THE STATUS OF THE KURILE ISLANDS (NORTHERN TERRITORIES) AT INTERNATIONAL LAW

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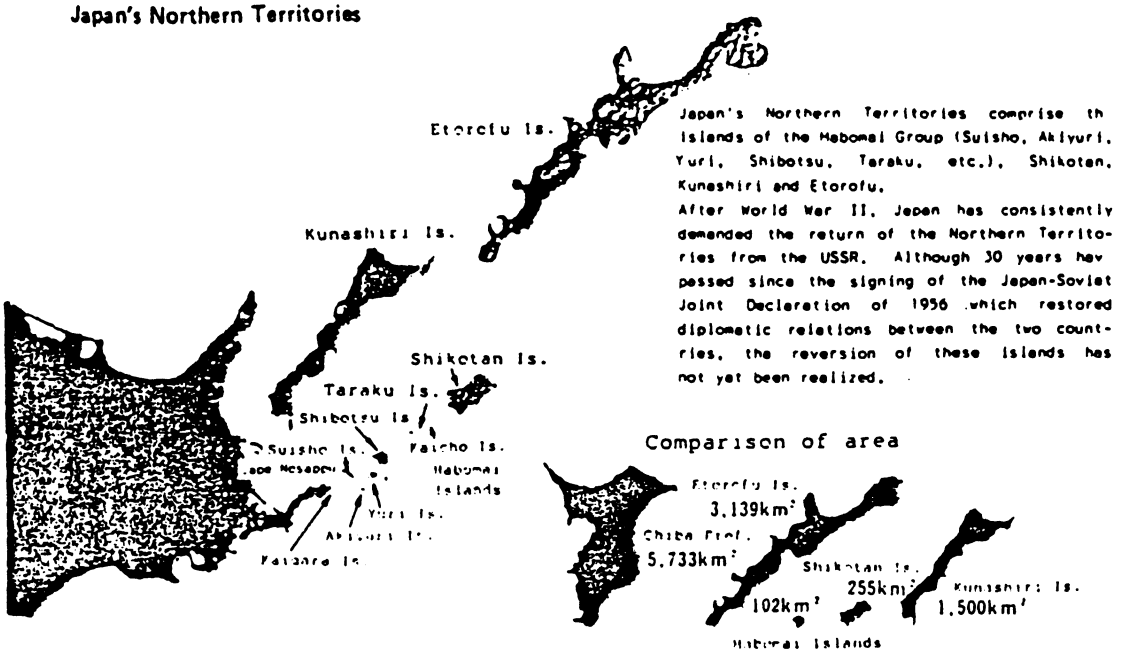
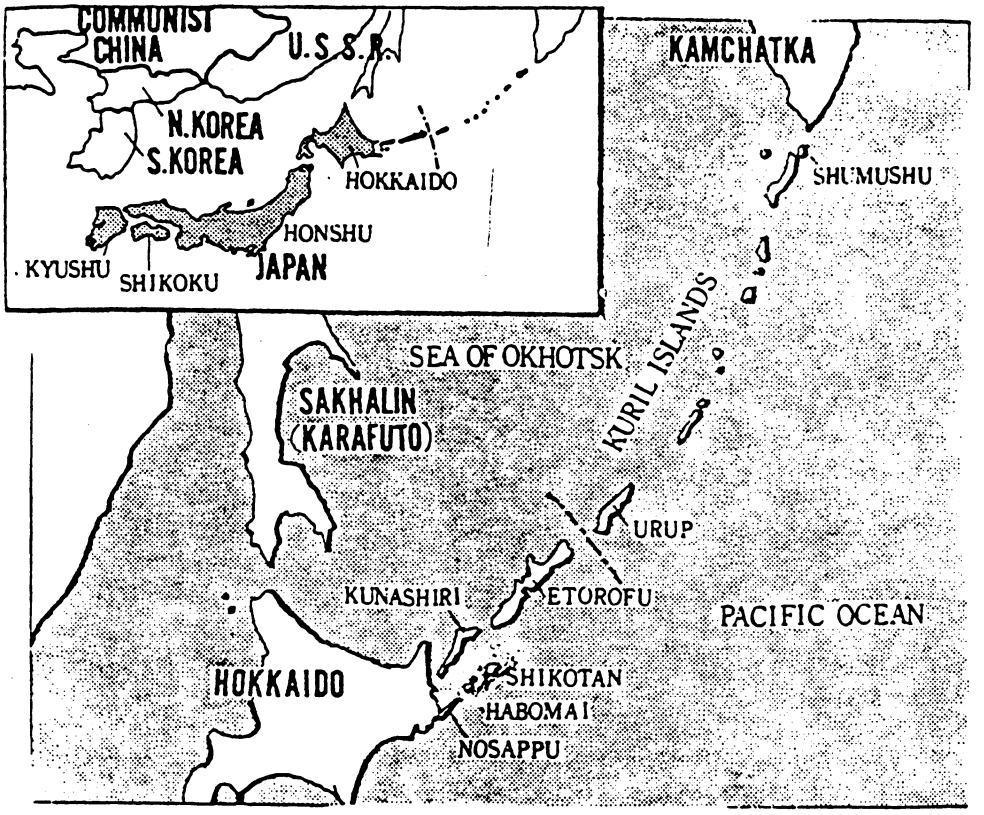


