

**ANALYSIS ON THE DEFINITION OF JAPANESE TERRITORY
AFTER WORLD WAR II IN TERMS OF INTERNATIONAL LAW:
THE SOUTHERN KURILS, THE DIAOYU ISLANDS
AND TOK ISLET**

HUI-CHOL PAK,
Kim Il Sung University (Pyongyang, North Korea)

HYE-RYON SON,
Kim Il Sung University (Pyongyang, North Korea)

<https://doi.org/10.17589/2309-8678-2020-8-4-30-52>

Geopolitical tensions have periodically risen in the Asia-Pacific region due to territorial disputes between Japan and its neighbours over the Southern Kurils (the Northern Territories), the Diaoyu Islands (the Senkaku islands) and Tok Islet (Tok Islet (Dokdo)/ Takeshima). There is, of course, great discrepancy between the disputes over the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) in terms of their respective origin and legal nature, and effective control over them, and the historical and legal grounds on which the disputing states rely in their claims over the disputed territories vary widely. But what is consensual and definite is the fact that the islands in dispute were already excluded from the Japanese territory under the international legal acts deciding Japanese territory after World War II. The paper examines and analyzes Japanese reasoning behind its claim over the disputed territories in terms of relevant international legal acts relating to the delimitation of Japanese territory after World War II.

Keywords: Southern Kurils/Northern Territories; Diaoyu Islands/Senkaku Islands; Tok Islet/ Dokdo/Takeshima; Cairo Declaration; Yalta Agreement; Potsdam Declaration; General Headquarter for the Supreme Commander for the Allied Powers.

Recommended citation: Hui-Chol Pak & Hye-Ryon Son, *Analysis on the Definition of Japanese Territory After World War II in Terms of International Law: The Southern Kurils, the Diaoyu Islands and Tok Islet*, 8(4) Russian Law Journal 30–52 (2020).



Table of Contents

Introduction

1. Japanese Territory Defined by the Cairo Declaration, the Yalta Agreement, and the Potsdam Declaration After World War II

2. Japanese Territory Determined by the Supreme Commander for the Allied Powers Instruction Note No. 677

3. Japanese Territory Specified by the San Francisco Peace Treaty

Conclusion

Introduction

The Southern Kurils refer to the four islands among a group of more than 30 islands and islets lying between Kamchatka peninsula of Russia and Hokkaido of Japan – Iturup, Kunashir, Shikotan and a group of islands Habomai – that lie to the north of Japan.¹ In the geopolitical language, Russia calls these islands the Southern Kurils while Japan in its turn refers to them as the Northern Territories, situated on the northeastern coast of Hokkaido.²

On the other hand, the Diaoyu Islands consisting of Diaoyu Dao (“dao” means island in Chinese) and its affiliated islands are located approximately 170 kilometers northeast of Taiwan of China and 410 kilometers northwest of the Okinawa island of Japan (at 123° E. longitude and 23° N. latitude). The Diaoyu Islands consist of five islands (Diaoyu Dao/Uotsuri-shima, Huangwei Yu/Kuba-shima, Chiwei Yu/Taishoto, Nan Xiaodao/Minami-Kojima, and Bei Xiaodao/Kita-Kojima) and three rocks (Da Bei Xiaodao/Okino Kitaiwa, Da Nan Xiaodao/Okino Minami-iwa, and Fei Jiao Yan/Tobise),³ among which the most disputed one being Diaoyu Dao. Japan in its part refers to Diaoyu Dao and its affiliated islands as the Senkaku Islands.

Tok Islet (also referred to as Dokdo), which is a group of two islets, Tong Islet (East Islet) and So Islet (West Islet), lies 87.4 kilometers to the southeast of Ullung Island (Ullungdo) in the East Sea of Korea and 157.4 kilometers to the west of Oki Island of Japan.⁴ In Japan, Tok Islet (Dokdo) and Ullung Island are respectively called Takeshima and Utsuryo.

¹ Zhaisanbek M. Amanzholov & Yerik B. Akhmetov, *Japanese-Russian Territorial Disagreements and Their International Legal Substantiations*, 13 Middle-East Journal of Scientific Research 16 (2013).

² *Border and Territorial Disputes* (A.J. Day (ed.), 2nd ed., Detroit: Gale Research, 1987).

³ 中华人民共和国政府关于钓鱼岛及其附属岛屿领海基线的声明, 人民日报, 11 September 2012 [Declaration of the People's Republic of China Concerning the Territorial Sea Baseline of Diaoyu Dao and its Affiliated Islands, People's Daily, 11 September 2012]; Michael D. Swaine, *Chinese Views Regarding the Senkaku/Diaoyu Islands Dispute*, 41 China Leadership Monitor 1, 17 (2013).

⁴ Ministry of Foreign Affairs of Japan, 10 Points to Understand the Takeshima Dispute (2014), at 2 (Aug. 12, 2020), available at <https://www.mofa.go.jp/files/000092147.pdf>.



Since the end of World War II, Japan has persistently been asserting that the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) are “inherent parts” of Japanese territory. The rationale behind this “inherent territories” claim is that Japan was the first to discover and occupy these territories, which had been *terra nullius*, and therefore, according to Japan, even when those territories are invaded by other states, Japan has the “right” to claim their return.

In order to support its “inherent territories” claims over the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo), Japan refers to a set of historical documents and old maps of the Medieval Period as evidence for “prior occupation” approach.

As for the Southern Kurils dispute, Japan asserts that it is the “historical memory issue for Japan”⁵ and that Japan had effectual control over the four Northern territories via such principalities as Edzo, Nambu and Tsugaru at the end of 18th century – beginning of 19th century.⁶ In this regard, Japan cites such possessive acts as its mapping of the Kurils and Sakhalin islands in the 18th century.⁷ Japan particularly refers to 1855 Treaty of Shimoda on Trade and Borders and 1875 Petersburg Treaty in order to base their argument that the Southern Kurils “had historically been part of their territory.”^{8,9}

With respect to the Diaoyu Islands, Japan claims that the islands were “first discovered” in 1884 by a Japanese merchant Koga Tatsushiro¹⁰ and that Okinawa authority started substantial survey on the islands in 1885, which allegedly confirmed that the islands were *terra nullius* and had never been under the control of China. On the basis of the survey results, Japan passed a Cabinet decision in 1895 ruling that the islands should become part of Japan and ordering to set up a signpost on the island.¹¹ In support of this assertion, Japan refers to relevant documents and maps.

With regard to Tok Islet (Dokdo), Japan also contends that a variety of maps and documents, including *inter alia* the Kaisei Nippon Yochi Rotei Zenzu (Revised Complete Map of Japanese Lands and Roads, which was first published in 1779)

⁵ Kazuhiko Togo, *Japan's Territorial Problem: The Northern Territories, Takeshima, and the Senkaku Islands*, The National Bureau of Asian Research, 8 May 2012 (Aug. 12, 2020), available at <https://www.nbr.org/publication/japans-territorial-problem-the-northern-territories-takeshima-and-the-senkaku-islands/>.

⁶ 北海道の新歴史 [New History of Hokkaido] (Hokkaido: Governorate Press, 1937).

⁷ Amy B. Quillen, *The Kuril Islands or the Northern Territories: Who Owns Them – Island Territorial Dispute Continues to Hinder Relations Between Russia and Japan*, 18(3) North Carolina Journal of International Law and Commercial Regulation 633, 646 (1992).

⁸ Togo, *supra* note 5.

