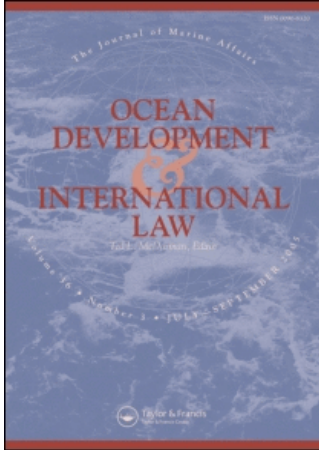


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Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary

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This article examines the historical events relevant to the claims of sovereignty by Japan and Korea over Dokdo, the legal doctrines that have been applied by international tribunals to other disputes over remote and uninhabited territories, and the principles governing maritime boundary delimitation that are relevant to the ocean space around Dokdo. The applicable decisions of the International Court of Justice and other tribunals are examined in detail. Among the topics addressed are the methods of acquiring sovereignty over territory, the relevance of contiguity to such claims, the requirements of effective protests, and the activities and omissions that constitute acquiescence. Attention is also given to the status of this matter as a “dispute” and how closure might be brought to it.

Keywords Dokdo, islands, Korea, Japan

Introduction

This article analyzes the legal issues related to two rocky islets and 32 even smaller outcroppings that have a combined land area of 0.18 square kilometers in the East Sea/Sea of Japan. These islets are called Dokdo by Korea, Takeshima by Japan, and the Liancourt Rocks by various Western explorers and colonial writers.¹ East Island (Dongdo in Korean) has a circumference of 1.9 kilometers and West Island (Seodo) has a circumference of 2.8 kilometers. These islets are located 88 kilometers (about 55 miles or 47 nautical miles) from Korea’s Ullungdo and can be seen from Ullungdo on a clear day in autumn and sometimes at other times of year in the early morning.² They are about 158 kilometers (about 99 miles or 86 nautical miles) from Japan’s Oki Islands.³

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Korean scholars contend that they have been claimed and utilized by Korea for centuries, dating back to AD 512. But, in early 1905, during the period when Japan was imposing its control over all of Korea, Japan declared the islets to be "*terra nullius*" and incorporated them into Shimane Prefecture as Japanese territory. Japan controlled these islets (and the rest of Korea) until 1945. When the military occupation of Japan and Korea came to an end in the early 1950s, Korea quickly reasserted its claim to the islets, and built a few structures and stationed marine guards on them. Japan protested this action, has issued regular protests during the past half century, and continues to assert its sovereignty over the islets.

Because both Japan and Korea claim these islets, the two neighbors have been unable to delimit the exclusive economic zone (EEZ) and continental shelf boundary in the East Sea/Sea of Japan. This article examines the issues related to sovereignty over the islets; the effect, if any, that Dokdo should have on the maritime boundary in the adjacent area; and the options available to the two countries regarding the resolution of these two matters.

An Analysis of the Claims by Korea and Japan for Sovereignty over Dokdo

The international legal system has resolved ownership disputes over small islands and other territory by examining evidence related to the issues of: (a) discovery, (b) effective occupation, (c) acquiescence, and (d) contiguity.⁴ Sometimes a claim based "effective occupation" and "acquiescence" will also be characterized as a claim of "prescription" or "acquisitive prescription."⁵ As one commentator has explained, "whereas occupation is a means of acquiring territory which is *res nullius*, prescription is a means of acquiring territory which is subject to the sovereignty of another state."⁶ A series of decisions of the International Court of Justice and other international tribunals have applied these doctrines to disputes in all parts of the world. The tribunals almost always emphasize recent effective displays of sovereignty as the most important factor, but historical evidence can also be important. The Dokdo matter is complicated because Korea, which physically controls the islets, believes Korean sovereignty is unquestionable and does not view its sovereignty to be "in dispute." Korean commentators contend that the matter was put to rest in the 1965 treaty normalizing relations between the Republics of Japan and Korea,⁷ and view Japan's regular assertions of its claim as a vestige of Japanese imperialism and an unwarranted annoyance.⁸ Nonetheless, for the purpose of this article, it is necessary to analyze the competing claims in detail and to view the facts through the legal lens that would be applied by an international tribunal.

The physical occupation of the islets by the Republic of Korea during the past half century is likely to be a significant factor that a tribunal would consider, but it would also examine the historical record in some detail, focusing in particular on events in the nineteenth century, the statements made and action taken during the time Korea became a protectorate of Japan and was subsequently annexed in 1905 and 1910, and the statements made and action taken during the occupation of Japan and Korea after World War II and in the 1951 peace treaty ending hostilities. During these various historical episodes, Korea has viewed Dokdo as linked to the larger island in the area, Ullungdo, and this relationship might also be significant. Although several key events are important, a tribunal would probably decline to identify a specific "critical date" at which time this matter vested as a formal dispute, and would want to look at the entire sequence of history.

Japan's claim to what it now calls "Takeshima" is based on its view that the islets were "*terra nullius*" in early 1905 when they were annexed into Shimane Prefecture.⁹ This view can prevail only if the islets were legitimately *terra nullius* at the time of this annexation and if other countries acquiesced in the annexation. Japan's reliance on the *terra nullius* argument at the time of its annexation in 1905 serves as an acknowledgment that Japanese

activities related to the islets prior to 1905 had not established sovereignty over them, and it would appear to estop Japan from subsequently developing a claim based on pre-1905 "occupation" of the islets.

*A Survey of Decisions of International Tribunals Regarding Sovereignty Disputes of Small Islets*¹⁰

All judicial and arbitral decisions since World War II regarding sovereignty disputes over islands and other remote territory have focused on which country has exercised actual governmental control over the feature during the previous century, rather than on earlier historical records. Decisions rendered before World War II have also been based primarily on the actual activities of states in the disputed territory. The decision makers have tended to ignore ancient historical claims and have looked instead at evidence of actual occupation, displays of sovereignty, and administration of the islets during recent times, focusing mostly on the previous 100 years.

Island of Palmas. The 1928 dispute over Palmas Island,¹¹ an isolated single islet 48 miles southeast of Mindanao (the Philippines) and 51 miles from Nanusa (Indonesia), was between the United States (which, as the colonial power then governing the Philippine Islands, succeeded to the claim of Spain after the 1898 Spanish-American War) and the Netherlands (which was then the colonial power governing Indonesia). This islet is 2 miles long and three-fourths of a mile wide, and then had a population of about 750.¹² The United States based its claim on Spain's earlier "discovery" of the island and the island's "contiguity" or proximity to Mindanao. The Netherlands invoked its contact with the region and its agreements with native princes, focusing on specific activities after the mid-1800s which intensified and included displays of sovereignty in the years preceding 1898. Judge Max Huber, the sole arbitrator,¹³ favored the Dutch, based on their peaceful and continuous display of authority over Palmas and on the acquiescence to the Dutch activities by Spain and later by the United States. Even if Spain may have "discovered" the island at some early point, its "discovery" was not accompanied by any subsequent occupation or attempts to exercise sovereignty, and hence it did not establish "effective control" of it. The Dutch activities on the island supported its claim of sovereignty through the process that other commentators have described as "acquisitive prescription."¹⁴ In language subsequently quoted in the 1999 *Eritrea-Yemen Arbitration*,¹⁵ Judge Huber said: "It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control."¹⁶ Judge Huber also rejected the U.S. claim based on "contiguity," concluding that geographical proximity is not a decisive factor in a sovereignty dispute.¹⁷

Clipperton. Three years later, in 1931, the emperor of Italy rendered an opinion in a dispute between France and Mexico over remote and barren Clipperton Atoll, 600 miles south of Mexico.¹⁸ This decision is sometimes viewed as departing in some respects from the *Palmas* decision and the rulings on disputed sovereignty that came later, because it focused on the moment of discovery rather than requiring continuous displays of sovereignty ("effective occupation") on the islet. These differences may result from the fact that Clipperton was uninhabited, and was determined by the emperor to be "*territorium nullius*,"¹⁹ and therefore susceptible to "discovery," in contrast to Palmas, which was inhabited, and was therefore not *terra nullius*. A sovereignty claim for Palmas thus required "effective occupation," and a claim based solely on "discovery" could be overcome by a counterclaim based on continuous displays of sovereignty ripening to "acquisitive prescription."

Clipperton was “discovered” by France in 1858 and claimed for its guano, but was then ignored for decades because the guano was not commercially exploitable. After Mexico asserted jurisdiction over the atoll in the 1890s (claiming historic links traced back to earlier Spanish explorers), France and Mexico agreed to submit the dispute to arbitration, selecting Italian emperor Victor Emmanuel to resolve the controversy. It took decades for the emperor to decide the matter, and he finally awarded the atoll to France based on its initial formal “discovery” of the feature. The opinion explained that something more than mere discovery is normally required to establish ownership, and that typically “effective occupation” will also be necessary, which occurs “when the state establishes in the territory itself an organization capable of making its laws respected.”²⁰ “Effective occupation” usually requires a presence in the territory and some exercise of sovereign authority, but for uninhabited islets these requirements are reduced. All that is necessary is that from the first moment when the occupying state makes its appearance there, the territory is “at the absolute and undisputed disposition of that state.”²¹ United State citizens had subsequently explored the atoll and Mexico had established a garrison there, but the arbitrator concluded that these actions had not dislodged the superior French claim based on the earlier formal announcement of its claim, which was done “in a clear and precise manner.”²²

Eastern Greenland. In 1933, the Permanent Court of International Justice awarded eastern Greenland to Denmark, rejecting Norway’s claim that this territory had been *terra nullius* subject to its occupation and annexation.²³ The Court explained that claims to sovereignty must be based on “the intention and will to act as a sovereign, and some actual exercise or display of such authority.”²⁴ The Court noted that “in thinly populated or unsettled countries,” tribunals have “been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.”²⁵ Although Denmark’s major historical presence had been in western Greenland, the Court noted that some of its decrees and ordinances seemed design to apply to all of Greenland, and that Norway had not met its burden of challenging Denmark’s claim.