Source: Japan Institute of International Affairs: "Foreign Policy" in White Papers of Japan (1985-1986) p33 at 37.



Source: S. Omori, "Japan's Northern Territories", 17 Japan Quarterly (Nol, 1970) p 18 at 19.

Introduction

One of the legacies handed down to the Russian Federation by the now defunct Soviet Union has been the thorny problem of the South Kurile Islands. The dispute over the South Kuriles, known to the Japanese as the "Northern Territories"[1], arose from the USSR's occupation of the area at the end of the Second World War. A peace treaty was never signed between the two countries on account of this problem. It followed that the post-war political relationship between these two north Asian giants was one of varying degrees of friction, with each country periodically accusing the other of taking a totally unreasonable and unacceptable position on the territorial issue.

When Soviet leader Mikhail Gorbachev came to power, the USSR become more interested in attracting Japanese foreign economic aid and investment. However, Japan stuck to its policy of the "indivisibility between economics and politics" and refused to extend full-fledged financial aid to Moscow until the disputed territories have been handed back.[2] This did not deter the Soviets from embarking on initiatives which they hoped might eventually lure Japan into accepting a compromise.

In a concerted attempt to improve relations, former Soviet Foreign Minister Eduard Shevardnadze visited Japan in September 1990. On his visit to Japan, he stated that Moscow was willing to take "drastic action"[3] regarding the withdrawal of troops from the disputed islands. However, it was always most unlikely, given the electorally explosive nature of the territorial problem[4], that the Japanese government would ever be satisfied with simply a military withdrawal.

President Gorbachev himself visited Japan in April 1991 in what was the first ever visit to Japan by a Soviet leader. High hopes were held amongst the Japanese that Gorbachev would come to Japan with a proposal which would break the stalemate. However, by 1991 Gorbachev's power base had already been too eroded for him to offer anything apart from goodwill. To the disappointment of the Japanese, the President during his visit failed to acknowledge even the 1956 Joint Declaration,[4A] a document in which the USSR had clarified its intention to one day return two of the four islands in question.

Gorbachev's attempt to grapple with the problem was hampered a lack of consensus between the Central Soviet Government and the Russian Republic, of which the islands are also a part.[5] The Soviets were in no position to float any serious proposals until they had the full support and agreement of the Russian government. Before Gorbachev's visit, a mechanism for reaching such a consensus had yet to be formulated[6]. The chances of a breakthrough occuring during the President's visit were minimal.[7]

With the demise of the Soviet Union, the President of Russia, Boris Yeltsin, has announced that he plans to visit Tokyo in September 1992. Yeltsin appears to be taking a softer stance on the issue than the Soviet Government had under Gorbachev, saying that the territorial problem should be resolved according to the principles of law and justice.[7A]

Whether Yeltsin can succeed where Gorbachev failed is still open to question. Many hurdles still need to be overcome. The Sakhalin provincial authorities, which have administrative jurisdiction over the islands, are still vehemently opposed to any suggestion that they should be given up.[7B] Domestic opinion, which has grown increasingly nationalistic since the Soviet Union broke up, is not likely to favour a deal in which land is overtly traded for economic aid. Yelsin's precarious political position may make it extremely difficult for his government to risk attracting domestic criticism and dividing the country on this issue.