⁹ Treaty of Saint Petersburg (1875), Wikipedia (Aug. 12, 2020), available at [https://en.wikipedia.org/wiki/Treaty_of_Saint_Petersburg_\(1875\)](https://en.wikipedia.org/wiki/Treaty_of_Saint_Petersburg_(1875)).

¹⁰ Jon Lunn, *The Territorial Dispute over the Senkaku/Diaoyu Islands*, House of Commons Library, SN06475, 20 November 2012, at 3 (Aug. 12, 2020), available at <https://www.files.ethz.ch/isn/157093/SN06475.pdf>.

¹¹ 尖閣諸島の領有についての基本見解, 日本外務省, 8 March 1972 [Basic Position on Territorial Sovereignty over Senkaku/Diaoyu Islands, Japanese Ministry of Foreign Affairs, 8 March 1972] (Aug. 12, 2020), available at <http://www.mofa.go.jp/mofaj/area/senkaku/index.html>.



confirm that Japan has long recognized the existence of Tok Islet (Dokdo).¹² More importantly, Japan cites the Cabinet Decision dated 28 January 1905 and the Official Instruction of Shimane Prefecture of 22 of February 1905 ruling that Tok Islet (Dokdo) should become part of Japan.¹³

Territorial disputes surrounding the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) have been, for the most part, “document warfare” and “map warfare” as Japan mostly rely on historical records to justify its “inherent territories” claim. Japan’s biased reliance on historical grounds seems to be related with its awareness of effects of international legal acts that might turn out to be detrimental to its territorial claim.

But the consequences of “document warfare” and “map warfare” actively conducted by Japan seems to turn unfavorably to itself as neighbors against which Japan is in territorial disputes refer to more impeccable and decisive historical, geological and legal grounds regarding the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo).

In rebuttal to the position of Japan, Russia argues that history shows Russia’s priority in discovering and exploration of the Kurils and the Japanese never had effective control over the island closest to them, Hokkaido, much less the disputed islands in the Kuril chain.¹⁴ As evidence, Russia presents an official map published in 1796 by the government of the Russian Empire during the reign of Catherine II and the Decree of Catherine II to the Senate in 1779 “On Exemption from Duties of the Population of the Kuril Islands That Have Acquired Russian Allegiance.”¹⁵ Moreover, Russia considers that Treaties of 1855 and 1875 do not have any modern value since Russia’s territorial concession to Japan under the two treaties were done in that period as a result of coercion of Japan.¹⁶

On the other hand, in opposition to Japan’s claim over the Diaoyu Islands, China released a number of historical records confirming China’s prior occupation of the Diaoyu Islands, including the Military Map for Chinese Coast Guard, on which Diaoyu Dao and its affiliated islands are inscribed as the Diaoyu Islands under Chinese Jurisdiction. The map was issued in 1562, 333 years earlier than 1895, when, according to Japan’s assertion, Japan first discovered and incorporated the islands. China argues that the fact that China has long recognized its sovereignty over the Diaoyu Islands is also confirmed by a number of maps produced by foreigners such as a map created in 1809 by a French geologist Pierre Lapie.¹⁷

¹² 10 Points to Understand the Takeshima Dispute, *supra* note 4, at 5.

¹³ 김정세 등, 《독도는 조선민족의 고유한 령토이다》 [Jong-Se Kim et al., *Tok Islet is Part of Sacrosanct Territory of the Korean Nation*] 239–243 (Pyongyang: Kim Il Sung University Publishing House, 2010).

¹⁴ Quillen 1992, at 646.

¹⁵ Полевой Б.П. Первооткрыватели Курильских островов [Boris P. Polevoy, *Explorers of the Kuril Islands*] 178–179 (Yuzhno-Sakhalinsk: Far Eastern Book Publishing House, 1982).

¹⁶ Amanzholov & Akhmetov 2013, at 18.

¹⁷ 郑海麟, 钓鱼岛列屿之历史与法理研究 [Hailin Zheng, *Study on the History and Legal Theory of the Diaoyu Islands*] 99–102 (Beijing: Zhonghua Bookshop, 2007).



As for Tok Islet (Dokdo), a numerous old documents and maps confirm that it is indisputably an inherent part of Korean territory, not that of Japanese territory. Historical records such as “Koryosa” (History of Korea) shows that Tok Islet (Dokdo) had already become part of Korean territory in 512. The Map of Eight Provinces of Korea produced in 1530 and a large number of subsequent maps confirm that Tok Islet (Dokdo) has long been recognized as part of Korean territory. This is also made clear by numerous maps created by Japanese and Europeans in the end of 18th century.¹⁸

The aforementioned facts indicate that Japan’s “inherent territories” approach is highly disputable.

Whilst it is true that historical documents and maps are of certain significance in the resolution of territorial disputes over a given area, the historical records, as evidence for confirming the facts of the past, seem to be less relevant to the legal determination of national jurisdiction over disputed territories. In addition, “document warfare” and “map warfare” are, in essence, wars of words, which cannot be deemed as valid grounds for determining territorial sovereignty.

In this light, the so-called “inherent territories” approach of Japan seems to be no more than a general term that anyone can use with regard to disputed territories and a term that “cannot be accurately defined” – it is, in no case, a technical term of international law.¹⁹

In modern international society, territorial jurisdiction is, for the most part, determined by written rules of international law, including international treaties. Since traditional custom is somewhat uncertain and unstable, reliance on it alone cannot clearly determine national jurisdiction over the disputed islands. Whatever legends on the past Japan may create, it cannot veil the truth of national jurisdiction determined by modern international law provisions.

In the light of the above, the paper examines the acceptability of Japan’s territorial claim over the Southern Kurils, the Diaoyu Islands, and Tok Islet (Dokdo) in terms of international treaties that were legitimately adopted at the end of World War II. On the basis of analysis of preceding literature of several international academics and practitioners, the paper focused on clarifying that the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) were excluded from Japanese territory under legitimately-adopted international law provisions before or after World War II.

Sections 1, 2, and 3 will argue that the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) were excluded from the post-war territory of Japan under the Cairo Declaration, the Yalta Agreement and the Potsdam Declaration, which was reaffirmed by the San Francisco Peace Treaty. Section 4 will provide concluding remarks.

¹⁸ Kim et al. 2010, at 162–235.

¹⁹ 佐藤優, “解説 外務省が公開しない多数の秘密文書”, 松本俊一 『日ソ国交回復秘録』 [Masaru Sato, *Commentaries on a Number of Confidential Documents Not Released by the Japanese Ministry of Foreign Affairs in Secret Records Concerning Restoration of Diplomatic Relations Between Japan and USSR*] 274, 274–275 (Tokyo: Asahi Shimbun, 2012); 豊下 穠彦 『「尖閣問題」とは何か』 [Narahiko Toyoshita, *What Is the “Senkaku Problem”?*] 150–151 (Tokyo: Iwanami Shoten, 2012).



The sources cited in the present research include academic literature, journal and newspaper articles, etc.

1. Japanese Territory Defined by the Cairo Declaration, the Yalta Agreement, and the Potsdam Declaration After World War II

The Cairo Declaration of 1 December 1943, the Yalta Agreement of 11 February 1945, and the Potsdam Declaration of 26 July 1945 are of paramount significance in defining the territory of Japan after World War II.