The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.²⁶

“... In light of the above facts, ... Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.”²⁷

Minquiers and Ecrehos. The first major decision by the International Court Justice regarding ownership of an isolated island feature was the decision in the *Minquiers and Ecrehos* case,²⁸ where the Court explained that: “What is of *decisive importance*, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to *the possession* of the Ecrehos and Minquiers groups.”²⁹ Both France and the United Kingdom claimed title to a groups of islets (a few of which were inhabited) and rocks between the British island of Jersey and the coast of France, in an area rich in sedentary fisheries.³⁰ Each party produced ancient historical titles from the Middle Ages, but the Court found these materials to be inconclusive³¹ and instead focused on actual

displays of authority during the nineteenth and twentieth centuries. One scholar has summarized the underpinnings of the Court's ruling by explaining that "the International Court found sovereignty lay with the United Kingdom on the basis of acts by the Jersey authorities involving the exercise of criminal jurisdiction, the conduct of inquests on corpses washed ashore, the imposition of taxes on huts, the maintenance of a register of fishing boats, a register of sales of real property, the establishment of a customs house and the construction of a slipway and various mooring buoys and beacons."³² The *Eritrea-Yemen* Arbitral Tribunal later summarized the *Minquiers and Ecrehos* decision by saying that even though "there had also been much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions."³³ Based on this evidence of recent activities, the International Court of Justice determined that the United Kingdom had exercised state functions over the features, that France had not established any similar assertions of authority during this period, and that all the disputed islets should be awarded to the United Kingdom.³⁴ The Court also relied for its decision on the view that the Minquiers group were a "dependency" of the Channel Islands (Jersey and Guernsey) and thus should be subject to the same sovereign authority.³⁵

Western Sahara. In the 1975 *Western Sahara Advisory Opinion*, the International Court of Justice quoted from the language in the *Eastern Greenland* case that "in thinly populated or unsettled countries, 'very little in the way of actual exercise of sovereign rights' might be sufficient in the absence of a competing claim."³⁶ The court also cited the *Minquiers and Ecrehos* case for the proposition that "what must be of decisive importance in determining" the links between the Western Sahara and Morocco and the Mauritanian entity "is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time."³⁷ Based on these principles, the Court found ties between Morocco and the Mauritanian Entity and the tribes in the Western Sahara, but not "any tie of territorial sovereignty."³⁸

Gulf of Fonseca. This same approach was utilized in the *Gulf of Fonseca* case,³⁹ where the Court focused on evidence of actual recent occupation and acquiescence by other countries to determine title to disputed islets, and in the *Eritrea-Yemen Arbitration*,⁴⁰ where the Tribunal relied explicitly on the *Minquiers and Ecrehos* judgment for the proposition that it is the relatively recent history of use and possession of the islets that is most instructive in determining sovereignty and that the historical title claims offered by each side were not ultimately helpful in resolving the dispute.⁴¹ The *Gulf of Fonseca* case, decided by a Chamber of the International Court Justice in 1992, involved a dispute over sovereign ownership of several small islands in the Gulf of Fonseca, which is located where the boundaries of El Salvador, Honduras, and Nicaragua meet. This area had been governed by a colonial power—Spain—until 1821 when the region became independent and established the Federal Republic of Central America.⁴² This entity disintegrated in 1839, when the states of Honduras, El Salvador, Nicaragua, Costa Rica, and Guatemala were established.⁴³ The Chamber ruled that the islands in the Gulf of Fonseca were not *terra nullius* at that time, but instead were inherited by the new entities from Spain. It then focused on which of the new countries occupied the islands, what actions indicated the exercise of authority over them, and to what extent the other states acquiesced in the exercise of authority.⁴⁴ The Chamber emphasized that it was not deciding whether occupation by one state over time could establish ownership in a case where a pre existing title was held by another state. Instead, the Chamber made clear that it was relying on occupation *and acquiescence* as evidence of

the recognition by the states of the region regarding which country had proper title over each of the disputed islands when the evidence regarding a pre existing title was ambiguous.⁴⁵

Based on these principles, the Chamber awarded the island of El Tigre to Honduras because of its occupation of this island for more than 100 years, accompanied by some evidence of recognition by El Salvador that Honduras was authorized to exercise authority over the island.⁴⁶ The Chamber then turned to Meanguera Island (1586 hectares and long-inhabited) and Meanguerita Island (26 hectares and uninhabited, lacking fresh water).⁴⁷ The Chamber found evidence of occupation ("effective possession and control") of these islands by El Salvador since 1854, and found no effective protests by Honduras.⁴⁸ The Chamber's conclusion was thus that "Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita," with Meanguerita being viewed as an "appendage" to or "dependency" of Meanguera.⁴⁹

Eritrea-Yemen. The *Eritrea-Yemen Arbitration* relied explicitly on the *Minquiers and Ecrehos* judgment for the proposition that it is the relatively recent history of use and possession of the islets that is most instructive in determining sovereignty, concluding that the historical title claims offered by each side were not ultimately helpful in resolving the dispute.⁵⁰ The Tribunal utilized the traditional criteria to determine sovereignty:

The modern international law of acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.⁵¹

The Tribunal relied on evidence of public claims, legislative acts seeking to regulate activity on the islands, licensing of activities in the surrounding waters, enforcement of fishing regulations, licensing of tourist activity, search and rescue operations, environmental protection, construction on the islands, and the exercising of criminal and civil jurisdiction on the islands.⁵² The Tribunal awarded the waterless, volcanic islets of the Zuqar-Hanish group to Yemen based on its greater showing "by way of [recent] presence and display of authority."⁵³ The Tribunal also awarded to Yemen the lone island of Jabal al-Tayr and the al-Zubayr group, because Yemen's activities on these barren islands were greater, and because they are located on the Yemen side of the median line between their uncontested land territories.⁵⁴

The Tribunal gave some attention to geographical proximity or contiguity, utilizing the "presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a clearly better title."⁵⁵ The Mohabbakahs and the Haycock Islands were thus awarded to Eritrea because they were mostly within 12 nautical miles of the Eritrean coast.⁵⁶

Ligitan and Sipadan. This same approach was utilized by the International Court Justice in its recent decision resolving a dispute between Malaysia and Indonesia over two tiny islets located east of Borneo: Ligitan and Sipadan.⁵⁷ The larger of the islets (Sipadan) is 0.13 square kilometers in size.⁵⁸ Neither has been inhabited historically, but both have lighthouses on them and Sipadan has recently been "developed into a tourist resort for scuba-diving."⁵⁹ The Court first addressed arguments based on earlier treaties, maps, and succession, but found that they did not establish any clear sovereignty.⁶⁰ It then looked at the "effectivités," or actual examples of exercises of sovereignty over the islets, and explained that it would

have to look at exercises of sovereignty even if they did “not co-exist with any legal title.”⁶¹ Indonesia claimed title based on various naval exercises in the area conducted by its military and previously by its colonial power (the Netherlands), but Malaysia prevailed based on the governmental actions of its colonial power (the United Kingdom) exercising control over turtle egg collection and constructing lighthouses on both islets.⁶²

The language and rulings provided by the International Court of Justice in the *Ligitan/Sipadan* case and in the earlier cases are directly relevant to the dispute over sovereignty of Dokdo. The Court’s opinion in *Ligitan/Sipadan* explained that “a claim of sovereignty based on . . . continued display of authority . . . involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”⁶³ In “areas in thinly populated or unsettled countries,” the Court “has been satisfied with very little,”⁶⁴ but the contrary claims of other countries will also be relevant.⁶⁵ The Court relied on only those displays of sovereignty that occurred before “the dispute between the Parties crystallized [which was 1969 in the *Ligitan/Sipadan* dispute] unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.”⁶⁶ In the course of its decision, the Court explained that actions of private parties will not be relevant “if they do not take place on the basis of official regulations or under governmental authority.”⁶⁷

The consistent reasoning in these international decisions appears to strengthen Korea’s claim of sovereignty to Dokdo. Korea was active in and around Dokdo in the late nineteenth century and took action to assert its claim of sovereignty over the islets, and Japan appeared to acquiesce in Korea’s sovereignty during that period. Korea was not in a position to exercise control during the first part of the twentieth century, because it was controlled and then formally annexed by Japan, but as soon as it regained its independence it asserted control over the islets, and has continued to exercise sovereignty over them since then. In July 2001, the South Korean National Maritime Police Agency announced it would commission a 5000-ton-class vessel carrying a crew of 97—entitled the *Sambong*, the name of Dokdo during the Choson Dynasty—to patrol the waters around Dokdo beginning in February 2002.⁶⁸

What Is the “Critical Date” When the Dispute Crystallized?

The term “critical date” refers to the time an “issue has been definitely joined”⁶⁹ and identifying this date has become important in some cases “to prevent one of the parties from unilaterally improving its position” and from gaining any advantage by “rejecting or evading a settlement.”⁷⁰ Although the critical date has been important in some cases, tribunals in other cases have been reluctant to set a specific date and have instead allowed the parties to introduce evidence of events that occurred until the time of litigation. In the *Minquiers and Ecrehos* case, for instance, France argued that August 2, 1839, was the critical date, but Britain argued that the dispute had not crystallized until the countries concluded their special agreement to submit the dispute to the International Court in 1950. The Court rejected the French position and considered the more recent evidence, and ultimately ruled in Britain’s favor.⁷¹

In the *Eastern Greenland* case, the International Court determined that July 10, 1931, was the “critical date,” because Norway formally announced on that date that it regarded eastern Greenland to be *terra nullius* and declared its occupation of the region.⁷² This date was only 2 days before the parties agreed to submit their dispute to the International Court of

Justice, so the designation of such a date did not eliminate the introduction of any evidence the parties sought to introduce.

The concept of the “critical date” played a prominent role in the *Island of Palmas* case, where the arbitrator Max Huber established December 10, 1898, as the “critical moment,”⁷³ because the U.S. claim was based on the cession of the disputed islet by Spain to the United States in the 1898 Treaty of Paris, which ended the Spanish-American War. The arbitrator thus required a “continuous and peaceful” display of authority as of that time⁷⁴ and excluded evidence of protests or other actions after that date. He did, however, examine the activities that occurred between 1898 and 1906, which were “indirectly of a certain interest, owing to the light they might throw on the period immediately preceding.”⁷⁵ Arbitrator Huber took note of several events that occurred after 1898, such as the fact that when U.S. General Wood visited the island in 1906 (which was “the first entry into contact by the American authorities with the island”⁷⁶), the boat that came out to greet him flew a Dutch flag, and a Dutch flag was also flying on the beach.⁷⁷

In its 2002 decision resolving the dispute between Indonesia and Malaysia over the two small islets east of Borneo, Ligitan and Sipadan, the International Court identified 1969 as the critical date in which the controversy had crystallized.