Given these recent developments, it seems appropriate to re-analyse this issue from the perspective of international law. This paper, as well as examining the traditional positions taken by the parties, will seek to show the extent to which Japan's legal position in regard to these territories has actually weakened over time on account of the operation of various international law doctrines.

(1) The Positions of Japan and the USSR in Relation to the Treaty of San Francisco

With the exception of the Soviet Union, the state of war that had existed between Japan and the Allied powers was terminated by the Treaty of San Francisco in 1951. The Soviet Union refused to become a signatory. The interpretation of Article 2(c) of the same Treaty represented the main bone of contention between Japan and the USSR in relation to the northern territories issue. The Article reads:

> "Japan renounces all rights, 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."

The Article contains no stipulation naming the country in whose favour these territories are renounced.

(a) The Japanese Position

Ever since the conclusion of the above Peace Treaty, Japan has persistently put forward the same reasons in support of its claim to the northern territories. Although acknowledging that it renounced "all right, title and claim" to the Kuriles and South Sakhalin, Japan cites historical and legal documents which she says proves that by definition, the islands of Kunashiri, Etorofu, Shikotan and the Habomai group are not part of the Kurile Chain. Namely, Japan claims that the texts of the Treaty of Commerce, Navigation and Delimitation signed in 1855, and the Treaty of Exchange of Sakhalin Island for the Kurile Islands Group, in referring to the Kurile Islands as "those eighteen islands north of Etorofu Island", clearly show that those islands south of and including Etorofu were regarded as territories quite distinct from the Kuriles.[8] Moreover, Japan claims that historically, the Habomais and Shikotan have been treated as essentially part of Hokkaido.[9]

Various scholars of international law have however pointed out that from a legal point of view, these arguments are extremely difficult to support.[10] Since Japan was in possession of the islands at the time of the Treaty of Exchange, there would not appear to have been any need to provide for their status in the body of that Treaty. Moreover, the Russo-Japanese War and the resulting Treaty of Portsmouth (1905) must be regarded as having ruled out the relevence of these nineteenth-century treaties to the current situation since war ends all treaties that existed between the beligerent states.[11]

Orders issued by the Supreme Commander of the Allied Powers during the Occupation also strongly suggest that Etorofu and Kunashiri were considered as part of the Kuriles. The "Memorandum Concerning Governmental and Administrative Separation of Certain Outlying Areas from Japan", provided that Japan was to cease exercising authority over the Kuriles, Shikotan and the Habomai Group.[12] It was implicit in this Memorandum that the Kuriles included Kunashiri and Etorofu because they were not referred to by name in the manner that Shikotan and the Habomais, which are situated to the south of Kunashiri, were specified. One must therefore be inclined to agree with the Kushiro District Court's ruling in the cases of Kitajima[13] and Morimoto[14] to the extent that:

> "It is clear that South Chishima is a part of the Kurile Islands mentioned here, considering what is provided in Paragraph (c) as a whole and the process of occupation of the Kurile Islands by the Soviet Union. Since the promulgation of this Memorandum, the Government of Japan could not exercise over the Kurile Islands, including South Chishima, even limited

sovereignty in a legal sense."[15]

The other main argument that has consistently been put forward since the war by the Japanese is based on the Allies' purported principle of the "non-aggrandizement of territories". This principle was enunciated in the Atlantic Charter and affirmed in the Cairo Declaration, neither of which incidentally involved the Soviet Union as a signatory. However, Article 8 of the Potsdam Declaration did purport to incorporate the Cairo Declaration. Japan argues that in the light of this principle that there is no reason for her to lose the three islands and one island group mentioned above since they were never acquired by force and have never been the territories of a foreign country.[16]

As Kotani has pointed out, this argument does not really give the Japanese any ground of objection to the acquisition of this territory by the Soviet Union.[17] These Declarations amounted to nothing except statements of policy. As to the Kurile Islands, Kotani adds that "it seemed that the policy agreed in the Cairo Convention was changed by the Yalta Agreement concluded thereafter."[18] Moreover, even if the Soviet actions were not in accordance with the Cairo Declaration and the Potsdam Declaration, Japan, by accepting the Instrument of Surrender, was in a position to acquiesce to the territorial dispositions made prior to the Peace Treaty, and indeed did so.[19] Her acquiescence was reconfirmed at the Peace Conference itself where, in the face of mounting pressure at home and abroad for the formal conclusion of peace, the Government decided not to press its argument to the other delegates that the northern territories be excluded from the scope of the Kurile Islands.[20] It is submitted that Japan thereby acquiesced to the territorial clauses of the Treaty as they were understood by the other delegates.

