup> Part IV, June 1947, Liancourt Rocks are included. It may therefore be advisable to name them specifically in the draft treaty, in some such form as the following (Article 2): (a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton, Dagelet, and Liancourt Rocks.<sup>353</sup>

Korea's position was reiterated by its Foreign Minister, who proposed that the final phrase in Article 2(a) should be amended after "claim to Korea" to read, "and all islands which were part of Korea prior to its annexation by Japan, including [Quelpart], Port Hamilton, Dagelet, Dokdo and [Parangdo]."<sup>354</sup> Further, Korea requested that the word "renounces" in Article 2(a) should be replaced by "confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part of Korea prior to its annexation by Japan, including the islands Quelpart, Port Hamilton, Dagelet, Dokdo and Parangdo."<sup>355</sup>

As to the first proposal, providing inclusion of the Liancourt Rocks in Article 2(a), Mr. Dulles responded that if the Liancourt Rocks had been Korean territory before the Japanese annexation, there was no particular problem in including these islands in the pertinent part of the treaty that related to the renunciation of Japanese territorial claims to Korean territory.<sup>356</sup> However, no relevant, reliable resources were identified,<sup>357</sup> even

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<sup>352</sup> Shortly after the draft dated March 19, 1947 was made, the Foreign Office of the Japanese Government published "Minor Islands Adjacent to Japan Proper" for information of the Allied Power in June 1947. This document contained the basic position of the Japanese Government, which maintained historical title to Liancourt Rocks. See Foreign Office, Japanese Government, Minor Islands Adjacent to Japan Proper, Part IV, Minor Islands in the Pacific, Minor Islands in the Japan Sea, For Information of the Allied Authorities, State Dep't Decimal File No. 894.014/9-2347, State Dep't Records, Record Group 59 (June 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>353</sup> Memorandum, Spratly Island and the Parcels in Draft Japanese Peace Treaty, *supra* note 351.

<sup>354</sup> Incoming Telegram to Secretary of State, State Dep't Decimal File No. 694.001/7-1751 HH, State Dep't Records, Record Group 59 (July 17, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>355</sup> Letter from You Chan Yang, Korean Ambassador in Washington, D.C., to Dean G. Acheson, U.S. Secretary of State, State Dep't Records, Record Group 59 (July 19, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Letter from You Chan Yang]; see also Memorandum of Conversation, Japanese Peace Treaty, State Dep't Decimal File No. 694.001/7-1951, State Dep't Records, Record Group 59 (July 19, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>356</sup> Memorandum of Conversation, Japanese Peace Treaty, *supra* note 355.



considering resources of the Korean Embassy in the United States.<sup>358</sup> The United States was inclined not to consider this proposal to confirm Korean sovereignty over the Liancourt Rocks.<sup>359</sup>

With respect to the second request of Korea, that Article 2(a) of the draft be revised to provide that Japan "confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part of Korea prior to its annexation by Japan, including . . . Dokdo," the United States did not concur because of the following facts: first, according to U.S. information, the Liancourt Rocks were never treated as part of Korea and, since about 1905, had been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan; second, the United States doubted that the formula confirming Japan's renunciation of certain territorial claims to Korea could be included in the treaty as suggested by Korea;<sup>360</sup> third, the United States recognized that the terms of the Japanese surrender instrument of August 9, 1945, did not themselves technically constitute a formal and final determination of this question;<sup>361</sup> and fourth, the United States could not accept the argument that Japan's acceptance of the Potsdam Proclamation was a formal or final renunciation of Japan's sovereignty over the areas dealt with in the Proclamation.<sup>362</sup>

#### 10. *The Implications of Drafts on the Territorial Dispositions over the Liancourt Rocks in the San Francisco Peace Treaty*

When Japan agreed in Article 2 of the San Francisco Peace Treaty to renounce "all right, title and claim to Korea, including the islands Quelpart, Port Hamilton, and Dagelet," the Liancourt Rocks were not included within the area to be renounced. Japan has, and with reason, assumed that its

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<sup>357</sup> Memorandum to Mr. Robert A. Fearey, Bureau of Far Eastern Affairs, Division of Northeast Asian Affairs, from Mr. S.W. Boggs, Special Advisor on Geography, Office of Intelligence Research, Parangdo and Dokdo (islands), State Dep't Records, Record Group 59 (July 31, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>358</sup> Outgoing Telegram from Dean Acheson, Secretary of State, to U.S. Embassy in Korea, State Dep't Records, Record Group 59 (Aug. 7, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD).