Nevertheless, Japan attempts to negate the international legal character of the above treaties to claim their territorial sovereignty over the islands in dispute. Arguments put forward by Japan can be classified into three categories. One is that relevant treaties are not legally binding upon Japan since the government was not a party to them at the time.²⁰ Another argument is that the treaties did not specifically name the islands from which Japan should be expelled.²¹ The other argument is that Japan did not know about one of those treaties (Yalta Agreement) at all.

The Cairo Declaration adopted as a joint declaration of the three allied powers – the U.S., the UK, and China – is not *per se* binding upon Japan. Later, the Cairo Declaration was incorporated into Article 8 of the Potsdam Declaration before the surrender of Japan. The Potsdam Declaration, which was adopted by the U.S., the UK, and China as a joint declaration and to which Russia subsequently acceded, did not have any immediate binding force on Japan at the time, either. However, the Japanese Emperor made public announcement in which Japan accepted the Potsdam Declaration on 14 August 1945 and signed the Act on Capitulation in which Japan unconditionally accepted the terms of the Potsdam Declaration on 2 September 1945.²² It was this subsequent express announcement of intention by Japan that rendered the Cairo and Potsdam Declarations binding upon the country, and thus, Japan thereby assumed international obligations regulated in the declarations.

The argument of Japan that it has title to the disputed territories since the Cairo and Potsdam Declarations did not specifically name the islands from which Japan should be expelled seems far from acceptable. This is because the Cairo and Potsdam Declarations merely defined the range of territories of a vanquished nation, Japan, without elaborating in detail on every individual island or islet.

If one reverses Japan's reasoning that failure to specifically name the islands in dispute to be returned by Japan to the neighbors gives Japan title to the disputed

²⁰ Quillen 1992, at 650.

²¹ *Border and Territorial Disputes*, *supra* note 2, at 344; Friedrich Kratochwil et al., *Peace and Disputed Sovereignty: Reflections on Conflict over Territory* 67 (Lanham, M.D.: University Press of America, 1985).

²² Act of Japan's Surrender, 2 September 1945, Ibiblio (Aug. 12, 2020), available at http://www.ibiblio.org/pha/war.term/093_03.html.



islands, it leads to the conclusion that failure to specifically name the islands to be part of Japan's territory will give neighboring states title to the disputed islands.

Similarly, the assertion of Japan that it is not bound by the Yalta Agreement since Japan did not know of the Yalta Agreement when it signed the instrument of surrender, nor was the Yalta Agreement mentioned in the Potsdam Declaration which Japan accepted at its surrender²³ lack legal grounds. It is true that the Yalta Agreement was kept confidential *vis a vis* Japan at that time since it dealt with the former Soviet Union's participation in the war against Japan. In fact, the Yalta Agreement was a contemporary wartime agreement, which carried more weight than the earlier Cairo Declaration.²⁴

In addition, the facts that Japan was not a third party of the Yalta Agreement but an enemy state of World War II and that it signed an unconditional surrender lead to the conclusion that the Yalta Agreement should be considered binding upon Japan. Therefore, it follows that the Yalta Agreement definitely qualifies as a binding international treaty.

Then, how was Japanese territory delimited after World War II according to the Cairo and Potsdam Declarations, and the Yalta Agreement?

Regarding the definition of post-war Japanese territory, the Cairo Declaration stated that

Japan shall be stripped of all the islands in the Pacific which she seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.^{25/26}

This provision in the Cairo Declaration was incorporated in paragraph 8 of the Potsdam Declaration stating that "the conditions of Cairo Declaration will be executed," which was accepted by Japan at its surrender,²⁷ thus rendering the Cairo Declaration valid as a binding international law.

Regarding the areas which Japanese sovereignty will be limited to, paragraph 8 of the Potsdam Declaration specifies that "the conditions of Cairo Declaration will be executed and that the Japanese sovereignty will be limited to the islands of

²³ Tim Johnson, *Disputed Territories Shrouded in Muddled History*, Japan Economic Newswire, 13 April 1991, available at LexisNexis Library; *Border and Territorial Disputes*, *supra* note 2, at 339.

²⁴ *Id.*

²⁵ Cairo Conference of 1 December 1943, Avalon Project (Aug. 12, 2020), available at <http://avalon.law.yale.edu/wwii/cairo.asp>.

²⁶ The Cairo Declaration, 27 Nov. 1943, US.-UK.-P.R.C. excerpt reprinted in John J. Stephan, *The Kuril Islands: Russo-Japanese Frontier in the Pacific* 240 (New York: Oxford University Press, 1974).

²⁷ Amanzholov & Akhmetov 2013, at 19.



Honshu, Hokkaido, Kyushu, Shikoku and less larger islands” which will be specified by the Allies.²⁸

Territories excluded from Japanese sovereignty under the Cairo Declaration and reaffirmed by the Potsdam Declaration, can be classified into three categories.

The first category includes all the islands in the Pacific that Japan seized or occupied since the beginning of World War I. To be more specific, the islands in the Pacific that Japan is obliged to return refer to the groups of islands in the southwest Pacific. During World War I, in 1914, Japan declared war against Germany and occupied groups of islands in the southwest Pacific, which it placed under its mandatory rule after the war. The islands in the Pacific over which the League of Nations approved Japan’s mandatory rule were the Caroline Islands, the Mariana Islands and the Marshal Island.²⁹ Now these groups of islands are no longer under the mandatory rule of Japan. The islands at issue – the Southern Kurils, Diaoyu Islands and Tok Islet (Dokdo) – do not fall below this category of territories.

The second category of territories excluded from Japanese sovereignty under the Cairo Declaration and reaffirmed by the Potsdam Declaration, include all the territories Japan had stolen from the Chinese after Sino-Japanese War of 1894–1895, such as Manchuria, Taiwan (Formosa), and the Pescadores. The Diaoyu Islands is affiliated to Taiwan, and therefore they are included in the territories that have to be returned to Japan according to the Declarations. Japan, however, asserts that the Diaoyu Islands are not affiliated islands of Taiwan. Furthermore, Japan argues that the Diaoyu Islands could not have been included in the Treaty of Shimonoseki since it had already incorporated the Diaoyu Islands into its territory by adopting a Cabinet Decision of January 1895.³⁰ According to Japan, the Diaoyu Islands do not belong to the territories Japan stole from the Chinese after the Sino-Japanese War, and therefore cannot be returned.

This claim of Japan does not seem sustainable in historical terms. Before Japan’s Cabinet Decision of 14 January 1895, the Diaoyu Islands had already been recognized as an inseparable part of Chinese territory; it was not a *terra nullius*. Having been aware of this fact, Japan could not make the Cabinet Decision open to the public and was unable to execute the Instruction of 21 January 1895 ordering the installment of a signpost for marking Japanese jurisdiction over the Diaoyu Islands. Several decades later, in 5 May 1969, Japan was able to erect the signpost on the island.³¹ This

²⁸ Paragraph 8 of the Potsdam Declaration (1945).

²⁹ George H. Blakeslee, *The Mandates of the Pacific*, 1(1) Foreign Affairs 98 (1922).

³⁰ Marta Hermez, *Sino-Japanese Relations: The Diaoyu/Senkaku Islands Dispute – Sovereignty, Maritime Delimitation and Resource Rights*, Thesis in Public International Law, Faculty of Law, Ghent University (2014), at 29 (Aug. 12, 2020), available at https://lib.ugent.be/fulltxt/RUG01/002/162/997/RUG01-002162997_2014_0001_AC.pdf.