The Court further observes that it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies upon them. The Court will, therefore, primarily analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.⁷⁸

How does the “critical date” apply to Dokdo? This concept has not been used uniformly, and it may be less important in the Dokdo dispute because of the long sweep of historical events and the complexities presented by Japan’s colonial domination of Korea during the first half of the twentieth century. Certainly the date of 1905, when Japan asserted that the islets were *terra nullius* and made its claim to them, is of significance, and the specific assertions and displays of sovereignty made by Korea prior to that date and its protests in the years immediately following are of importance. If the *Palmas Arbitration* and *Eastern Greenland* case were followed strictly, then 1905 might be designated as the “critical date.” But, the decrees issued during the military occupation after World War II and the actions taken by Korea and Japan in the years immediately following the ending of the occupation are also significant, as are the subsequent efforts of Korea to solidify its occupation of the islets, Japan’s protests of these actions, and the 1965 treaty normalizing relations between the two countries.⁷⁹ A tribunal, therefore, would probably want to examine the entire sequence of historical events concerning the islets. Japan has suggested that the critical date should be 1954 when it proposed submitting the matter to the International Court of Justice,⁸⁰ but it is unlikely that a tribunal would view the matter as having been frozen in time since that moment. Japan’s decision to normalize relations with Korea in 1965 without pressing its claim to Dokdo and the quality of its subsequent protests should be considered by a decision-making tribunal, as should Korea’s position that the matter can no longer be viewed as “in dispute” after the 1965 Treaty.⁸¹ No one single date stands out as *the critical date*, and, as in the *Minquiers and Ecrehos* case, all aspects of the history should be evaluated by a tribunal entrusted with the task of determining sovereignty.

The activities of Japan regarding Dokdo/Takeshima between November 1905 and 1945 would be viewed as irrelevant by any tribunal, because Japan was wrongfully occupying Korea during that time, and no decision maker would allow Japan to obtain territory and thereby benefit from its wrongful activity. Some Korean scholars have argued the period should be considered to be irrelevant to a judicial determination should begin in February 1904 (and, thus, before Dokdo/Takeshima was claimed by Japan) because it was the protocol imposed on Korea then that marked the moment when Japan established its wrongful control over Korea and when Korea lost its ability to operate independently.⁸² In any event, the Japanese activity regarding Dokdo in the late nineteenth century and early twentieth century must be understood in the context of its expansionist policies which led to military domination in Northeast Asia and total control of Korea for four decades.⁸³

The Historical Record Concerning Exercises of Sovereignty by Korea and Japan with Regard to Dokdo

512–1416: Korea Subjugates and Administers Ullungdo. Ullungdo is a ruggedly forested volcanic island with a circumference of about 55 kilometers lying about 135 kilometers (84 miles or 73 nautical miles) east of the Korean peninsula, which is now populated with small coastal villages whose residents focus on squid fishing. Dokdo lies 88 kilometers (about 55 miles or 47 nautical miles) south of Ullungdo. As already noted, Dokdo can be seen from Ullungdo on a clear day,⁸⁴ and Korean scholars explain that Koreans have always viewed Dokdo as a dependency or an appendage of Ullungdo.

A survey of the Silla kingdom published during the Choson dynasty in 1454, called *The Annals of the Kingdom of Silla*,⁸⁵ included the report that the Silla kingdom conquered the Kingdom of Usan'guk on what is now called Ullungdo in AD 512, and Korean scholars contend that this conquest included Dokdo as well. *The Annals of the Kingdom of Silla* referred only to Ullungdo in describing the 512 subjugation,⁸⁶ but later documents claim that Silla subjugated both Ullungdo and Dokdo following the 512 invasion.⁸⁷ The early records are confusing and difficult to interpret, in part because the names of these islands have changed during the years. Professor Yong-Ha Shin has explained that "Japanese scholars accede to the fact that, up to 1900, Ullungdo had been called Takeshima and Tokdo, Matsushima, by Japanese. As for the Korean appellation, Tokdo was originally called Usando, implying its derivation from Usan'guk."⁸⁸ Although the records regarding activity connected with these islands during this early period are limited "as far as Ullungdo is concerned, there is evidence that Koreans lived there and the government attempted to control it politically."⁸⁹ Under the standard Western legal perspectives regarding claims of sovereignty, as explained above,⁹⁰ it is the "continuous and peaceful display of State authority" not the acts of individuals that would be needed to establish "occupation" and thereby sovereign authority,⁹¹ but the acts of individuals can nonetheless be important to show which political community was presumed to exercise authority over the disputed region. In the *Minquiers and Ecrehos* case, "the ICJ [International Court of Justice] relied for its decision on the broad range of connections of the disputed island with Jersey, manifested mainly in the activities of individuals—fishermen from Jersey."⁹²

1416–1881: Korea's "Vacant Island Policy." From 1416 until 1881, Korea removed the inhabitants of Ullungdo as part of its "vacant island policy."⁹³ This policy, initiated by King T'aejung in the early years of the Choson dynasty, was apparently designed to prevent Korean occupants of Ullungdo from evading taxes and dodging military service, as well as to protect them from Japanese marauders.⁹⁴ Several documents and maps from the period

confirm that Korea maintained some administrative control over Ullungdo and also over Dokdo. Records from the reign of King Sejong in the fifteenth century listed both Ullungdo and Dokdo as belonging to Uljin County,⁹⁵ and records subsequently added to *The Annals of the Dynasty of Choson* described how inspections of Ullung-Do continued sporadically until the end of the Choson dynasty.⁹⁶ A geographical survey published in 1531 contained a map depicting Ullungdo and Dokdo as separate islands,⁹⁷ although the locations of the islands were inaccurate.⁹⁸ Three maps created between 1678 and 1846 similarly depicted the two islands in this inaccurate fashion.⁹⁹ Beginning in the late seventeenth century, the Korean government apparently sent inspectors to Ullungdo every 3 years to enforce the ban on residing there.¹⁰⁰

The Japanese had some presence in these islands during this period. The reference to “marauders” in the Korean records from the late fifteenth century indicates that Japanese fishers were present in the area. Japan’s first governmental reference to Dokdo did not appear until 1667, but records from private Japanese collections of the early seventeenth century discussed how Japanese had been making frequent voyages to the islands.¹⁰¹

The 1667 report of an observational trip to Oki Island in 1667 is the earliest known Japanese governmental reference to Ullungdo and Dokdo.¹⁰² This report stated that the “two islands are uninhabited and getting a sight of Koryo [Korea] from there is like viewing Oki from Onshu.”¹⁰³ The report also noted that Oki Island “marked the northwestern boundary of Japan,”¹⁰⁴ thus acknowledging that Japan did not claim sovereignty over Dokdo and Ullungdo.

1693–99: Japan Recognizes Ullungdo and Dokdo as Korean Territory. In 1693, a fight erupted between Korean and Japanese fishers over fishing rights off the shores of Dokdo and Ullungdo. Referred to by Japanese authors as the “Takeshima Incident” (because the Japanese then called Ullungdo “Takeshima,” and referred to Dokdo as Matsushima), this dispute was brought before the Japanese government for adjudication.¹⁰⁵ After some back and forth exchanges, the Japanese government concluded that Ullungdo was Korean territory, and appeared to recognize that Dokdo was an appendage linked to Ullungdo and subject to the same regime, and thereby promulgated a ban on Japanese fishers from visiting these islands.¹⁰⁶

Korean scholars evaluating this incident pointed to documents that seem to be referring to Dokdo, although the evidence is somewhat confusing because of the different names used for these islets.¹⁰⁷ A Japanese scholar reached a different conclusion, stating that the Japanese government did not refer to the islets now called Dokdo or Takeshima in its conclusion, neither recognizing them as Korean territory nor banning Japanese from visiting these islets.¹⁰⁸ It is significant that the Koreans made regular claims during this period that Dokdo was Korean territory and was covered by the Japanese ban.¹⁰⁹ The Korean government continued to try to enforce its “vacant island policy” during this period, and the Japanese government also apparently “imposed a ban on foreign travel by its nationals for almost two hundred years lasting until the Meiji Restoration in 1868, when the ban was lifted.”¹¹⁰

Eighteenth Century: Japanese Cartographers Draw Dokdo as Korean Territory. In the eighteenth century, Japanese scholars began producing color-coded maps that pictured Japan and its surrounding countries. In 1778, a map made by Nagakubo Sekisui includes Dokdo (then referred to by Japan as Matsushima), but does not mark it as a Japanese possession.¹¹¹ In 1785, the prominent scholar Hayashi Shihei finished *Sangoku setsujozu*, “A Map of Three Adjoining Countries,” which displayed Korean territory in yellow and Japanese territory in

red.¹¹² Hayashi painted two islands that appear to be present-day Ullungdo and Dokdo in yellow, and wrote next to the depictions of the islands: “Korea’s possessions” or “belong to Korea.”¹¹³ He created this map to emphasize (and perhaps exaggerate) that Japan was surrounded by potentially unfriendly countries and had a national security problem that needed attention. Two other Japanese maps were produced about this same time using color schemes that acknowledged Ullungdo and Dokdo as Korean possessions.¹¹⁴ Another official Japanese map of Japan’s coastal waters called *Tainippon Enkai Yochi* was published in 1821 by Ino Tadataka which also excluded Matsushima/Dokdo from being considered to be Japanese territory.¹¹⁵ The emergence of such maps in Japan provides strong evidence that the Japanese had come to recognize Dokdo as a part of Korea during the late eighteenth and early nineteenth centuries.

The Current Japanese View of the Early History. As is explained below,¹¹⁶ Japan claimed Dokdo/Takeshima in January 1905, asserting that it was “*terra nullius*,” and thus susceptible to annexation. This assertion that the islets were “*terra nullius*” and thus not owned by any country would appear to be an acknowledgment that Japan’s earlier contacts with the islets were not sufficient to establish any claim of sovereignty.¹¹⁷ It therefore, would appear, that Japan is “estopped” from now arguing that it had established sovereignty at an earlier period.

Nonetheless, Japan’s Ministry of Foreign Affairs does now claim that Japan did establish sovereignty over Dokdo/Takeshima at an earlier period.¹¹⁸ Because this position is significant, it is reprinted below in its entirety as it was issued by the Ministry of Foreign Affairs in March 2004.

Japan’s Assertions Concerning Sovereignty of Takeshima

(1) Historical facts of Takeshima’s sovereignty

In light of the following historical facts, it is apparent that at the latest by the middle of the 17th Century, Japan had established sovereignty of Takeshima based on effective rule. After 1905 too, Japan’s claim to sovereignty of Takeshima was reaffirmed as a modern nation state, based on a Cabinet decision, and in this way Takeshima has effectively been ruled by Japan.