<sup>359</sup> *Id.*

<sup>360</sup> Letter from Dean Rusk, Assistant Secretary of State, to You Chan Yang, Korean Ambassador in Washington, D.C., State Dep't Decimal File No. 694.001/8-1051 CS/H, State Dep't Records, Record Group 59 (Aug. 9, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD) [hereinafter Letter from Dean Rusk].

<sup>361</sup> Letter from You Chan Yang, *supra* note 355.

<sup>362</sup> Letter from Dean Rusk, *supra* note 360.

sovereignty still extends over the Liancourt Rocks, and the Koreans have disputed this assumption.<sup>363</sup> Therefore, as Charney points out, “There is even a dispute over whether by implication or, by general terms, the victors in World War II intended to return the disputed [Liancourt Rocks] to Korea.”<sup>364</sup>

During the course of drafting the San Francisco Peace Treaty, Korea’s views were solicited, in consequence of which the Korean Ambassador requested the U.S. Secretary of State in a letter of July 19, 1951 to amend Article 2(a) of the draft treaty so as to include the Liancourt Rocks as well as Quelpart, Port Hamilton and Dagelet among those islands over which Japan would renounce right, title and claim by virtue of recognizing Korea’s independence. In his reply to the Korean Ambassador, Mr. Dean Rusk, the Assistant Secretary of State, stated in a letter dated August 10, 1951 that the United States could not concur in the proposed amendment as it applied to the Liancourt Rocks, since according to his information the Liancourt Rocks had never been treated as a part of Korea—they had been under the jurisdiction of the Oki Islands Branch Office of Japan’s Shimane Prefecture since 1905 and it did not appear that they had ever before been claimed by Korea. As a result, Article 2(a) of the San Francisco Peace Treaty made no mention of the Liancourt Rocks.<sup>365</sup>

Accordingly, it appears that the United States viewed the San Francisco Peace Treaty as constituting a determination that the “minor islands” would be left to Japan under the Potsdam Proclamation, and that the treaty left the Liancourt Rocks to Japan. The United States’ stated position was simply that of one of the several signatories of the treaty, and that Article 22 of the San Francisco Peace Treaty, providing for reference to the International Court of Justice, was drafted in order to settle disputes arising from the treaty.<sup>366</sup>

In determining what course of action should be taken in light of this development, a question arose about whether the statement made in Mr. Rusk’s letter entailed the legal conclusion that the San Francisco Peace Treaty left the Liancourt Rocks to Japan. On the one hand, it may be argued

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<sup>363</sup> Letter from Mr. Kenneth T. Young, Jr., *supra* note 188.

<sup>364</sup> Charney, *supra* note 3, at 161.

<sup>365</sup> Letter from Mr. Kenneth T. Young, Jr., *supra* note 188; see San Francisco Peace Treaty, San Francisco Peace Treaty, *supra* note 12, art. 2(a), 3 U.S.T. 3172, 136 U.N.T.S. 49.

<sup>366</sup> Conflicting Korean-Japanese Claims to Dokdo Island (Otherwise Known as Takeshima or Liancourt Rocks), State Dep’t Records, Record Group 59 (Aug. 26, 1954) (on file with the U.S. National Archives and Records Administration in College Park, MD).

that the determination of the minor islands to be left under Japanese sovereignty required by the Potsdam Proclamation has been made by the treaty; i.e., Japan retained everything not renounced under Article 2; that Korea, prior to the signing of the treaty, specifically asked for a renunciation of the Liancourt Rocks by Japan and was turned down; that, therefore, it was the intent of the drafters of the treaty that Japan not renounce the Liancourt Rocks; and that these islands were accordingly included in the minor islands determined to remain under Japanese sovereignty.