³¹ 管建强, 《国际法视角下的中日钓鱼岛领土主权纷争》 [Jianqiang Guan, *Territorial and Sovereign Disputes over the Diaoyu Islands Under the Scrutiny of International Law*] 129 (Beijing: Chinese Social Science, 2012).



indicates that the Diaoyu Islands were not ceded to Japan according to the peace treaty as Taiwan was, but was coercively incorporated to Japan at the point of time when “victory” of Sino-Japanese War was certain. A Japanese scholar supports this view as well. He considers that Japan stole the Diaoyu Islands from China without any treaty negotiations taking advantage of victory in war.³² All these coalesce to indicate that the Diaoyu Islands fall within the category of territories Japan stole from the Chinese, and therefore should be returned to China after World War II.

The third and final category of territories excluded from Japanese sovereignty, under the Cairo Declaration and reaffirmed by the Potsdam Declaration, consist of all other territories which Japan had taken by violence and greed. Incorporating a paragraph to that effect, the drafters of the Declarations probably intended to make Japan return all the territories it had taken by every possible means and ways from other countries. Under this provision, Japan assumed obligation to unconditionally return territories of other countries which it had taken by violence and greed. This obligation is not confined to the territories taken since the beginning of World War I. The Cairo and Potsdam Declarations were international instruments providing rights and obligations of Allied Powers *vis a vis* their enemy state, Japan. Since the former Soviet Union and Korea belong to the Allied Powers, the two states had legitimate rights to have their territories that Japan had taken by violence and greed returned under the Declarations.

The Kuril Islands were obviously part of the Soviet Union/Russia’s territory Japan had taken by violence and greed. The Treaty of Shimoda (7 February 1855), defining the Southern Kurils as belonging to Japanese territory by drawing a national boundary between Iturup and Urup, and the Treaty of St. Petersburg (7 May 1875), bringing all the Kuril Islands into Japanese possession are invalid since they were concluded in that period as a result of coercion of Japan. Moreover, these treaties were dissolved by Japan itself as a result of an armed attack on Russia and the signing of the Portsmouth Peace Treaty in 1905. Some Japanese scholars support this interpretation as well.

As far as Tok Islet (Dokdo)’s concerned, ten years after Japan stole the Diaoyu Islands from the Chinese, in 1905, Japan followed the same scenario as it had stolen the Diaoyu Islands to steal Tok Islet (Dokdo), an inherent part of Korean territory. Since 1912, when Korea incorporated Tok Islet (Dokdo) into its territory, the government has been continuously exercising its sovereignty and control over the island without once giving up its territorial sovereignty over it. In 25 October 1900, the Korean government promulgated a royal ordinance reaffirming Korean sovereignty over Tok Islet (Dokdo), and expressly declared it both home and abroad through official gazette and legation of foreign states in Korea. Nevertheless, 5 years later, on 28 January 1905,

³² 井上清, 尖閣列島——釣魚諸島の史的説明 [Kiyoshi Inoue, *Historic Account for Senkaku/Diaoyu Islands*] 118–123 (Tokyo, 1996).



Japan issued a Cabinet Decision regulating that Tok Islet (Dokdo) should be part of Japanese territory and on 22 February that year, issued an Official Instruction of Shimane Prefecture to that effect. But Japan could not at the time publicly announce the adoption of the decision and the official instruction to the international society. This seems to indicate that Japan was reluctant to let other countries know about its incorporation of Tok Islet (Dokdo).³³ The year 1905, when Japan officially issued documents claiming its sovereignty over Tok Islet (Dokdo) was the period when Japanese colonial rule over Korea was established. Therefore, it can be argued that Tok Islet (Dokdo) definitely falls within the category of territories which Japan had taken by violence and greed.

The Yalta Agreement provided the transfer to the former Soviet Union of the southern part of Sakhalin island and all the islands adjoining to it, as well as the Kuriles so that the rights of Russia violated by the treacherous attack of Japan in 1904 could be restored.³⁴ As discussed earlier, Japan is obliged to be bound by the Yalta Agreement as it is a legally binding international treaty.

In light of the aforementioned, it can be said that Japan's assertion that the territories at issue fall outside the category of territories which Japan had taken by violence and greed lacks legal ground. The Cairo Declaration, the Potsdam Declaration and the Yalta Agreement are basic international instruments which defined Japanese sovereignty after World War II and according to which the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) are respectively recognized as part of Russia, China and Korea, and not those of Japan.


2. Japanese Territory Determined by the Supreme Commander for the Allied Powers Instruction Note No. 677

Since the General Headquarters for the Supreme Commander for the Allied Powers was a lawful and legitimate organ established after World War II under international law at the time, all the documents or instructions it issued were undoubtedly valid under international law. One of the major functions of the General Headquarters for the Supreme Commander for the Allied Powers was to enforce international law provisions, including declarations and agreements adopted during World War II. To that end, the General Headquarters for the Supreme Commander for the Allied Powers issued a set of directives to technically deal with determination of Japanese territories based on the Cairo and Potsdam Declarations.

The most typical directive is Supreme Commander for the Allied Powers Instruction Note (SCAPIN) No. 677, which expressly listed the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) as the areas excluded from Japanese national jurisdiction.

³³ Kim et al. 2010, at 239–243.

³⁴ The Crimean Conference of 4–11 February 1945.



In order to define post-war Japanese territory based on the Potsdam Declaration, which provided that “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine,” the General Headquarters for the Supreme Commander for the Allied Powers commenced its work to distinguish islands that had originally been part of other countries’ territories from those of Japan among a number of small islands scattered between Japan and its neighbors.³⁵ As a result of months of survey, the General Headquarters for the Supreme Commander for the Allied Powers issued SCAPIN No. 677 entitled “Governmental and Administrative Separation of Certain Outlying Areas from Japan” on 29 January 1946.³⁶

Paragraph 3 of SCAPIN No. 677 provides that

3. For the purpose of this directive, Japan is defined to include the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately 1 000 smaller adjacent islands, including the Tsushima Islands and the Ryukyu (Nansei) Islands north of 30° North Latitude (excluding Kuchinoshima Island); and excluding (a) Utsuryo (Ullung) Island, Liancourt Rocks (Tok Islet/Dokdo/Take Island) and Quelpart (Saishu or Cheju) Island, (b) the Ryukyu (Nansei) Islands south of 30° North Latitude ... and (c) the Kurile (Chishima) Islands, the Habomai (Hapomaze) Island Group (including Suisho, Yuri, Akiyuri, Shibotsu and Taraku Islands) and Shikotan Island.³⁷

Paragraph 4 of SCAPIN No. 677 stipulates that further areas excluded from the governmental and administrative jurisdiction of Japan are the following: (a) all Pacific islands that were seized or occupied by Japan since the beginning of the World War in 1914, (b) Manchuria, Formosa (Taiwan), and the Pescadores, (c) Korea.³⁸

The above-seen provisions of SCAPIN No. 677 expressly excluded from Japanese territories the Southern Kurils and Tok Islet (Dokdo or Liancourt Rocks), and Taiwan (Formosa) thus concurrently excluding its affiliated islands, the Diaoyu Islands as well.

SCAPIN No. 677 plainly excluded Tok Islet (Dokdo), Ullung Island and Jeju Island (Chejudo) from Japanese territory and defined them as islands to be returned to Korea. This seems to confirm that the General Headquarter for the Supreme Commander for the Allied Powers acknowledged, through months of survey, that Tok Islet (Dokdo) had originally been under national jurisdiction of Korea, and that they deemed it conformable to the terms of the Cairo and Potsdam Declarations to exclude them from Japanese territory and return to Korea.