- (a) Japan has long known about the existence of Takeshima (then known as “Matsushima”). This is clear from many references to it in writing and on maps. [Note: On the Kaiser Nippon Yochi Rote Zions (Revised Complete Map of Japanese Lands and Roads (1779) by Sekisui Nagakubo, the most representative of all published cartographic projections of Japan, the location of Takeshima is accurately recorded in its current position. Many other documents through to the Meiji era make the same reference.]
- (b) At the beginning of the Do period (1618) the Hoya and Maraca families of Houri-Han were granted permission from the Tokugawa Shogunate to take feudal tenure of Utsuryo Island, and every year the families conducted fishing on and around the island, sending some of their catch of abalone in tribute to the Shogunate. Takeshima was en route to Utsuryo Island and was used as a stopover port and for fishing. In addition, at the latest by 1661 the Hoya and Maraca families had been granted feudal tenure of Takeshima from the Shogunate.
- (c) In 1696, as a result of negotiations between Japan and Korea concerning fishing in the vicinity of Utsuryo Island the Shogunate prohibited

passage of vessels to Utsuryo (Takeshima Ikken), but did not prohibit passage to Takeshima.

- (d) In 1905, Japan reaffirmed its intention to possess Takeshima by a Cabinet decision in January, followed by a notification by Shimane Prefecture in February, officially incorporating Takeshima as part of Shimane Prefecture. Subsequently Takeshima appeared on the State Land Register, and a system of approval for sea lion hunting on Takeshima was introduced, which continued until its termination in 1941 due to the Second World War.
- (2) Validity of the incorporation of Takeshima by the Japanese government in 1905

The measures to incorporate Takeshima into Shimane Prefecture in 1905, through the Cabinet decisions and notification by Shimane Prefecture reaffirmed the intention of the Japanese government to claim territorial rights as a modern nation over Takeshima. There were no indications that Japan did not hold territorial rights prior to that, nor were there any counter claims by any other country of territorial rights over Takeshima. In addition, the incorporation of Takeshima was reported in the newspapers and was not undertaken secretly, hence it can be seen to have been implemented validly. (Note: It is not an obligation under international law to notify foreign governments of measures to incorporate territory.)¹¹⁹

This Japanese position paper also asserts that the various “instructions” issued by the U.S. occupying forces after World War II “do not represent final decisions concerning the attribution of Japanese sovereign territory,” that in the 1951 San Francisco Peace Treaty “Japan did not include Takeshima in the definition of ‘Korea,’” that Japan proposed submitting the dispute to the International Court of Justice in September 1954 “but this proposal was rejected by the Republic of Korea,” and that when relations between Japan and Korea were normalized in 1965 “an exchange of documents concerning dispute settlement was concluded.”¹²⁰ The issues raised by these contentions are all addressed below.

The Events of the Late Nineteenth and Early Twentieth Centuries

Korea's Status in the International Community. Once the focus turns to the events of the second half of the nineteenth century, the complex and fast-moving events in Northeast Asia call for an examination of Korea's status within that region and within the international community at large. Korea was certainly recognized as a “state” under international law during the nineteenth century, but it held a unique relationship with China during this period and then it was overwhelmed by the military interventions of Japan shortly after the turn of the century. It had the capacity to act as an independent nation during the nineteenth century, and did attend international meetings and enter into treaties on its own. But, as the twentieth century began, its ability to act independently diminished sharply. Japanese troops were located in Korean territory in the early 1900s, Korea became a “protectorate” of Japan in 1905, and it was then formally incorporated into Japan in 1910. Korea thus had a limited capacity to represent its own interests during this period and this limited international capacity is of substantial importance in understanding the Dokdo controversy.

Korea's Relationship with China. Prior to the twentieth century, the concept of “sovereignty” and the basis of interaction between and among countries in East Asia differed

from that in the West. China was historically recognized as the dominating power in the region, and neighboring states acknowledged China's role through tributary relationships.¹²¹ The deference of these smaller countries to China was not, however, inconsistent with their status as independent states. Although they paid tribute to China, they retained complete control over their internal and external affairs.¹²² This unique Asian system of relationships makes it difficult to apply modern Western concepts of international law and relations on historical events in East Asia. In the West, after the Peace of Westphalia in 1648, sovereign states came to enjoy complete independence and equality in international relations. Western observers of East Asia therefore faced the predicament of classifying the Asian nations without understanding their different regional structure.

The Korean-China relationship was an example of a traditional East Asian tributary system. With the adoption of Confucian doctrine, Korea acknowledged that the Chinese emperor was the preeminent figure in societal order and accepted him as the Son of Heaven.¹²³ Korea's recognition of the Chinese emperor as mediator between heaven and Earth was expressed through periodic tribute paid to and investiture received from the Chinese court. Tributes consisted of the offering of valuable products native to Korea, and in return the emperor would bestow presents to the Korean court worth more than the Korean offerings.¹²⁴ Investitures were regarded as a means for new rulers to gain legitimacy, yet they were "strictly ceremonial relations bearing with them no idea of subordination, other than that of respect and deference on the part of a younger member of a family to its recognized head."¹²⁵

Although Confucian doctrine played a role in governing the Korean-China tributary relationship, China's position as the foremost military power of the region was a determining factor of Korea's ceremonial submission. A regime change in China was often met by Korean refusal to renounce its loyalty to the previous ruler, yet such resistance was always short lived. As soon as the new regime consolidated its military power, Korea was forced to accept resumption of the tributary system.¹²⁶ When the Monguls established the Yuan dynasty (1279–1368) and the Manchus established the Qing dynasty (1644–1911), for example, Korea initially refused to renounce its loyalty to the previous Han Chinese rulers, and only following military invasions did Korea agree to recognize the new Chinese courts.¹²⁷ The Korean-China tributary relationship, can therefore, be characterized as one that Korea accepted in order to secure its independence as a state.

Foreign Powers Contend for Dominance over Korea. The arrival of powerful Western nations in East Asia marked an end to the region's traditional form of relationships. Korea had been engaged in a tributary relationship with China, but the advanced technology and military strength of Western nations nullified China's position of supreme dominance in the region. Although Korea's military was inferior to China's prior to the arrival of the Western powers, and inferior to those of the West following their arrival, Korea was nonetheless an independent, sovereign state throughout this era.

In the nineteenth century, Western nations began visiting Korea to solicit trade. Between 1832 and 1866, warships and merchant vessels from Britain, France, Russia, Germany, and the United States sailed into Korean coastal waters, yet Korea refused to enter into relationships with them.¹²⁸ Korea had witnessed the advanced technology of these nations and the ease with which they managed to overcome Chinese military forces. Their foreign ways of thinking, in particular Catholicism, had also penetrated the Confucian social order of China, previously perceived as inviolable, and this religion was beginning to seep into Korea as well. The Korean government concluded that a policy of isolationism could protect the country from these incursions, and it closed its doors to both the Western powers and

Japan, whose Meiji Restoration had been founded on foreign ideas of government and social order. Korean international relations thus were restricted to its contact with the Chinese court.¹²⁹

Korea's isolationism led to clashes with the Western nations. In 1866, France dispatched its French Asiatic Squadron upon learning that the Korean government had captured and killed most of the French missionaries present in Korea. Korean defenses successfully prevented the French troops from reaching Seoul, however, and France thereafter withdrew its squadron.¹³⁰ The same year, Korea destroyed a U.S. merchant ship that had sailed up the Kanghai Strait to Pyongyang, and in 1871 the United States retaliated by sending five warships to the strait. Korea had strengthened its fortifications following France's attack, however, and managed to repel the U.S. force.¹³¹

The new Meiji government in Japan was also attempting to penetrate Korea's closed doors, and in the late 1860s sent correspondences to the Korean court that proposed the establishment of a new relationship between the two, one that would place Korea under Japanese sovereignty.¹³² Korea rejected the proposal, refusing even to acknowledge receipt of the correspondences, which in turn sparked the "Korean Problem" within Japan's Great Council of State.¹³³ Japan's ministers were divided over whether the time had come to conquer Korea militarily, with opponents of the policy arguing that an easy victory over Korea was not guaranteed.¹³⁴ The argument led to numerous assassinations, riots, and a full-scale civil war within Japan,¹³⁵ and finally in 1873 an imperial decision announced that the conquest of Korea had been indefinitely postponed.¹³⁶

As Korea's contact with foreign powers increased, Koreans debated whether to commence relations with these nations. Conservatives among the Confucian literati advocated the "reject heterodoxy" persuasion, which called for continued resistance against foreign penetration. The underlying precept of this school was that the Neo-Confucian basis of Korean society would be preserved only through the rejection of foreign ideologies and that relations with nations that did not subscribe to this social order would undermine Korean civilization.¹³⁷ Those who favored "enlightenment thought," or development through the introduction of foreign trade and Western technology, were split into two vying factions. Proponents of the gradualist approach believed that contact with the outside world should proceed through continued relations with the Chinese court.¹³⁸ The progressive camp called for an end of foreign intervention and a more radical change modeled after Japan's Meiji Restoration.¹³⁹ When King Kojong ascended to the throne in 1864 at the age of 12, his father the Taewon'gun assumed control of the government.¹⁴⁰ In 1873, after the Taewon'gun was forced to relinquish his power, Kojong began to enact progressive policies.¹⁴¹

Japan followed with interest the changes taking place within the Korean government, particularly the declining support for the isolationist policy. In 1875, Japan sought to make contact with Korea by dispatching a naval vessel to the Kanghai coast, with the expectation that its presence would provoke an attack from Korean defenses.¹⁴² Korea did attack the ship and Japan's protest that Korea had engaged in an unprovoked attack led to treaty negotiations. In 1876, Japan sent two warships and 400 soldiers to Kanghai to extract an agreement that would establish commercial relations. Although negotiations with Japan met with fervent resistance from the "reject heterodoxy" camp of the Confucian literati, the military presence of the Japanese and support from the progressive Koreans led to the signing of the 1876 Treaty of Kanghai.¹⁴³ This agreement recognized that Korea was an autonomous nation with the same sovereign rights as Japan, but its provisions favored Japan's economic expansion into Korea. Korea agreed to open three ports for trade, one in Pusan and two more to be chosen by Japan, and Japan was granted unrestricted access to Korean waters and the right to establish extraterritorial settlements on leased land.¹⁴⁴