(b) The Soviet Position

In reply to Japan's claims over the Southern Kuriles, the Soviets consistently held to a position that the matter had been settled prior to the Peace Treaty, the Peace Treaty merely confirming this fact.[21] In arguing its position, the USSR relied heavily on the Yalta Agreement in which Stalin secretly agreed that his country would declare war on Japan on the condition that South Sakhalin would be "returned" and the Kuriles "handed over" to the Soviet Union.[22] The USSR also cited her act of incorporating the territories into the Soviet state by domestic legislation in 1946.

Japan argues that she is not bound by the Yalta Agreement because, as it was a secret agreement, Japan was unaware of its existance at the time of the Potsdam Declaration or at the Instrument of Surrender.[23] Moreover the United

States declared at the time of the Peace Treaty that the Yalta Agreement was intended to be nothing more than a statement of common intention.[24] It is difficult to understand why the USSR persistently adhered to such a position since it was extremely difficult to justify at international law. The idea that the territorial clause in the Peace Treaty somehow "presupposes" the relationship of the Soviet Union to the Treaty is inconsistent with the legal meaning of "renunciation" of territorial rights as stipulated in the treaty.[25] Moreover, there are other more feasible interpretations that the Soviets could have adopted in support of their sovereignty over the region. For example, it is arguable that Article 2(c), when considered against the background of Yalta, the Potsdam Declaration and the Instrument of Surrender, clearly indicates that title to the territories was to be vested in the USSR from after the Treaty's promulgation.[26] Alternately, as will be discussed, the "territorium nullus" interpretation could have been adopted.

In defence of the Soviet position, it would appear that the Yalta agreement, as an international convention, should be binding on the parties to the agreement, that is, Great Britain, the USA, and the USSR.[27] Thus if the final disposition of the territories under Soviet occupation had been left to the Allies or some other resolution, as was the USA's hope at the Treaty Conference[28], the USA and Britain should have been bound to support the Soviet claims. (other than to the Habomais and Shikotan, which do not appear to be by definition part of the Kuriles, see above) However, it has been pointed out that the Soviet Union itself had not honoured promises made in relation to China in the Yalta Agreement.[29] The US has cited this reason to explain why she felt she was not bound to observe Yalta:

> "So long as other Governments have rights under the Yalta Agreement which the Soviet Union has not fulfilled, there is at least a question as to whether the Soviet Union can, with clean hands, demand fulfillment of the parts of that agreement that it likes."[30]

The USSR's occupation of the Kuriles and Sakhalin however was in accordance with General Order No.1, which was issued by the Supreme Commander of the Allied Powers on the same day that Japan signed the Instrument of Surrender.[31] Thus, whilst technically still at war with Japan, the USSR's "belligerent occupation" of those areas would have to be described as legal.[32]

(2) The Effect of the Japan-Soviet Joint Declaration

The Japan-Soviet Joint Declaration of 1956 ended the state of war between the two nations. This would have had the effect of terminating the Soviet Union's right of belligerent occupation that had been bestowed by General Order No.1.[33] However, the territories in question could hardly be said to have reverted back to the country which had renounced "all rights, title and claim" thereto in the Treaty of San Fransisco five years earlier. As one will recall, the Treaty contained no explicit stipulation in whose favour the territories were to be relinquished. It is thus submitted that the Japan-Soviet Joint Declaration rendered South Sakhalin and the Kuriles "terra nullus".

If the effect of the Joint Declaration at law was to indeed render South Sakhalin and the Kuriles "terra nullus", one can apply the doctrine of occupation to the disputed territories. The doctrine of occupation dictates that an area in the situation of "territorium nullus" becomes the territory of the occupier who "reduces to its possession the territory in question and takes steps to exercise exclusive authority there."[34] It is clear that this has been satisfied in this case since the territories had been incorporated into the USSR by an ordinance issued at the Presidium of the Supreme Soviet on February 2nd, 1946, and had been subject to tight Soviet control ever since. Moreover, the Japanese population had all moved to mainland Japan, a new Soviet population having since taken its place.[35] It is therefore arguable that the USSR acquired title to Etorofu and Kunashiri after 1956 by occupation, although the status of Shikotan and the Habomais remains unclear.[36]

A formal peace treaty was not promulgated between Japan and the USSR because of a stalemate in regard to the status of the Southern Kuriles. In the Declaration, the Soviet Union undertook to relinquish its claims to the tiny islands of the Habomai group and Shikotan in favour of Japan upon the successful conclusion of a peace treaty. It thus appears that Japan at that time made some headway in making its position understood to the Soviets and may have established a stronger legal basis upon which it can argue that presciptive title will not be acquired in relation to the Habomais and Shikotan.