³⁵ Kim et al. 2010, at 253.

³⁶ General Headquarters of Supreme Commander for Allied Powers Instruction Note, Governmental and Administrative Separation of Certain Outlying Areas from Japan, 29 January 1946 (Aug. 12, 2020), available at <http://en.wikisource.org/wiki/SCAPIN677> [hereinafter SCAPIN No. 677].

³⁷ *Id.* para. 3.

³⁸ *Id.* para. 4.



SCAPIN No. 677 reaffirmed the terms of the Cairo Declaration, the Potsdam Declaration and the Yalta Agreement by excluding the Southern Kurils, including Habomai and Shikotan from Japanese territory.

Japan interprets the meaning of “Kuril Islands” differently from Russia. According to the Russian view, the clear understanding at the time was that the term included the disputed islands. Japan argues that the two treaties in 1855 and 1875, affecting only the control of the islands north of the northernmost disputed island of Etorofu, show that the “ordinary meaning” of Kuril Islands at the time only included those islands from Uruppu north to the Kamchatka peninsula of mainland Russia.

Some scholars argue that the language of 1946 SCAPIN No. 677 suggests that the Allied Powers, including United States considered Kunashiri and Etorofu as part of the Kurils, but not Shikotan and the Habomais.³⁹

In geopolitical light, Habomai and Shikotan are generally perceived as belonging to the Kuril Islands, and the Southern Kurils apart from these two islands cannot be thought of. Even if Habomais and Shikotan were to be excluded from the Southern Kurils, these two islands had already been excluded from Japanese territory under SCAPIN No. 677.⁴⁰

The fact that SCAPIN No. 677 listed Habomais and Shikotan as well as Kuril Islands on the same level seems to manifest that the drafters might have intended to emphasize the legal status of those two islands to be returned to Russia given Japan's obstinate claim over them at the time.

On the other hand, although SCAPIN No. 677 did not specifically name the Diaoyu Islands, it can be interpreted as excluding the Diaoyu Islands from Japanese territory since it excluded Taiwan (Formosa) from governmental jurisdiction of Japan. As mentioned earlier, in geopolitical terms, the Diaoyu Islands are affiliated to Taiwan and were undoubtedly recognized as part of Chinese territory in accordance with not only SCAPIN No. 677 but also the Cairo and Potsdam Declarations.

As it is, SCAPIN No. 677 is an international instrument that expressly excluded the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) from Japanese territory and it has substantial binding force upon a defeated nation, Japan.

However, Tokyo argues that SCAPIN No. 677 cannot be considered as a valid instrument ultimately determining the return of the Southern Kurils, the Diaoyu Islands because paragraph 6 stated that

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.⁴¹

³⁹ Quillen 1992, at 652–653.

⁴⁰ Kratochwil et al. 1985, at 67; see SCAPIN No. 677, *supra* note 36.

⁴¹ SCAPIN No. 677, *supra* note 36, para. 6.



In light of other paragraphs of SCAPIN No. 677, Japan's position is untenable. At the time of drafting, paragraph 6 aimed at leaving room for further amendment so that if any of the allied powers put forward different proposals, the definition of Japanese territory could be amended. This is explained by paragraph 5 specifying that the definition of Japan included in the present directive will apply to all other future directives, memorandums, and orders issued by the present Allied General Headquarters except otherwise defined by special directives.⁴² Therefore, it can be inferred from paragraph 5 that when the definition of Japanese territory is to be amended, the Allied General Headquarters should necessarily issue other SCAPINs regarding the definition of Japan; otherwise, the definition of Japan regulated by SCAPIN No. 677 will not cease to apply in the future.

If, as claimed by Japan, SCAPIN No. 677 was not a final determination regarding the return of the islands at issue because of the language in paragraph 6, the General Headquarters for the Supreme Commander for the Allied Powers would have issued other special directives specifying the incorporation of those islands to Japan. But no special directives had ever been issued regarding the alteration of the definition of Japan until the General Headquarters for the Supreme Commander for the Allied Powers was dissolved in 1952.

The foregoing seems to confirm that the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) were lawfully excluded from Japanese territory under SCAPIN No. 677 of 29 January 1946 and reaffirmed as parts of respective countries.

In view of the fact that Japan denies the definition of Japan specified in SCAPIN No. 677, it is preferable to reexamine the legal status and effect of SCAPIN No. 677. The legal effect of SCAPIN No. 677 was originated from the Potsdam Declaration, the memorandum of allied powers calling upon Japan to surrender, and the Instrument of Surrender. After the Potsdam Declaration was adopted on 26 July 1945, the former Soviet Union, China, the U.S. and the UK issued a memorandum calling upon Japan to surrender and calling upon all governmental bodies of Japan, including Japanese Emperor to obey the orders of the Allied Supreme Commander.⁴³ Accordingly, paragraph 6 of the Act of Surrender signed by the Japanese Foreign Minister and the Chief of the General Staff on behalf of Japan prescribed that the Emperor and the Government of Japan should officially announce that they would faithfully implement the provisions of the Potsdam Declaration and all orders and measures required by the Supreme Commander for the Allied Powers and other Allied representatives.⁴⁴ Paragraph 8 of the Act of Surrender specified that the

⁴² *Id.* para. 5.

⁴³ Quillen 1992, at 637; 中苏美英四国对日本乞降照会的复文, 王绳祖, 何春超, 吴世民编选, 国际关系史资料选编 (17世纪中叶—1945) [Response to the Japanese Instrument of Surrender of the Four Powers: China, the Soviet Union, the United States, and the United Kingdom in Selection of the History of International Relations: 17th Century – 1945] 898 (S. Wang et al. (eds.), Beijing: Law Press, 1988).

⁴⁴ 《日本投降书》 [Japanese Instrument of Surrender] in *Id.* at 903.



Emperor and power organs of Japanese Government should obey the Supreme Commander for Allied Powers, who were responsible to take appropriate measures to enforce the terms of surrender.⁴⁵

Thus, the General Headquarters for the Supreme Commander for the Allied Powers was competent to take all appropriate measures necessary for the enforcement of the terms of surrender and Japan was obliged to unconditionally obey them.

Therefore, SCAPIN No. 677, which was adopted for the implementation of the Potsdam Declarations according to the act of surrender, validly defined Japanese territorial sovereignty.

If fact, the San Francisco Peace Treaty cannot be deemed riding over the Potsdam Declaration or the Act of Surrender of Japan in terms of relations between Japan and three neighbors in dispute – Russia, China and Korea. This is because, as will be discussed below, the three neighbors were not the parties to the San Francisco Peace Treaty, and therefore the treaty cannot bind those three countries.

It can be said in the light of the above that the Potsdam Declaration and the Act of Surrender of Japan are the basic legal instruments binding upon Japan and three neighbors and SCAPIN No. 677, which was adopted according to those instruments, is the most authoritative legal act defining Japanese territory after World War II.

3. Japanese Territory Specified by the San Francisco Peace Treaty

In principle, the San Francisco Peace Treaty is not binding upon Russia, China, and Korea. This is because China and Korea did not take part in the conference and Russia refused to sign the treaty even though it took part in the conference. In particular, China and the DPR Korea officially denounced the San Francisco Peace Treaty and declared respectively on 15 September 1951 and 18 September 1951⁴⁶ that they do not recognize the treaty.