Kojong's progressive policies met with strong resistance not only from the conservative Confucian literati, but also from the traditional military units. His policy initiatives included reforms to the military structure and the establishment of an elite corps, and he stopped paying and providing rations to the traditional military units.¹⁴⁵ In 1882, concerned about the impending end to their career, these soldiers allied with the Taewon'gun and forced Kojong to reinstate the Taewon'gun's power.¹⁴⁶ This episode brought forth military intervention from both Japan and China. Japan dispatched forces with the goal of preventing the reestablishment of isolationist policies under the Taewon'gun. China, disturbed by Japan's increased strength within Korea, also sent a large military force, claiming it had a duty to assist its suzerain in a time of internal disorder. The Chinese forces reached Seoul first, removed the Taewon'gun from power and escorted him back to China.¹⁴⁷ Japan, no longer threatened by the Taewon'gun's anti-Japanese policies, entered into an agreement with Korea, the Treaty of Chemulp'o, whereby Japan was granted the right to establish a military station within Seoul.¹⁴⁸

China's assistance in removing the Taewon'gun from the political scene empowered Korea's gradualist faction of "enlightenment thought." The government enacted administrative reform under China's direction, and brought in two foreign affairs advisors from the Chinese court. Chinese merchants were granted the right to reside and conduct business in Korea.¹⁴⁹ China urged Korea to open trade relations with Western nations as a further means to curb Japanese economic expansion in Korea. As a result, Korea signed commerce treaties with the United States and Germany in 1882; with Great Britain, Italy, and Russia in 1884; and with France in 1886.¹⁵⁰

The newly formed Progressive Party, which favored radical reform based on Japan's Meiji Restoration and complete independence from foreign intervention, opposed China's increasing presence in Korea's governmental affairs.¹⁵¹ In 1884, when military conflict erupted between China and France over Annam (Vietnam), the progressives gained the support of military leaders who had recently undergone training in Japanese military academies. With the support of the Japanese legation troops, the progressives killed the senior officials of the gradualist faction, and formulated a program for reform that included "the immediate return of the Taewon'gun and an end to the empty formalities of the tributary relationship with China."¹⁵² The Chinese troops, however, overcame the progressives before they were able to make known their reformation program, thus bringing an end to the Progressive Party.¹⁵³

In 1885, Japanese Prime Minister Ito Hirobumi met with his Chinese counterpart Li Hung-chang in Tientsin, China, to discuss their respective military roles in Korea. The resulting Convention of Tientsin stated that both nations would withdraw their troops from Korea. The Chinese general Yuan Shih-k'ai remained in Korea, however, under the title of director-general resident in Korea of diplomatic and commercial relations, and his continuing presence ensured that Chinese merchants would control the Korean markets.¹⁵⁴

The Russian presence in Korea also began to increase, and with the 1884 treaty between Russia and Korea, a Russian minister was stationed in Seoul. A segment of Korean officialdom, including one of the foreign advisors appointed by China, began to perceive the Russian presence in Korea as a counterbalance to the increased Japanese and Chinese influence over Korean economic affairs.¹⁵⁵ China reacted by replacing its foreign advisor and returning the Taewon'gun to Seoul with the goal of removing Kojong and his pro-Russian leanings from power.¹⁵⁶ The new foreign advisor also advocated increased Russian relations, however, and without his assistance the pro-Chinese forces were unable to regain control of the court.¹⁵⁷

Great Britain also was concerned that the increasing Russian presence in the Korean court could lead to Russian dominance on the peninsula. To thwart this outcome, Britain dispatched a naval force in 1885 to prevent Russian military infiltration of the peninsula, occupying Komundo at the entrance of the Korean Strait. Great Britain's military presence in turn caused alarm among both the Chinese and Russians, and in 1887 negotiations led to Britain's withdrawal from Komundo in exchange for a pledge from Russia that it would not seize Korean territory. This agreement did not preclude Russia from seeking increased economic influence over Korea, however, and in 1888 the Overland Trade Agreement increased trade relations between Korea and Russia by opening the town Kyonghung and its surrounding area to Russian navigational rights and to the establishment of extraterritorial settlements.¹⁵⁸

By the early 1890s, a revolutionary movement that had been building in Korea for several years evolved into a well-organized uprising.¹⁵⁹ Korea was unable to suppress the strength of the revolutionary army, and requested assistance from China.¹⁶⁰ Under the provisions of the Convention of Tientsin, China reported its military deployment to Japan, which in turn sent a large military force under the pretext of protecting its citizens in Korea. By the time the Japanese force arrived in Korea, China had already suppressed the Tonghak uprising, and thus proposed to Japan a joint withdrawal of their troops. Japan rejected China's proposal, however, arguing that the two powers should remain in Korea to conduct reforms of Korea's administration. China declined this proposal, and in 1894, after the two nations were unable to reach an agreement, Japan launched a preemptive strike against the Chinese forces, thus beginning the Sino-Japanese War.¹⁶¹ Japan's victory in 1895 produced the Treaty of Shimonoseki, under which China acknowledged Korea's complete independence as a sovereign nation and ceded the Liaotung Peninsula and Taiwan to Japan.¹⁶²

In 1894, with its troops occupying the Korean palace, Japan enforced reforms on the Korean government that abolished the Confucian-based structure of administration. Pro-Japanese officials who used to belong to the Progressive Party occupied seats of power under the newly formed State Council, and a restructuring of the local system of governance weakened the position of the local authorities.¹⁶³

Therefore, by the end of the nineteenth century, Japan had established a formidable presence in Korea, exerting influence over both the government and the markets. During the first several decades of Korea's contact with foreign powers, competition among the major powers had allowed Korea to preserve a semblance of control over its internal affairs. But, after Japan's 1895 victory in the Sino-Japanese War, China officially recognized that Korea was no longer its suzerain, and Japan began exerting the increasing control that led to formal annexation in 1910.

Strategic Maneuvers in Northeast Asia Prior to the Russo-Japanese War. Japan's final competitor in the region was Russia. As Japan increased its control over Korean affairs after the 1895 Sino-Japanese War, Russia was establishing a presence in Northeast Asia through its expansion of the Trans-Siberian railroad into Manchuria and its long-term leases of Dalian and Port Arthur. Neither Japan nor Russia invaded Korea militarily at this time, because Russia was busy in Manchuria and Japan was unwilling to face the impressive Russian army. Instead, Japan and Russia agreed in 1898 to refrain from interfering in Korea's internal administration and from providing military or financial advice to Korea without prior mutual agreement. Russia also pledged not to interfere with Japan's economic activities in Korea.¹⁶⁴

Following the 1900 suppression of the Boxer Rebellion in China by the combined efforts of the Western Powers and Japan, Russia sent a large occupying force to Manchuria.

In January 1901, Russia approached Japan and proposed a joint neutralization of Korea. Japan regarded the existing state of affairs to be an effective means of containing Russia's presence in Northeast Asia to Manchuria and thus considered acceptance of the proposal strategically unwise unless the joint neutralization was to also include Manchuria. Japan, therefore, declined Russia's proposal, stating that it was satisfied with their relationship as defined in the 1898 agreement.¹⁶⁵

Japan perceived the Russian buildup of power as a possible threat to its interests in the region, as did Great Britain, which was engaged in similar confrontations with Russia in other parts of the world. The concerns of the two states led to the Anglo-Japanese Alliance of January 1902, whereby Japan and Britain agreed to come to each other's aid in the event of war, and also recognized each other's respective rights and interests in the region; namely, Britain's in China and Japan's in Korea.¹⁶⁶

Several months later, Russia agreed to withdraw its military forces from Manchuria under the Sino-Russian Treaty of April 8, 1902.¹⁶⁷ This withdrawal was to take place in three stages, with the first stage completed in the fall of 1902. When Russia failed to complete the second phase in the spring of 1903, Japan demanded further negotiations, backed by the strength of the Anglo-Japanese alliance. Japan's initial proposal in August stated that Russia should recognize its rights and interests in Korea in exchange for Japan's recognition of Russia's position in Manchuria, a position that did not exclude future Japanese commercial activity in the area.¹⁶⁸ Russia's October 1903 counterproposal stated that it would recognize Japan's exclusive interests in Korea as long as Japan did not use Korea as a base for military operations. Russia further stated that Japan's interests should not extend into Manchuria, and also that Korean territory north of the 39th parallel should become a neutral zone in which both states could establish a military presence. Japan refused Russia's counter proposal, and attacked Russia several months later.¹⁶⁹

Japan's Increasing Influence in Korea During the Russo-Japanese War. Although Korea took a neutral stance in the Russo-Japanese War, Japan sent troops into Seoul and compelled Korea to sign a protocol agreement on February 23, 1904, which read:

For the purpose of maintaining a permanent and solid friendship between Japan and Korea and firmly establishing peace in the Far East, the Imperial government of Korea shall place full confidence in the Imperial government of Japan and adopt the advice of the latter in regard to improvements in administration. . . . [T]he Imperial government of Japan definitely guarantees the independence and territorial integrity of the Korean Empire.¹⁷⁰

This agreement also stated that Japan would take necessary measures to protect the Korean monarch from threats of foreign powers or internal disorder, thus providing a justification to increase its military presence throughout Korea, as well as establishing navigational rights in coastal waters.¹⁷¹ This protocol marked the moment when Korea lost its ability to act independently on the world stage: "Korea was deprived of its rights to conduct diplomacy and its sovereignty and independence by this protocol signed on February 23, 1904, not by the Protectorate Treaty concluded on November 17, 1905."¹⁷²

Another agreement was signed between Korea and Japan in August 1904, through which all Korean financial matters were placed under the direction of a Japanese-appointed financial advisor. Article I of the agreement stipulated that "the Korean government shall engage as financial adviser to the Korean government, a Japanese subject, recommended by the Japanese government, and all matters concerning finance shall be dealt with after

his counsel has been taken.”¹⁷³ All matters of foreign affairs were also placed under the direction of a Japanese appointed foreign affairs adviser:

The Korean government shall engage as diplomatic adviser to the Department of Foreign Affairs a foreigner recommended by the Japanese government, and all important matters concerning foreign relations shall be dealt with after his counsel has been taken. . . . The Korean government shall previously consult the Japanese government in concluding treaties and conventions with foreign powers, and in dealing with other important diplomatic affairs, such as the granting of concessions to or contracts with foreigners.¹⁷⁴