(3) Presciption

The doctrine of prescription at international law may have been undermining Japan's position in relation to its claims to sovereignty over the South Kuriles. Presciption is the means by which a "de facto" title is acquired by a long, continued and undisturbed possession.[37] The original act of occupying the territory need not have been made in good faith.[38] Prescription has been defined in Oppenheim's International Law in the following terms:

> "The acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with the international order."[39]

Various judgments made by international arbitrators and more recently by judges on the International Court of Justice appear to indicate that over time, title can be acquired by one country from another by the operation of a doctrine of "acquisitive" prescription.[40] The Chamizal Arbitration[41] involved a straightforward application of the doctrine of prescription. The US failed in its claim for title because on the facts, its possession had not been continuous, undisturbed or unchallenged. In The Island of Palmas Case,[42] the arbitrator, Professor Max Huber, appeared to implicitly accept that title may be established by prescription. This case is generally accepted as laying down the main principles of the law of presciption although Huber never expressly claimed to be doing so.[43] Harris has pointed out that in the Frontier Land Case, the International Court of Justice, in its consideration of the legal title of land under dispute between Belgium and the Netherlands, seemed to imply that prescription could be established by the Netherlands if it was shown that Belgium had not asserted its rights and had acquiesced to acts of sovereignty by the Netherlands.[44] However, it must be conceded that the acceptance of prescription as a doctrine of international law is not yet universal, as indicated by Judge Morena Quintana's explicit rejection of the doctrine in his minority judgment in the Right of Passage Case.[45]

Some states in practice have acknowledged that presciption is part of international law. Johnson cites a treaty that was signed by Great Britain

and the USA with a view to settling a boundary dispute by arbitration. The treaty laid down that "adverse holding or presciption during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription." [46]

It appears, therefore, that if not already a customary international law, acquisitive prescription must fit into the international law structure, as enumerated by Article 38 of the Statute of the Permanent Court of International Justice, as a "general principle of law recognised by civilised nations."[47]

Fauchille has written that four conditions must be fulfilled for presciption to be operative.[48] The first is that a state must assert sovereignty over the area in question. This involves displaying a will to act as sovereign as well as the actual exercise of authority.[49] The second is that the possession must be peaceful and uninterupted. The third is that possession must be public and the fourth is the requirement that possession must endure for a certain length of time.

The first and third conditions have been clearly satisfied. The second condition would also appear to have been satisfied as none of the fifteen thousand or so pre-war Japanese residents of the islands have chosen to remain, thereby allowing the Soviet Government to exercise its authority without use of force. A question however arises in relation to whether the vanquished state has shown the necessary acquiescence for possession to be regarded as truly "peaceful and uninterupted".

It is the view of the Japanese Government[50], as well as at least one renowned Japanese academic[51], that Japan's numerous diplomatic protests made to the Soviet Union over the northern territories have been sufficient to prevent acquisition of prescriptive title. The expressed views of a number of most eminent writers[52] appear to give credence to the Japanese Government's position. However, it is submitted that this is a view that was only tenable in the age before nations had recourse to international courts and bodies in

which to bring their complaints. As Johnson, Sorensen and Verykios persuasively argue, mere diplomatic protests which lead to no subsequent result merely serve to postpone the date of final acquisition by prescription:[53]

> "There can be no doubt that the establishment, first of the League of Nations and the Permanent Court of International Justice, and later of the United Nations and the International Court of Justice, has considerably modified the old practice whereby the somewhat crude and ineffective method of the diplomatic protest was the only method, short of war, of interupting peaceful possession.....The position now is that, if the matter is a proper one for the determination by the Security Council or the International Court of Justice, failure to bring the matter before the Council or to attempt to bring it before the Court must be presumed to amount to acquiescence, even if, for propaganda purposes or for other reasons, "paper protests" are still made from time to time."[54]

Even though Japan has been a member of the United Nations since 1956, her representatives have never brought the northern territories up for discussion in the General Assembly. Nor has Japan ever approached the International Court of Justice in regard to this issue, although it must be conceded that the chances of the USSR allowing such a case to go ahead would have been extremely small.