Given the fact that Japan refers to the provisions of the San Francisco Peace Treaty, which has no binding force upon the three neighbors, to support its claim over the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo), it seems necessary to discuss the range of Japanese territory after World War II by analyzing relevant provisions of the peace treaty.

According to the Vienna Convention on the Law of Treaties, a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and if the

⁴⁵ *Id.* at 904.

⁴⁶ 周恩来外长关于美国及其仆从国家签订旧金山对日和约的声明 (18 September 1951), 田桓主编: 《战后中日关系文献集(1945-1970)》 [Statement by Foreign Minister Zhou Enlai on the San Francisco Peace Treaty Concluded by the U.S. and its Satellite States, 18 September 1951 in Collection of Literature on Post-War Sino-Japanese Relations: 1945-1970] 103, 103-104 (H. Tian (ed.), Beijing: Chinese Social Science, 1996).



meaning of a treaty is ambiguous, one must have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.⁴⁷ If the San Francisco Peace Treaty is interpreted in accordance with the above-mentioned international rules on treaty interpretation, it is not difficult to discern that Japanese claim over the disputed islands is indefensible.

First, Japan refers to Article 2(a) of the San Francisco Peace Treaty, which dealt with the relations between Japan and Korea. The paragraph reads,

Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart (Jeju Island), Port Hamilton (Komun Island) and Dagelet (Ullung Island).⁴⁸

Japan argues that this paragraph confirmed that Tok Islet (Dokdo) is part of Japanese territory since it listed “Korea, including the islands of Quelpart, Port Hamilton and Dagelet” as territories that Japan must renounce, while intentionally excluding Tok Islet (Dokdo).⁴⁹ With all due respect, it would be more reasonable to consider that the drafters of the San Francisco Peace Treaty didn’t bother to list all islands of Korea (more than 30 islands) but just mentioned the names of three representative ones among them. If one follows Japan’s reasoning, all other islands which were not listed in the San Francisco Peace Treaty would become part of Japanese territory. This makes no sense in accordance with the ordinary meaning to be given to the terms of the treaty.⁵⁰ Since Tok Islet (Dokdo) is an affiliated island of Ullung Island, it is proper and natural that the wording “Korea, including the islands of Quelpart, Port Hamilton and Dagelet” should be interpreted as including Tok Islet (Dokdo). Thus, the interpretation of Article 2(a) of the San Francisco Peace Treaty in accordance with the ordinary meaning makes it certain that Tok Islet (Dokdo) is part of Korean territory.

Taking into account the preparatory work of the treaty and the circumstances of its conclusion, Japan’s claim that Tok Islet (Dokdo) should be part of its territory for the San Francisco did not expressly list Tok Islet (Dokdo) lacks legal ground. Originally, Tok Islet (Dokdo) had been expressly specified as part of Korean territory in the first to fifth *travaux préparatoires* of San Francisco Peace Treaty drafted by the U.S. between 1947 and 1949. However, Tok Islet (Dokdo) was omitted from the sixth *travaux préparatoires* of San Francisco Peace Treaty drafted by the U.S. in December 1949. The omission appears to have resulted from political conspiracy between the U.S. and Japan.⁵¹ The United

⁴⁷ Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (1969).

⁴⁸ Art. 2(a) of the San Francisco Peace Treaty (1951).

⁴⁹ 10 Points to Understand the Takeshima Dispute, *supra* note 4, at 3.

⁵⁰ Kim et al. 2010, at 259.

⁵¹ *Id.* at 261.



Kingdom, on the other hand, included Tok Islet (Dokdo) in Korean territory in its first and second draft, which it made independently of other allied powers in 1951. On 2 May 1951, the U.S. and the UK held a joint meeting to negotiate and reach a compromise between the *travaux préparatoires* of the two states. Consequently, a compromise draft was made, in which Tok Islet (Dokdo) was included in neither Korean nor Japanese territory. In this regard, New Zealand declared its position that Tok Islet (Dokdo) should be specified as Korean territory.⁵² As is manifested by the above, the attempt of Japan to compromise with the U.S. over Tok Islet (Dokdo) was thus checked and rebuffed by other allied powers, including the U.K. and New Zealand.

The fact that the San Francisco Peace Treaty did not specifically include Tok Islet (Dokdo) in Japanese sovereignty can be viewed as reaffirming the validity of the preceding international legal acts under which Korean sovereignty over Tok Islet (Dokdo) was already recognized.

Secondly, let's consider some provisions of the San Francisco Peace Treaty providing territorial relations between Japan and China. Article 2(b) stipulates, "Japan renounces all right, title and claim to Formosa and the Pescadores" and Article 3 specifies

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 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.⁵³

In this connection, Japan argues that the Diaoyu Islands are excluded from Taiwan renounced by Japan under Article 2(b), and, in particular, the Diaoyu Islands should become part of Japanese territory under Article 3 providing Nansei Shoto Islands south of 29 north latitude be placed under the administrative authority of the U.S. since at that time the Diaoyu Islands were included in the Nansei Shoto Islands.⁵⁴

This position of Japan that the Diaoyu Islands were not included in Taiwan that Japan renounced does not sustain in terms of treaty interpretation in accordance with the ordinary meaning to be given to the terms of the treaty. As mentioned earlier, Article 2 of the San Francisco Peace Treaty stipulates that Japan renounced Taiwan and the Pescadores. In accordance with the ordinary meaning to be given to the terms of the treaty, Taiwan should be interpreted as including all islands affiliated

⁵² Kim et al. 2010, at 261–262.

⁵³ Arts. 2(b) and 3 of the San Francisco Peace Treaty (1951).

⁵⁴ Ministry of Foreign Affairs of Japan, The Senkaku Islands (March 2013), at 4 (Aug. 12, 2020), available at https://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku_en.pdf.



thereto. Taiwan is the biggest island that is closest the Diaoyu Islands and the distance between them is only 90 n. mile. This is much shorter than 225 n. mile, which is the distance between the Diaoyu Islands and the Okinawa, a Japanese island. It is international custom to affiliate small islands to the closest big island. Examples of Japan's practice in this regard can also be found. The Bonin Islands of Japan, which lies the closest to the Marcus Island among other nearby islands – 660 n. mile – was recognized as affiliating the latter, thus incorporating it to Japanese territory.⁵⁵ Therefore, according to international custom, the Diaoyu Islands should be affiliated to its closest big island, Taiwan and the term “Taiwan” in Article 2 of the San Francisco Peace Treaty should be interpreted as including the Diaoyu Islands.

Recourse to the preparatory works of the San Francisco Peace Treaty and the circumstances of its conclusion does not aid Japan in its claim over the Diaoyu Islands, either. Exhaustive reading of the preparatory works of the San Francisco Peace Treaty shows that the Diaoyu Islands were defined as neither Chinese nor Japanese territory in the first place. The draft version of the San Francisco Peace Treaty of 5 August 1947 and 8 January 1948 provides that

Japan hereby cedes to China in full sovereignty the islands 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 Sho); 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 due north to a point in 24° N. latitude, thence northeasterly to the point of beginning.⁵⁶

The Diaoyu Islands, which lie at 25° 44' to 56' N. latitude and 123° 30' to 124° 34' E. longitude, was not included in the specific listing of islands to be ceded to China and the delineation of Taiwan through latitude and longitude. As the draft shows, the Diaoyu Islands were included neither in Taiwan that should be returned to China nor in Japanese territory. This seems to imply that the drafters of the peace treaty deemed it unnecessary to specifically reaffirm the national jurisdiction over the Diaoyu Islands since they had been already returned to China under the earlier international legal instruments.