Japan also appointed a defense advisor, police advisor, royal household affairs advisor, and education advisor to the Korean government, although these last four positions were not provided for in the August 1904 agreement.¹⁷⁵ As historian Ki-Baik Lee stated, “Japan thus had created what was known at the time as a ‘government by advisers’ in Korea. The situation was exactly as if actual administrative authority had passed into Japanese hands.”¹⁷⁶

1868–1904: What Was Happening in and Around Dokdo. It is important to understand the internal turmoil in Korea and the big-power struggles over the peninsula in order to be able to evaluate the Japanese activities in and near Dokdo during this period. The new Meiji government in Japan sought to build a modern state and encourage its citizens to travel overseas.¹⁷⁷ The Japanese developed advanced vessel technology, which allowed for easier access to the islands.¹⁷⁸ Although the ban on travel to Ullungdo from the 1693 “Takeshima Incident” remained in place as a formal matter, Japanese fishers were traveling to both Ullungdo and Dokdo in increasing numbers.¹⁷⁹

During the 1870s, Japanese fishers began submitting applications to exploit the resources found on and around Ullungdo, including lumber and abalone.¹⁸⁰ The Meiji government denied the applications, however, adhering to the ban of the “Takeshima Incident.”¹⁸¹ In 1870, an investigating team established by the Japanese Foreign Ministry issued a report responding to an inquiry to explain the circumstances under which Dokdo/Takeshima “have fallen under Korean possession.”¹⁸² On March 29, 1877, Japan’s highest governmental organ, the Dajokan, responding to an inquiry from Shimane Prefecture about whether Ullungdo and Dokdo should be included in a nationwide land survey, instructed the Home Ministry that “Re Takeshima [referring to present-day Ullungdo] and another island [referring to present-day Dokdo/Takeshima], it is understood that our country has nothing to do with them.”¹⁸³ Significantly, maps published by Japan’s Ministries of the Army and Navy positioned Dokdo outside Japanese territory.¹⁸⁴ One Japanese scholar who has examined these maps has concluded that: “There is no doubt the Japanese naval hydrographic authorities were aware Takeshima/Tokdo belonged to Korea around the end of the 19th century. . . . It is clear that all the Japanese government organs involved regarded the island as Korea’s along with Ullungdo though the degree of their cognizance of the island differed.”¹⁸⁵

Toward the end of this decade, Japanese fishers began to confuse the names of Ullungdo, Takeshima, and Matsushima on their applications.¹⁸⁶ Although the names created problems, a Japanese scholar has stated clearly that, on the part of the Meiji government during this period: “Definitely, there was not any notion that ‘Tokdo/Takeshima was an inherent Japanese territory.’”¹⁸⁷ Korea was not pleased with the Japanese use of Ullungdo’s resources, and therefore lodged a “stern protest” with the Japanese Foreign Minister in 1881.¹⁸⁸

That same year, Korea withdrew its “vacant island policy” for Ullungdo “to start a positive management of the island by moving inhabitants there from the mainland in 1883.”¹⁸⁹

Following Korea’s protest, the Meiji government “apologized for the illegal act” and attempted to evacuate the 254 Japanese inhabiting Ullungdo, but not all departed.¹⁹⁰ Koreans were living on Ullungdo as well, and reports indicated that the peoples of the two nations “maintained an amicable and good neighborly relationship.”¹⁹¹

Toward the late 1890s, when the Korean population of Ullungdo had increased to 1,134,¹⁹² the Korean government became increasingly concerned over the continued Japanese activities in and around Ullungdo. In 1897, the government reported that approximately 70 Japanese inhabited the island.¹⁹³ On October 25, 1900, following the renaming of the Choson dynasty to the Empire of Korea (*Taehan Cheguk*), the Korean government promulgated Imperial Ordinance No. 41, which established the county of Ullungdo, which had jurisdiction over its surrounding islands, clearly referring to Sokto, which was the name then being used for what is now called Dokdo.¹⁹⁴ But, in the years that followed, particularly as of 1904 when Japanese “advisors” began effectively making policy in Korea and Japanese troops were stationed in various parts of the peninsula, Korea was no longer able to protect its territorial interests effectively.

1905: Japan Incorporates Dokdo/Takeshima Following the Russo-Japanese War. The outbreak of the Russo-Japanese War in February 1904 amplified the strategic value of the islands off the Korean coast, and the Japanese navy constructed a series of watchtowers and underwater cables that provided communication between these islands. In July–August 1904, the Japanese navy built two watchtowers on the island of Ullungdo, with cables extending to the Korean mainland,¹⁹⁵ and then built two more watchtowers on Ullungdo during the summer of 1905.¹⁹⁶ On November 13, 1904, Japan dispatched a warship to Dokdo/Takeshima in order to determine its suitability for the installation of a radio station.¹⁹⁷ The survey concluded that the islets could support a watchtower, but construction was put off until the following summer.¹⁹⁸

The seas surrounding Dokdo and Ullungdo became a key battleground in the Russo-Japanese War during the winter of 1904–5 and, following a successful campaign, the Japanese navy recommenced plans to develop a military installation on Dokdo. In August 1905, Japan completed construction of a four-person watchtower connected through underwater cables to Ullungdo and Matsue Island.¹⁹⁹

Also in 1904, a Japanese fisher and sea lion hunter named Nakai Yozaburo approached the Japanese Ministry of Agriculture and Commerce for assistance in acquiring a license from the Koreans for fishing off the coast of Dokdo/Takeshima. The Ministry of Agriculture and Commerce referred the request to the Hydrographic Bureau of the Japanese Ministry of the Navy, which informed Yozaburo that Dokdo/Takeshima was “*terra nullius*,” and that he should therefore apply to the Japanese government rather than the Korean government for the fishing license.²⁰⁰

On September 29, 1904, Nakai Yozaburo then filed his “Request for Territorial Incorporation of Liancourt Island and Its Lease” with the Japanese Ministries of Home Affairs, Foreign Affairs, and Agriculture and Commerce, asserting in his application that “the ownership of the island is undetermined” and that settling the ownership question is important to prevent “a keen competition . . . among sea lion hunters.”²⁰¹ His application was approved on January 28, 1905, and the Japanese government decided “to incorporate into Japan’s territory a *terra nullius* in lat. 39°9.30’ N. and long. 131°55’ E., 85 nautical miles off Okinoshima, there being no evidence of its being occupied by any country; to call it Takeshima, and to place it under the jurisdiction of the administrator of Okinoshima.”²⁰²

Several months later, on February 22, 1905, the Shimane Prefecture announced its incorporation of Dokdo/Takeshima in Public Notice No. 40.²⁰³ Japan's central government, however, did not produce an official announcement of the incorporation, which ran counter to its usual practice in territorial affairs.²⁰⁴ In 1876, for example, when Japan established territorial sovereignty over the Ogasawara Islands, it announced its decision by notifying the United States and 12 European countries.²⁰⁵

The Korean government, which was effectively being run by Japanese "advisors" during this period, did not become aware of Japan's incorporation of Dokdo until 1906, when Japan conducted a survey of the island. Following the survey, the Japanese officials visited Ullungdo and explained their activity in the area, as was reported in the *Korean Daily News* on May 1, 1906:

Unusually strange things are happening. Ullungdo County Chief Sim Hung-t'aek reported to the Home Ministry that a party of Japanese government officials came to Ullungdo and professed that Tokdo belonging to Ullungdo was now Japanese territory, and took record of the topography, population and land size, etc. The Home Ministry sent a directive saying that it is strange for them to record the population of other country while on an excursion, and as their claim to Tokdo as Japanese territory is totally groundless, the story is really shocking.²⁰⁶

A report in the *Capital Gazette* later that month also described the incident.²⁰⁷ Although records of the Home Ministry's directive have not been produced, these news reports indicated that the members of the Korean government were not only surprised, but also reluctant to accept Japan's incorporation of Dokdo. Japan's influence over the Korean government, however, precluded any serious efforts to protest Japan's actions.

Postwar Treaties Solidify Japan's Occupation. The Treaty of Portsmouth, signed on September 5, 1905, officially brought to an end the Russo-Japanese War.²⁰⁸ This Treaty stipulated that all Russian and Japanese troops were to be evacuated from Manchuria, and that the administrative control of Manchuria would be returned to China.²⁰⁹ Russia also agreed to acknowledge Japan's interests in Korea:

The Imperial Russian Government, acknowledging that Japan possesses in Korea paramount political, military and economical interests, engages neither to obstruct nor interfere with measures for guidance, protection and control which the Imperial Government of Japan may find necessary to take in Korea.²¹⁰

Japan thus removed the Russian threat from Manchuria and solidified its control over Korea, "and Japan's political, economic and military supremacy in Korea was internationally recognized."²¹¹

Other members of the international community also recognized Japan's rights and interests in Korea following the war. The United States gave its approval of Japan's continued occupation of Korea in a secret treaty signed by the Japanese prime minister and the U.S. secretary of war William H. Taft in July 1905.²¹² Taft's remarks, approved by President Theodore Roosevelt, stated:

The establishment of a suzerainty over Korea by Japanese troops to the extent of requiring that Korea enter into no foreign treaties without the consent of

Japan was the logical result of the present war and would directly contribute to permanent peace in the East.²¹³

Great Britain accepted Japan's control over Korea during the reformation of the Anglo-Japanese Alliance in August 1905. Their new agreement stated:

Japan possessing paramount political, military and economic interests in Korea, Great Britain recognized the right of Japan to take such measures of guidance, control and protection in Korea as she may deem proper and necessary to safeguard and advance those interests as long as such measures were not contrary to the principles of equal opportunities for the commerce and industry of all nations.²¹⁴

Following publication of this new Anglo-Japanese Alliance, Korea protested to both Japan and Britain and stated that it would not acknowledge the treaty.²¹⁵ Korea further argued that the alliance violated a previous agreement between Britain and Korea.