As Johnson states, there is no agreement as to the length of time necessary for presciption to take place other than that "the time varies with the facts of each case."[55] The circumstances of this dispute, it is submitted, augour towards prescriptive title having already attached to the Russian "fait accomplit". Over forty years have now elapsed since the territories fell into Soviet hands. In the case of the Kuriles, the fifty year period laid down in the British Guiana-Venezuela boundary dispute treaty would appear to be a reasonable amount of time for prescription to subsist, especially when one takes into account the frequency with which Sakhalin and the Kuriles changed hands in the century or so before the end of the Second World War.[56] If title has not already vested in the Russian Federation, it soon will.

(4) Acquisition of Territory by War

Article 2(4) of the United Nations Charter, in combination with the original Covenant of the League of Nations and the Kellogg-Briand Pact,[57] effectively outlaws aggressive war as a method of legitimately changing international rights. However, the legal situation may have been different in 1945 when the Soviet Union, having declared war on Japan, occupied the northern territories with a minimum of resistance. Under the basic doctrine of intertemporal law, we must attempt to analyse the law as it stood when the USSR performed its act of conquest in 1945.

At the "critical date" when the USSR occupied the territories, neither Japan nor the USSR were members of the League of Nations. They were thus not bound by the Covenant of the League which provides for the establishment of everlasting world peace by restricting the freedom to wage war. However, both countries were signitories to the Kellogg-Briand Pact which prevented recourse to war in general. In addition, in 1941 the Japanese and the Soviets had signed a bilateral treaty, the USSR - Japan Neutrality Treaty, which was to have a duration of five years. Thus, although the Soviets had indicated to Japan in January, 1945, that it did not wish to renew the Treaty of Neutrality, her act of aggression of August 1945 was clearly in contravention of both of the above instruments.[58] The conquest of the northern territories was illegal and the Soviets did not thereby immediately acquire title.

It is submitted however that acquiscence of the status quo by third party states during the years since the Peace Treaty has had the effect of impliedly validating the Soviet Union's title to the territories. Although it has been vigorously argued by writers such as Lauterpacht[59] that the principle of "ex injuria jus non oritur"[60] should be made to apply to states in international law, the reality is that the international legal system has not reached a stage of procedural development that enables such a principle to be enforced.[61] As Akehurst has stated:

> "Ideally the facts should be brought in line with the law, but, if states are not prepared to take action to alter the facts, the only alternative is to bring the law in line with the facts, by means of recognition."[62]

The proponents of "ex injuria jus non oritur" favour non-recognition as the means by which title may be witheld at law from the aggressor country.[63] However the international community has not shown much concern about the status of the territories in question. Indeed even the USA, after one of its aircraft was forced to land on on one of the disputed islands, referred in its protest to the Soviet Government to the "Soviet Island of Kunashiri."[64] Japan's policy of non-recognition of the USSR's sovereignty did not purport to be based on the ground that the USSR waged an illegal war to acquire the territories.[65] Seen against the background of the acquiescence and approbation of third states generally[66] and Japan's failure to bring any protest to the United Nations or the International Court of Justice, Japan's policy of non-recognition could only be said to be serving a "moral purpose at best".[67] One is inevitably drawn to the conclusion that defects in the territotial title held by the Soviet Union have been corrected under international law and that Russia's title has thereby been "consolidated".[68]

Conclusion

Japan's position at law in regard to the Islands of Etorofu and Kunashiri has never been a strong one. It is unlikely that these islands can be treated differently from the rest of the Kurile group, the title to which was clearly renounced by Japan in the Treaty of San Francisco. Even if Japan did have some tenuous basis to her claims over the islands, this is becoming weaker over time in the face of the international law doctrines of prescription and recognition. The Russion Federation may already have title should one interpret Kunashiri and Etorofu as having been "terra nullus" since 1956.

In regard to the the islands of Shikotan and Habomai, Japan may be in a stronger position. These islands, as separate entities to the Kuriles, could not be said to have been renounced in the Treaty of 1951. Moreover, as the Soviet Union appeared to implicitly recognise Japan's claim to Habomai and Shikotan in the Joint Declaration of 1956, it is submitted that it would take a considerably longer period for prescriptive title to vest as a result.