However, the drafts of 1949 of the San Francisco Peace Treaty provided that the Ryukyu Islands south of 29° N. latitude, which included the disputed Diaoyu islands,

⁵⁵ Kim et al. 2010, at 258.

⁵⁶ Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11(1) Pacific Rim Law & Policy Journal 63, 124–125 (2002).



would be under the envisioned system of the U.N. trusteeship.⁵⁷ The drafts of October and November 1949 stipulated,

Japan hereby renounces all rights and titles to the Ryukyu Islands south of 29° N. 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 Nations, the trusteeship agreement to provide that the United States shall be the administering authority.⁵⁸

The provisions concerning the Ryukyu Islands south of 29° N. latitude was reiterated in the draft dated 29 December 1949 and the same provision was finally incorporated in Article 3 of the San Francisco Peace Treaty. Although the Diaoyu Islands was not specifically named in the San Francisco Peace Treaty, the Ryukyu Islands south of 29° N. latitude, which according to Article 3 were to be placed under the US trusteeship, included the Diaoyu Islands.

Article 34 of the Vienna Convention on the Law of Treaties regulates that “a treaty does not create either obligations or rights for a third State without its consent.”⁵⁹ It should be noted that China has never expressly recognized the San Francisco Peace Treaty nor has consented even implicitly. In light of such position of China, it is not in conformity with international treaty law to interpret the San Francisco Peace Treaty as including the Diaoyu Islands in Japanese territory.

Even before the San Francisco Peace Treaty was concluded, Manchuria, Taiwan and the Pescadores had already been ceded to China in accordance with the Cairo and Potsdam Declarations and the Japanese Instrument of Surrender. The effect of these international legal instruments cannot be overridden by the San Francisco Peace Treaty.⁶⁰

Finally, provisions of the San Francisco Peace Treaty concerning territorial relations between Japan and Russia give rise to controversy. Article 2(c) of the Peace Treaty provides 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 5 September 1905.⁶¹

⁵⁷ *Id.* at 125.

⁵⁸ *Id.* at 125–126.

⁵⁹ Art. 34 of the Vienna Convention on the Law of Treaties (1969).

⁶⁰ Guan, *supra* note 31, at 133–134.

⁶¹ Art. 2(c) of the San Francisco Peace Treaty (1951).



Japan argues that Russia is not a party to the San Francisco Peace Treaty⁶² and further asserts that the islands in dispute were not included into the notion of Kuril Islands and that this Treaty does not directly indicate to which state – Japan or Russia – the specified territories are to be transferred to.⁶³

It is observed that in terms of international treaty law, Japan's assertion that Russia has no sovereignty over Kuril Islands because it is not a party to the Treaty is unsustainable. The San Francisco Peace Treaty spelt out Japan's renunciation of all rights, title and claim to the Kuril Islands. On the other hand, Russia did not officially declare its opposition to this article of the Treaty, which created rights for a third state, Russia.

Article 36 of the Vienna Convention on the Law of Treaties provides that in the event that a right arises for a third State from a provision of a treaty, its assent shall be presumed so long as the contrary is not indicated.⁶⁴ In light of this provision, the fact that Russia was a third State of the Peace Treaty cannot help Japan in its claim that the former has no title to the territories in dispute.

Also, the assertion of Japan that the Southern Kurils, including Habomais and Shikotan are not included into the concept of Kuril Islands and the national jurisdiction over these islands is not expressly provided in the San Francisco Peace Treaty seems to have little ground in light of the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose.

Regarding the "ordinary meaning" of Kuril Islands, Japan argues that Habomais and Shikotan are not included in Kuril Islands and it only includes those islands from Uruppu north to the Kamchatka peninsula of mainland Russia. Tokyo refers to the two treaties in 1855 and 1875 to support this claim.⁶⁵ In rebuttal, Russia argues that the "ordinary meaning" of Kuril Islands include not only Iturup and Kunashir but also Habomais and Shikotan referring to the Yalta Agreement of 11 January 1945 and the Potsdam Declaration of 27 July 1945 and Japanese Instrument of Surrender of 2 September 1945.⁶⁶ The two disputants have different positions on the "ordinary meaning" of Kuril Islands.

Then, which position – Japanese or Russian – finds support in more credible evidence in terms of international law? It is observed that the former falls short of credible and convincing evidence. The two treaties of the 19th century invoked by Japan had already been dissolved by Japan itself as a result of an armed attack on Russia and the signing of the Portsmouth Peace Treaty in 1905. Therefore, even if it was recognized that Kuril Islands did not include the 4 islands in dispute under 19th century treaties, it no longer has any effect today.

⁶² Quillen 1992, at 652.

⁶³ Amanzholov & Akhmetov 2013, at 18.

⁶⁴ Art. 36 of the Vienna Convention on the Law of Treaties (1969).

⁶⁵ Johnson, *supra* note 23.

⁶⁶ Act of Japan's Surrender, *supra* note 22.



It is a general principle of law interpretation that when interpreting the meaning of a certain term, a subsequent law overrides earlier laws providing the meaning of the identical term. It is, therefore, rightful to interpret the meaning of Kuril Islands according to the international legal acts concerning Russia-Japanese relations which were subsequently concluded after the two treaties of the 1800s Japan refers to.

When viewed from the linguistic aspect that the meaning of a given term can continuously change, i.e. either dwindle or expand as society develops, Japan's allegation hardly seems acceptable. Even though as asserted by Japan, Kuril Islands did not include the islands in dispute in the 19th century, the meaning of the term may well change or expand over time.

When there is inconsistency between the meaning of a word in the past and that at present, the most accurate resolution would be to examine the meaning of the period that is closest from the point of time when inconsistency was taken issue. In this light, the meaning of Kuril Islands should be examined on the basis of the international legal acts concluded just prior to the San Francisco Peace Treaty, which led to controversies surrounding the meaning of Kuril Islands.

More importantly, the purpose of the San Francisco Peace Treaty was to reaffirm and legally determine the international legal instruments accepted by Japan, including the Yalta and Potsdam Declarations, the Instrument of Surrender, and Instruction Notes of the Supreme Commander for the Allied Powers. This also indicates that it is most reasonable to interpret the meaning of "Kuril Islands" on the basis of these instruments. Russian position that Kuril Islands included all the Southern Kurils, including Habomais and Shikotan was reflected in the term "Kuril Islands" specified by the Yalta and Potsdam Declarations, Instrument of Surrender, and Instruction Notes of the Supreme Commander for the Allied Powers, which Japan unconditionally accepted.

The Yalta Agreement provided that it is restoration of the rights of Russia to transfer to the former Soviet Union the southern part of Sakhalin island and all the islands adjoining to it, as well as the Kuril Islands.⁶⁷ On 2 September 1945, Japan signed the Act of Surrender unconditionally accepting the terms of the Potsdam Declaration defining the Japanese territory after World War II.⁶⁸ Japan thereby lost the right to refer to the Southern Kuril as "illegally occupied." If Japan had had the lawful grounds not to consider any of the islands in dispute as Kuril Islands, it would have declared about it at that time.⁶⁹ This indicates that no real misunderstanding existed as to whether the treaty term, "Kuril Islands," included the disputed islands.⁷⁰

⁶⁷ The Crimean Conference of 4–11 February 1945.

⁶⁸ Act of Japan's Surrender, *supra* note 22.