Did the British Empire ignore Korea because she was a small nation? It is true that the small nations are powerless against any large nation, but alas, how could you violate our friendship? Our government is still hoping for good relations with the British Empire, so we propose the discarding of the Anglo-Japanese treaty of 1905.²¹⁶

Despite Korea's protests, Japan's influence over its administrative affairs continued to grow. In November 1905, Japanese officials entered the Korean palace escorted by Japanese soldiers and demanded that Emperor Kojong and his ministers sign a prepared treaty. Receiving a less than enthusiastic response from the palace officials, the Japanese entourage went to the Department of Foreign Affairs, where it was able to convince the minister of foreign affairs to affix his seal to the treaty.²¹⁷ The key provision of this treaty stated:

The government of Japan, through the Department of the Foreign Affairs at Tokyo, will hereafter have control and direction of the external relations and affairs of Korea. . . [T]he government of Korea agrees not to conclude hereafter any act or engagement having an international character except through the medium of the government of Japan. . . The government of Japan shall be represented at the court of His Majesty the Emperor of Korea by a Resident-General, who shall reside in Seoul, primarily for the purpose of taking charge of and directing matters relating to diplomatic affairs.²¹⁸

Through this treaty of 1905, Japan solidified its control over Korea's foreign affairs, "reduced Korea to semi-colonial status," and led to the dismantling of the Korean Ministry of Foreign Affairs on January 17, 1906.²¹⁹ Although the treaty limited the authority of the resident-general "primarily" to diplomatic affairs, the new resident-general in fact took control of the entire administration, effectively removing any vestiges of sovereignty.²²⁰ Despite Korea's crippled status, the Korean State Council (Ch'amjong taeshin of the Uijongbu) nonetheless issued a protest of Japan's purported annexation of Dokdo/Takeshima on April 29, 1906, shortly after it learned of this move.²²¹

Japan Prepares for Annexation as Korea's Protests Are Ignored. Following the promulgation of the treaty of 1905, Emperor Kojong sent representatives to Washington to seek assistance from President Theodore Roosevelt, stating that the treaty was achieved "at the point of the sword and under duress," but Roosevelt ignored this plea.²²² In February 1906, Kojong published a letter in the *Taehan Maeil Shinbo* newspaper in which he reiterated his refusal to have consented to the treaty of 1905 and appealed for international assistance.²²³ In June 1907, Kojong sent three representatives to the Second Hague Peace Conference with a statement that read:

As the independence of Korea has been known to all the powers with which she has ever been in friendly relation; we have for this reason, the right to send delegates to all international conferences which can be convoked for any purpose. But by the terms of the treaty of November 18 1905, which was extorted from us by force. . . [t]he Japanese by menace and by a violation of all international equity deprived us of the right of direct communication with the friendly powers. . . [N]ot recognizing this act on the part of the Japanese, we hereby appoint. . . delegates. . . for the purpose of making clear to the representatives of the powers the violation of our rights by the Japanese and the dangers which presently threaten our country; and also to reestablish between my country and the foreign powers the direct diplomatic relations to which we are entitled by the fact of our independence.²²⁴

The president of the peace conference, Russian Czar Nicholas II, ruled, however, that the Korean delegation could not participate in the conference.²²⁵

The international elites seem to have considered Japan's presence in Korea both rightful and deserving. Articles in the *New York Tribune* may have reflected the feelings of many in countries also engaged in imperialist conquest.

Corea [was] saved by Japan from Russian conquest and agreed to conduct its foreign affairs through the Japanese government. . . [an] arrangement recognized by all the world. The gravity of the offense of the Emperor of Corea in sending a delegation to La Hague unknown to Japan may be estimated if we imagine the Emir of Bokhara sending one to ask intervention between him and the Czar or the Annamese King against France or some Indian Maharajah asking La Hague to expel the British from Hindustan. The title of Japan to deal with Corea, as she has, is at least as good as that of Russia, France, Britain or any other Power to deal as they have with subject nations. . . Corea has been a source of irritation. . . [and a] menace to peace. . . [and it is] well to have the menace removed. The peace and progress of the world are more important. . . [T]he Law of survival of the fittest prevails among states as well as plants and animals. Corea has been conspicuously unfit. . . Had Corea manifested one tenth of Japan's energy and ability, she would have established and maintained her sovereignty. Instead she was cruel, corrupt and ignorant, and displayed none of the essential elements of sovereign nationality.²²⁶

Following the peace conference, the Japanese resident-general insisted that Kojong abdicate his throne because he had sent the mission to The Hague without the resident-general's authority, and he replaced Kojong with a mentally-deficient prince.²²⁷ In July 1907, the resident-general and the new emperor signed a treaty, which stated "the government of

Korea shall act under the guidance of Resident-General.”²²⁸ For the remaining years prior to the formal annexation in 1910, Korean officials were no longer in a position to protest Japanese activity. This history is significant, “because the annexation of Dok Island [Dokdo] took place under circumstances in which Korea was deprived of the right to control its internal and foreign affairs.”²²⁹ The two “agreements” forced on Korea in 1904 “effectively deprived the Korean government of the right to conduct independent foreign policy. Above all, those two agreements foreclosed any possibility that Korea [could] protest against Japan’s annexation of Dok Island in 1905.”²³⁰

*Analogies to the Dispute over the Senkakus/Daiyou Dao*²³¹

In 1895, Japan claimed to annex the Senkaku/Daiyou Dao islets as *terra nullius*. These five small volcanic islands and three rocky outcroppings have a total land area 7 of square kilometers. The largest is Uotsurishima/Diaoyu Dao which has 4.5 square kilometers. The islets are 170 kilometers northwest of Taiwan and 410 kilometers west of Okinawa. None are inhabited. Attempts to develop economic activity on Uotsurishima/Diaoyu Dao in the early twentieth century failed. The 2,270-meter-deep Okinawa Trough separates these islets from the nearest undisputed Japanese island.

Japan’s claim is based on “discovery” of the islets by a Japanese national (Tatsushiro Koga) in 1884, followed by formal incorporation of the islets into Japanese territory by the Japanese cabinet on January 14, 1895, after the islets were deemed to be “*terra nullius*.”²³² The United States administered the islets after World War II and transferred jurisdiction to Japan in 1951, but specified that this action did not affect the determination of sovereignty over the disputed islands.²³³ Japan has administered the islets from 1895 to 1945 and from 1951 to the present.

The China/Taiwan claim is: that Chinese discovered the islands in 1372, they were mentioned in a Chinese text in 1403, and they were incorporated into China’s coastal defense system by the Ming government in 1562; that fishers from northern Taiwan used the islets as shelters for a long period of time; that the Dowager Empress Tsu Hsi awarded property rights to three of them to a U.S. citizen of Chinese ancestry in 1893 to gather rare and precious medicinal herbs; that the islets were transferred to Japan in the Treaty of Shimonoseki in May 1895 after the 1894–95 Sino-Japanese War (as “islands appertaining or belonging to the said Island of Formosa”)²³⁴ and therefore should have been returned after World War II according to the 1943 Cairo Declaration (saying Japan must return all “territories which she has taken by violence and greed”),²³⁵ the 1945 Potsdam Proclamation,²³⁶ and Article 2 of the 1951 San Francisco Peace Treaty;²³⁷ and that, prior to 1945, Japan administered the islets through the Taipei Prefecture, not the Okinawa Prefecture.²³⁸

Professor Lee Keun-Gwan has observed that Japan’s claim to the Senkakus/Diaoyu Dao and to Dokdo/Takeshima are both based on an argument that they were *terrae nullius*, “discovered” and then “effectively occupied” by Japan, and that “in both cases the measure of occupation was taken during armed conflicts, that is, the Sino-Japanese War and the Russo-Japanese War respectively in which Japan emerged victorious.”²³⁹ He observed that although “occupation” may sound “neutral on its own,” during the age of imperialism it “became a powerful conceptual tool for the acquisition or aggrandizement of territory by European states” and that this method of acquiring territory “is, quite often, deeply tainted with European expansionism and colonialism.”²⁴⁰ And, as applied to Japan’s claims to the Senkakus and Dokdo/Takeshima, the doctrines of “discovery” and “occupation” are “a technical or legal camouflage that serves to justify an essentially expansionist and colonialist act on the part of the pre-1945 Japan.”²⁴¹

International Law Principles Governing the Acquisition of Territory by “Discovery” of “Terra Nullius”²⁴²

The basis for the current Japanese claim to Dokdo traces back to the historical events just described, relying primarily on the 1905 incorporation of the islets into the Shimane Prefecture. For Japan to prevail in this claim, it would have to convince a decision maker that Dokdo was “*terra nullius*” as of 1905, that Japan had acted properly in claiming and incorporating the islets, and that nothing has happened subsequently to question or dislodge Japan’s claim to the islets. It is significant that the original Japanese basis for its claim was *not* based on any Japanese acts of sovereignty regarding the islets *prior to* 1905. By asserting that the islets were *terra nullius* in 1905, Japan acknowledged that it had no legally cognizable claim to the islets prior to that time. It is arguably prevented by the doctrine of estoppel from now making any claim based on any prior acts of sovereignty regarding the islets.²⁴³

Land is in a state of “*terra nullius*” and thus subject to acquisition by “discovery” and “occupation” if it is not “under any sovereignty at the moment of occupation,”²⁴⁴ or, in another phrasing, “immediately before acquisition, belonged to no state.”²⁴⁵ Today, “there is hardly any *terra nullius* left on the globe,” but the concept is still “relevant. . . to legitimize sovereignty or jurisdiction over territory acquired at an earlier time.”²⁴⁶

Because of the remote and barren nature of the Dokdo islets, little activity would appear to be required to establish an “occupation” in relation to these islets,²⁴⁷ and Korea argued that it met these limited requirements repeatedly during previous centuries through its presence and administrative activities on Ullungdo, the fishing activities of Koreans around Dokdo, and its displays of sovereignty with specific reference to Dokdo. Korea also stressed that Dokdo can be seen from Ullungdo and hence that the principle of contiguity supports its claim, and, finally, that Japan had acquiesced repeatedly over the years and had accepted Korea’s sovereignty over Dokdo, as represented by Japan’s maps and governmental actions in the eighteenth and nineteenth centuries.

International tribunals have only rarely accepted claims that disputed territory was in a state of *terra nullius* at times relevant to a dispute. In the *Eastern Greenland* case, for instance, the Permanent Court of International Justice rejected Norway’s argument that the disputed region was *terra nullius*, when Norway claimed it on July 10, 1931, ruling that Denmark had exercised sufficient amounts of sovereignty over the region prior to that time (and that Norway’s foreign minister had acquiesced to Denmark’s claim in 1919).²⁴⁸ In the 1992 *Gulf of Fonseca* case, the Chamber of the International Court ruled that the disputed islets in the Gulf of Fonseca were not *terra nullius* in 1839 when the Federal Republic of Central America disintegrated, but instead were inherited by the new Central American political entities from Spain.²⁴⁹ In the *Western Sahara Advisory Opinion*, the International Court ruled that the disputed territory in the Western Sahara could not be viewed as *terra nullius*,²⁵⁰ explaining that “territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*.”²⁵¹ In the *Eritrea-Yemen Arbitration*, the Tribunal said that none of the disputed islands previously governed by the Ottoman Empire could be viewed as having a *res nullius* status after the negotiation of the 1923 Lausanne Treaty, because their status was said to be subject to being “settled by the parties concerned.” For this reason, sovereignty over previously Ottoman islands cannot be resolved by a single party “unilaterally. . . by means of acquisitive prescription.”²⁵² In light of the many historical examples of Korean acts reflecting its exercise of sovereignty over Dokdo, as well as the acts of the Japanese government declining to exercise sovereignty over the islets during the nineteenth century, and the many precedents rejecting claims that

disputed territory was *terra nullius*, it is extremely unlikely that a tribunal would accept Japan's claim that Dokdo was *terra nullius* in 1905.