Since international legal doctrines are operating in her favour, Russia need only sit tight and wait for the Soviet Union's "fait accomplit" to become thoroughly consolidated at international law. The motivation behind current attempts to negotiate the issue are basically economic - Russia is hungry for economic aid and foreign investment, especially from Japan. As far as international law is concerned, the Russians clearly have the upper hand. However the allure of Japan's economic wealth may yet prove to be the ultimate bargaining chip.

NOTES

1) Japan maintains that its northern territories are constituted by the islands of Etorofu, Kunashiri, Shikotan and the Habomais. (see map)
2) The Japanese government announced on December 18, 1990, that it had decided to exclude "humanitarian issues" from this principle. Reported in Japan Economic Journal (English Edition), Dec.22, 1990. Reported in China
3) Daily, Saturday, September 8, 1990. A public opinion survey conducted by
4) the Nippon Keizai Shinbun Inc. found that 85% of respondents believe that the islands should be returned. In the same survey, 56・2% of respondents agreed that the territorial issue should be tied with improvement in relations, and that all four islands should be returned at the same time. Reported in the Japan Economic Journal (English edition), Dec.29, 1990 and Jan.5, 1991.

4A) Infra.discussion on p.6

5) The foreign minister of the Russian Soviet Republic revealed in a meeting with a delegation of Japanese journalists in November or December 1990 (precise date unstated) that there was still no consensus between the Russian and Soviet governments over the issue, and no mechanism yet in place to achieve such a consensus. Kuntori Risuku Joho, (Country Risk News) No.221, December 10, 1990.
6) Ibid.
7) The foreign minister seemed to intimate that the Russian Republic intended to prevent the resolution of the issue during President Gorbachev's visit in April. id.

7A) This statement was made at a during a 60 minute meeting between Yeltsin and Japanese Prime Minister Kiichi Miyazawa on 31 January in New York, reported in Nikkei Weekly, February 8, 1992.

7B) Asahi Shimbun, morning edition, Tuesday, February 4, 1992 at ppl.

8) See S.Oda & H.Owada: The Practice of Japan in International Law, 1961-70, (Uni. of Tokyo Press, Tokyo, 1982), pp52.
9) Ibid.
10) eg. Y.Takano; "The Territorial Problems Between Japan & the Soviet Union", 3 Japanese Annual of International Law, (1959), pp52 at 59.
11) M.Akehurst; A Modern Introduction to International Law, (2nd ed), (George Allen & Unwin Ltd, London, 1963) at ppl80.
12) Cited in Japan v Kitajima, Decision of the Kushiro District Court, March 29, 1968. Translated in 14 Japanese Annual of International Law, (1970), ppll2 at 117.
13) Ibid.

14) Japan v Morimoto, decision of the Kushiro District Court, April 12, 1969, translated in 15 Japanese Annual of International Law, (1971), pp158; Also note the Japanese Supreme Court decision of Kitajima, in which the Court overruled the lower court decision by repeating the official Government position on the issue. Significantly, the Ministry of Foreign Affairs in 1968 had criticised the Kushiro District Court decision, reiterating its traditional stand. See Oda & Owada, op. cit, supra note 3, at pp63.

15) Supra note 8, Kitajima, at pp118.

16) In contrast to the Southern Kuriles, the Northern Kuriles had been under Soviet rule until the Treaty of Exchange in 1875.

17) T.Kotani; "A Theoretical Approach to the Problem of the Kurile Islands", 24 Japan Annual of International Law, (1981), pp1 at 7.

18) Ibid.

19) Z.Ohira; "The Territorial Problems of the Peace Treaty With Japan", 25 Far Eastern Economic Review, (1958), pp17 at 18.

20) S.Omori; "Japan's Northern Territories", 17 Japan Quarterly, (No.1, 1970), pp18 at 23.

21) For a detailed account of the Soviet position, see Oda & Owada, op cit, supra note 3, pp53-59.

22) For the text of the Yalta Agreement, see Takano, op cit , supra note 5, appendix 5 at pp61.

23) Oda & Owada, op cit , supra note 3, at pp60.

24) Memorandum to Japanese Government, September 7, 1956, in Omori, op cit, supra note 15, pp24.

25) Supra note 5, Takano, op cit, pp57.