⁶⁹ Чернявский С.В. Сан-Францисский мирный договор 1951 г. [S.V. Chernyavsky, *San Francisco Peace Treaty (1951)*] (Aug. 12, 2020), available at https://rgavmf.ru/sites/default/files/lib/cherniavskiy_sf_dogovor_1951.pdf.

⁷⁰ Quillen 1992, at 644.



The foregoing considerations indicate that Japan's claim that the Southern Kurils, the Diaoyu Islands and Tok Islet (Dokdo) are excluded from the territories renounced by Japan under the San Francisco Peace Treaty lack credibility.

Conclusion

The Cairo Declaration, the Yalta Agreement, the Potsdam Declaration, and the Act of Surrender, which defined Japanese territory after World War II are binding international treaties and international legal documents which Japan is obliged to abide by.

Article 26 of the Vienna Convention on the Law of Treaties provides that,

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁷¹

This provision is a codification of a rule of customary international law "*pacta sunt servanda*," which is binding upon all states. In this regard, it is an obligation under customary international law and Vienna Convention on the Law of Treaties for Japan to comply with the terms of international legal acts defining its territory.

It is to be deplored that in violation of its obligations under international law regarding territorial issues, Japan infringed Chinese territorial sovereignty over the Diaoyu Islands. And the disputes surrounding the Southern Kurils and Tok Islet (Dokdo) are also aggravating tensions in the Asia-Pacific region.

What should be noted in the territorial dispute between Russia and Japan is the Joint Soviet-Japanese Declaration, which was signed by the parties on 19 October 1956 and came into force after an exchange of ratification documents on 12 December the same year. Article 2(9) set forth

[t]he Union of the Soviet Socialist Republics meeting half-way the wishes of Japan and considering the interests of the Japanese state agrees on assigning the islands Habomai and Shikotan to Japan, however, provided that the actual assignation of these islands to Japan will be made after the conclusion of a Peace Treaty between the USSR and Japan.⁷²

As the provision shows, the former Soviet Union declared its readiness to meet "the wishes of Japan," and also to take into account "the interests of the Japanese state" depending on the conclusion of the Soviet-Japanese Peace Treaty.

⁷¹ Art. 26 of the Vienna Convention on the Law of Treaties (1969).

⁷² Joint Declaration of the Soviet Union and Japan of 19 October 1956 (Aug. 12, 2020), available at <http://www.jstor.org/discover/10.2307/2145323?uid=3739632&uid=2129&uid=2&uid=70&uid=4&uid=3739256&sid=21100737449971>.



But it is noteworthy that the Joint Soviet-Japanese Declaration used the term “assign” instead of “return.” The implications of the two terms are quite different. Whilst “assignment” refers to a voluntary transfer of property or right by a lawful owner to others, the term “return” refers to transfer of property or right illegally acquired to its original owner. The use of the term “assign” instead of “return” in the Joint Soviet-Japanese Declaration implies that both parties admitted that Habomais and Shikotan were under Russian sovereignty. In fact, the conclusion of this joint declaration was preconditioned by the concord of both signatories concerning the national jurisdiction over Kuril Islands, to which Japan agreed. Therefore, the envisaged “assignment” of the territories provided in the Joint Soviet-Japanese Declaration should not be construed as the intention to “return” the territories “that were illegally occupied” by Russia, but as voluntary will to transfer the islands under its own national jurisdiction considering “the interests of the Japanese state.” Furthermore, the Soviet-Japanese Joint Declaration was not a “recognition of Japanese historical or legal rights” to the disputed territories, “but merely a ‘gesture of goodwill’ which in no way meant to signify a revision of the results of World War II.”⁷³

The Soviet-Japanese Joint Declaration, under which Habomais and Shikotan could have been assigned to Japan, however, was revoked not long after its conclusion when Japan renewed its security treaty with the U.S. Japan, thus, did not take advantage of such a provision of the Soviet-Japanese Joint Declaration.

To conclude, Japanese territory after World War II has already been determined by a set of international legal instruments at the time. The recurrent frictions surrounding territorial disputes between Japan and its neighboring states can trigger destabilization of international security in the Asia-Pacific region. In order to maintain international and regional peace and security in the Asia-Pacific Region, and in the interests of Japan itself, it is necessary for Japan to recognize the international legal acts of the past and to be ready to peacefully coexist with its neighboring states.

References

Amanzholov Z.M. & Akhmetov Y.B. *Japanese-Russian Territorial Disagreements and Their International Legal Substantiations*, 13 Middle-East Journal of Scientific Research 16 (2013).

Blakeslee G.H. *The Mandates of the Pacific*, 1(1) Foreign Affairs 98 (1922). <https://doi.org/10.2307/20028201>

Border and Territorial Disputes (A.J. Day (ed.), 2nd ed., Detroit: Gale Research, 1987).

Kratochwil F. et al. *Peace and Disputed Sovereignty: Reflections on Conflict over Territory* (Lanham, M.D.: University Press of America, 1985).

Lee S. *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11(1) Pacific Rim Law & Policy Journal 63 (2002).

⁷³ Johnson, *supra* note 23.

Quillen A.B. *The Kuril Islands or the Northern Territories: Who Owns Them – Island Territorial Dispute Continues to Hinder Relations Between Russia and Japan*, 18(3) North Carolina Journal of International Law and Commercial Regulation 633 (1992).

郑海麟, 钓鱼岛列屿之历史与法理研究 [Hailin Z. *Study on the History and Legal Theory of the Diaoyu Islands*] (Beijing: Zhonghua Bookshop, 2007).

佐藤優, “解説 外務省が公開しない多数の秘密文書”、松本俊一 『日ソ国交回復秘録』 [Sato M. *Commentaries on a Number of Confidential Documents Not Released by the Japanese Ministry of Foreign Affairs in Secret Records Concerning Restoration of Diplomatic Relations Between Japan and USSR*] 274 (Tokyo: Asahi Shimbun, 2012).

豊下植彦 『「尖閣問題」とは何か』 [Narahiko Toyoshita, *What Is the “Senkaku Problem”?*] (Tokyo: Iwanami Shoten, 2012).

国际关系史资料选编 (17世纪中叶–1945) [Response to the Japanese Instrument of Surrender of the Four Powers: China, the Soviet Union, the United States, and the United Kingdom in Selection of the History of International Relations: 17th Century – 1945] 898 (S. Wang et al. (eds.), Beijing: Law Press, 1988).

周恩来外长关于美国及其仆从国家签订旧金山对日和约的声明 (18 September 1951) , 田桓主编: 《战后中日关系文献集(1945-1970)》 [Statement by Foreign Minister Zhou Enlai on the San Francisco Peace Treaty Concluded by the U.S. and its Satellite States, 18 September 1951 in Collection of Literature on Post-War Sino-Japanese Relations: 1945–1970] 103 (H. Tian (ed.), Beijing: Chinese Social Science, 1996).

Information about the authors

Hui-Chol Pak (Pyongyang, North Korea) – Professor of Law, International Law Department, College of Law, Kim Il Sung University (Ryongnam-dong, Taesong District, Pyongyang, North Korea; e-mail: hc.pak0101@ryongnamsan.edu.kp).

Hye-Ryon Son (Pyongyang, North Korea) – Associate Professor, International Law Department, College of Law, Kim Il Sung University (Ryongnam-dong, Taesong District, Pyongyang, North Korea; e-mail: hr.son@ryongnamsan.edu.kp).