On the other hand, it may be argued that Mr. Rusk's letter refusing to include the Liancourt Rocks in the islands renounced in connection with Korea was based on the U.S. understanding of the historical facts, providing that "Dokdo . . . was *according to our information* never treated as part of Korea," and that his statement left the door open for Korea to show that it had in fact treated the Liancourt Rocks as part of Korea prior to 1905, when the Japanese placed the Liancourt Rocks under the jurisdiction of Shimane Prefecture. Under this theory, Korea would still be free to establish legally, if it could, that the "Korea" renounced in the San Francisco Peace Treaty included the Liancourt Rocks.<sup>367</sup> This rationale is supported by the fact that the reports on the Liancourt Rocks were based for the most part on Japanese language sources available in the Department of State and the Library of Congress, studies prepared by the Department of State, and studies by the Japanese Foreign Office.<sup>368</sup>

#### IV. CONCLUSION

Although careful drafting of the San Francisco Peace Treaty could have put an end to territorial disputes over islands,<sup>369</sup> today, almost half a century later, territorial disputes remain. This is not surprising given that historical facts were not a major factor in the post-World War II territorial dispositions in East Asia. Territorial provisions of the San Francisco Peace Treaty largely reflected the Allied Powers' policy in East Asia, which failed to give serious consideration to rival claims to title over specific territories. The fact that the Allied Powers were more concerned with their own geo-

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<sup>367</sup> *Id.*

<sup>368</sup> See, e.g., Memorandum, Spratly Island and the Paracels in Draft Japanese Peace Treaty, *supra* note 351; Minor Islands Adjacent to Japan Proper, Part IV, Minor Islands in the Pacific, Minor Islands in the Japan Sea, For Information of the Allied Authorities, *supra* note 352.

<sup>369</sup> See Memorandum of Conversation, Canberra Conference on Japanese Peace Treaty, *supra* note 2.

political and strategic interests resulted in a failure to resolve territorial disputes in East Asia.

It is one thing to determine the abstract legal question of sovereignty over the disputed islands in East Asia, but it is quite another to effectuate it in practice. Given the institutional void in the East Asian region insofar as the resolution of territorial disputes is concerned, and given the current political atmosphere in the region, one is skeptical about the likelihood of a regional dispute resolution any time soon.<sup>370</sup>

Nevertheless, it is imperative that the disputants approach the issues through dialogue and with a spirit of compromise. An all-or-nothing approach, which obviously does not accommodate the mutual interests of the disputants, will only aggravate an already precarious situation. Therefore, various confidence-building measures, including joint development of the disputed maritime zone for the mutual benefit of all the affected parties, should be attempted first, prior to any hasty attempt to resolve the question of sovereignty over the disputed territories. Finally, every effort should be made to determine the real worth of the disputed territories instead of placing undue reliance, as is presently the case, on exaggerated notions of what is at stake.

All the claimants (China, Japan, Korea, Russia, and Taiwan) in the disputes over the Kurile Islands, Senkaku Islands, and Liancourt Rocks, have certain international legal obligations in accordance with the U.N. Charter principle of peaceful settlement of disputes, especially as articulated in Articles 2 and 33(1).<sup>371</sup> The duty to conduct good faith negotiations in certain circumstances also finds substantial support in the recent decision by the International Court of Justice in the *Gabcikovo-Nagymaros Project*, emphasizing that good faith negotiations should be conducted under international law.<sup>372</sup>

Finally, the mode of resolution and the legal arguments regarding these controversies in East Asia shed light on several ongoing disputes in other regions in Asia including, *inter alia*, the Spratly Islands and Parcel

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<sup>370</sup> See M. K. Young, *Regional Institutions in East Asia and The Pacific: Is the Time Ripe?*, 89 AM. SOC'Y INT'L L. PROCEEDINGS 471 (1995); G. Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650 (1997).

<sup>371</sup> See U.N. CHARTER arts. 2, 33 para. 1, available at <http://www.deoxy.org/wc/wc-un.htm> (last visited Nov. 17, 2001).

<sup>372</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 78-79 (Sept. 25) (quoting its Judgment in the 1969 North Sea Continental Shelf cases).

Islands.<sup>373</sup> Therefore, the eventual resolution of these disputes implicates the regional dynamics of territorial dispute settlements among several Asian nations.

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<sup>373</sup> For brief information on this issue, see generally BORDER AND TERRITORIAL DISPUTES, *supra* note 3, at 469-71, 542-45; G. AUSTIN, CHINA'S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT 98-161 (1998); M. CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS (2000); C.C. Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan*, 32 NEW ENG. L. REV. 819 (1998); C. Liu, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute*, 18 LOYOLA OF LOS ANGELES INT'L & COMP. L.J. 865 (1996); L. A. Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands*, 13 AM. U. INT'L L. REV. 727 (1998); S. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 282-90 (1997); J. Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L.J. 1 (1997).