26) S.Tabata & Y.Iwamoto: Kokusaiho (International Law), (Yushindo,Tokyo,1983) at pp89.

27) Supra note 14, Ohira, op cit, pp17.

28) Supra note 5, Takano, op cit, pp56.

29) K.Tamura: "The Japan-Soviet Negotiations and the Territorial Problem", (Nisso Kosho to Ryodo Mondai), in Jurisuto, Vol. 80, April, 1955, pp18 at 19. The promises were in relation to the Chinese Eastern and South Manchurian Railroads and the internationalisation of the port of Dairen.

30) Cited in Tamura, ibid.

31) Supra note 7, Kitajima (Kushiro District Court), pp118.

32) Supra note 24, Tamura, op cit, pp18.

33) The Japanese Government has also expressed this viewpoint, S.Oda & H.Owada: "Annual Review of Japanese Practices in International Law", in 28 Japanese Annual of International Law, (1985), pp76 at 82.

34) Clipperton Island Case, 27 AJIJ 130 (1933), cited in D.J.Harris: Cases and Materials in International Law, (4th ed.), (Sweet & Maxwell, London, 1987), pp159 at 161.

35) Supra note 15, Omori, op cit, pp19.

36) This is because there is a strong case that the Habomais and Shikotan are not part of the Kurile Chain as renounced by Japan in Article 2(c) of the Treaty of San Fransisco.

37) R.Y.Jennings: The Acquisition of Territory in International Law, (Manchester Uni. Press, Manchester, 1963) at pp20

38) D.H.N.Johnson: "Acquisitive Prescription in International Law", British Yearbook of International Law, Vol.27, (1950), pp332 at 337 per Hall, Vattel, Oppenheim and Fauchille.

39) L.Oppenheim: International Law: A Treatise, (8th ed., Lauterpacht ed.), (Longmans, Green & Co, London, 1955) at pp576.

40) The distinguishing feature of "acquisitive prescription" is that "the party who succeeds in establishing a title under this doctrine obtains a substantive right whilst the substantive rights of the previous possessor are abolished." Supra note 33, Johnson, op cit, pp332.

41) Chamizal Arbitration, AJIL, 5, (1911) pp782, cited in Johnson, ibid, pp340

42) Island of Palmas Case, AJIL 22 (1928),pp867, cited in Johnson, ibid, pp342

43) Ibid, Johnson, pp343.

44) Supra. note 29, Harris, op cit, pp169.

45) Ibid.

46) British Guiana - Venezuala Boundary Dispute Treaty, Article 4(a), cited in Johnson, op cit, pp340.

47) Ibid pp343 per Verykios.

48) Ibid pp346

49) The Legal Status of Eastern Greenland, cited in Johnson, op cit, pp344.

50) Supra note 28, Oda & Owada, op cit, pp83.

51) Supra note 12, Kotani, op cit, pp4; Ohira (supra note 14) at pp 20 suggests the opposite.

52) Jennings, supra note 32, at pp23; Oppenheim, supra note 34, at pp577; Akehurst, supra note 6, at pp186.

53) Johnson, op cit, pp341.

54) Ibid.

55) Ibid. pp347.

56) Russo-Japanese Treaty of Commerce and Navigation (1855): Southern Kuriles to Japan, North Kuriles to Russia, Sakhalin subject to the co-occupation of both nations.
Treaty of Exchange (1875): Southern Sakhalin to the Russians in exchange for the Northern Kuriles.
Treaty of Portsmouth (1905): Southern Sakhalin to Japan.

57) Otherwise known as the Treaty for the Renunciation of War (1928)

58) The Treaty had 8 months and 17 days left to run when the USSR declared war; Supra. note 24, Tamura, pp18.

59) H.Lauterpacht, cited in P.T.Merani: "Territorial Claims in International Law and Relations", 7 Indian Journal of International Law, (1967), pp15.

60) "Ex injuria jus non oritur" - "an illegal act cannot create a valid title".

61) Supra. note 54, Merani, op cit, pp28.

62) Supra note 6, Akehurst, op cit, pp188.

63) Merani, op cit, pp29 per Lauterpacht.

64) Supra note 3, Oda & Owada, op cit, pp64.

65) See Oda & Owada, op.cit.

66) Supra note 32, Jennings, op cit, pp64.

67) Supra note 54, Merani, op cit, pp29

70) Supra note 61.