1905–45: Japanese Control and Formal Annexation

During the four decades between 1905 and 1945, Japan controlled the Korean peninsula, and the Korean government did not operate as a separate sovereign state. This period cannot be considered with regard to the current dispute between Korea and Japan over Dokdo. Because Japan controlled all of Korea, and because that control is now recognized as having been wrongful and highly injurious to the Koreans, no consequences can follow from the activities during this period regarding which country now has sovereignty over the disputed islets.²⁵³

The Events, Documents, and Decisions Following World War II

This section turns to the international agreements that arose during the final years of World War II and the years following the end of the war which are relevant to the status of Dokdo.

Wartime Territorial Declarations. A series of wartime declarations issued by the Allied powers toward the end of the war addressed how to treat lands acquired by Japan during its aggressive territorial expansion, including the Cairo Declaration,²⁵⁴ the Yalta Agreement,²⁵⁵ and the Potsdam Proclamation.²⁵⁶ Although the 1951 San Francisco Peace Treaty²⁵⁷ superseded these earlier declarations in 1951, the Allied powers had agreed that the San Francisco Treaty would be guided by the terms put forth in the wartime declarations.²⁵⁸ Although the text of the San Francisco Treaty prevails over any inconsistencies between it and the declarations, the declarations may assist in clarifying issues left unresolved in the Treaty, such as the status of Dokdo.

The Cairo Declaration. The Cairo Declaration, signed by Great Britain, the United States, and China on November 27, 1943, expressed the resolve of the allies “to procure the unconditional surrender of Japan.” The Declaration addressed the need to “punish the aggression of Japan” and free an enslaved Korea:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. . . Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914. . . . Japan will also be expelled from all other territories *which she has taken by violence and greed*. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.²⁵⁹

The Declaration's usefulness is found in its specifications on how to handle territories acquired by Japan following the commencement of World War I. Territories acquired prior to 1914, however, are governed by the provision of whether acquisition was done through “violence and greed.” Although Korean commentators would view Japan's incorporation of Dokdo in 1905 as being the result of “violence and greed,” since Japan was engaged in a major imperialistic expansion during that period which included the annexation of the entire Korean peninsula, “the expulsion of Japan from the territory which she took by violence and

greed is difficult for the Japanese to understand, since all countries have acquired additional territory in such a way.”²⁶⁰

The Yalta Agreement. The second wartime declaration that laid a foundation for the 1951 San Francisco Peace Treaty was the Yalta Agreement, signed by the Soviet Union, the United States, and Great Britain on February 11, 1945.²⁶¹ This Agreement outlined the conditions to be met if the Soviet Union were to join the war against Japan. Because these conditions covered the restoration of territories acquired by Japan from the Soviet Union, the agreement has no direct relevance to the Dokdo debate.

The Potsdam Proclamation. The “Proclamation Defining Terms for Japanese Surrender,” or Potsdam Proclamation, issued by the United States, China, and Great Britain on July 26, 1945, provided the conditions under which the Allied powers would desist from effectuating “the utter devastation of the Japanese homeland.”²⁶² Article 8 of the Proclamation outlined the main territory that would remain under Japanese sovereignty, but left further details to be resolved.

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

The incorporation of the terms of the Cairo Declaration in Article 8 effectively removed territories acquired after 1914 from Japanese sovereignty. It also apparently was designed to indicate that territories acquired prior to 1914 would continue to be guided by the “violence and greed” provision in the Cairo Declaration. But, by referring to “such minor islands as we determine,” the Potsdam Proclamation indicated that decisions were to be made by the Allied powers. The status of “minor islands” such as Dokdo therefore, would be subject, to the interpretation given to the historical events that surrounded their acquisitions by the Allied powers.

Article 7 of the Proclamation provided that Japanese-controlled islands would be subject to occupation by the Allied powers:

Until such a new order is established and until there is convincing proof that Japan’s war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

Because decisions regarding the sovereignty of minor islands would be settled at a latter date, the occupation of these “points in Japanese territory” would take place on islands that either would be returned to the Japanese or placed under the sovereignty of other nations.

SCAPINs. Japan accepted the provisions of the Potsdam Proclamation with the signing of the “Instrument of Surrender” on September 2, 1945.²⁶³ Following the surrender, the Allied powers issued a series of Supreme Commander for the Allied Powers Instructions (SCAPINs), three of which addressed the status of Dokdo.

SCAPIN No. 677 (1946). On January 29, 1946, the Allied powers issued SCAPIN No. 677, which defined the territory over which Japan was to “cease exercising, or attempting to exercise, governmental or administrative authority.”²⁶⁴ Dokdo was one of the islands that

was removed from Japanese control: "For the purpose of this directive, Japan is defined to include the four main islands of Japan. . . and excluding. . . Liancourt Rocks."²⁶⁵

Korean commentators have contended that this statement excluding Dokdo from defined Japanese territory should be seen as a recognition that Japanese sovereignty did not extend to the islets.²⁶⁶ The Instruction stated, however, that its territorial definition would be "for the purpose of this directive," and that "[n]othing 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."²⁶⁷ The United States confirmed that the directive was not an ultimate decision of jurisdiction but rather was an "operational directive to the Japanese Government tentative in character" that constituted a suspension of Japanese administration but "was not an Allied policy determination of Japanese territory."²⁶⁸

SCAPIN No. 1033 (1946). The Allied Powers issued SCAPIN No. 1033 on June 22, 1946, which established the MacArthur Line to delineate authorized areas for Japanese fishing and whaling.²⁶⁹ The Instruction placed Dokdo outside the authorized area, and thus Japan lost not only administrative control of the islets but also the ability to exploit the resources adjacent to them. SCAPIN No. 1033 also expressly noted that the Instruction was not meant to be understood as an ultimate decision of jurisdiction: "the present authorization is not an expression of Allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area."

SCAPIN No. 1778 (1947). This Instruction, issued September 16, 1947, completed the Allied powers' act of occupying Dokdo under Article 7 of the Potsdam Proclamation.²⁷⁰ SCAPIN No. 677 placed Dokdo outside Japanese administrative control, SCAPIN No. 1033 blocked Japan from exploiting the adjacent ocean resources, but SCAPIN No. 1778 went further by claiming the islets for use by the Allied powers as a bombing range for the Far East Air Force.²⁷¹ Pursuant to this directive, the U.S. military conducted a bombing exercise at Dokdo on June 30, 1948, that caused the death of 16 Koreans and wounding of 6 other Koreans fishing in the area.²⁷² Korean commentators sometimes refer to this incident as providing evidence of active Korean use of the islets and their surrounding waters, and after the incident, "the Korean government immediately took measures to extend its administrative authority to the island."²⁷³

San Francisco Peace Treaty (1951). This Peace Treaty, signed on September 8, 1951, provided the terms for terminating the state of war between Japan and the Allied powers, to "settle questions still outstanding as a result of the existence of a state of war between them,"²⁷⁴ such as the status of the minor islands that were under Japanese sovereignty at the end of the war. In Article 2(a), "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet [Ullungdo]." Dokdo was not mentioned in the Treaty, but Korean commentators are quick to point out that many other Korean islands also are not explicitly mentioned.

Analysis of the drafting history of the 1951 Peace Treaty reveals that the Allied powers considered Dokdo in their deliberations, and therefore the Treaty's silence was not a result of failure to consider the island's status. Professor Seokwoo Lee's study of the Treaty has provided a thorough examination from the Treaty's initial draft to the final text, and has established that the Allied powers changed their mind several times as to whether Dokdo/Takeshima should remain Japanese.²⁷⁵ The first five and the seventh draft of the Treaty provided that Dokdo/Takeshima be returned to Korea by including the islets in the Article 2(a) list.²⁷⁶ The sixth, eighth, ninth, and fourteenth drafts explicitly stated

that the territory of Japan included Dokdo/Takeshima.²⁷⁷ The tenth through thirteenth and fifteenth through eighteenth drafts, like the final draft, were silent on the status of Dokdo/Takeshima.²⁷⁸

The varying positions taken by the Allied powers during these deliberations reveal that they considered three potential outcomes for Dokdo under the Peace Treaty: (a) designate Japan as sovereign, (b) designate Korea as sovereign, or (c) remain silent on the issue, thus leaving the issue open for further deliberation. The Allied powers did not indicate why they choose the third outcome, but the varying positions taken during the deliberation process indicate that the decision was made either because not enough information had been provided regarding the historical events surrounding Japan's incorporation of Dokdo/Takeshima, or because the Allied powers felt themselves to be incapable, or inadequate, adjudicators.

Korea's Occupation of Dokdo Since 1952

With the announcement of the Peace Line in 1952 and the construction of a guarded lighthouse in 1954, Korea has physically possessed Dokdo for half a century. This activity could either: (1) reinforce a long-standing historically established claim to sovereignty, or (2) establish a claim by prescription to gain control from Japan. If an adjudicator were to conclude that Korea's occupation and possession reinforced its sovereignty over the islets, Japan would have no recourse to challenge the claim. If, however, an adjudicator were to find that Korea's present occupation is designed to establish a claim based on prescription, Japan could challenge the claim by arguing that it never acquiesced to Korea's possession and noting the many protests that it has registered during the past half century.

Prescription is a means of establishing title over a territory previously owned by another state through peaceful and uninterrupted possession over an extended period of time.²⁷⁹ “[O]nce every year, Japan sends a protest note rejecting South Korea's claim to ownership of these features.”²⁸⁰ Japan's protests therefore could contest the “peacefulness” of Korea's possession of Dokdo, thereby raising doubts about a claim of sovereignty based on prescription.

Japanese Action Since 1952—Acquiescence or Effective Protest?

Although the International Court of Justice has addressed the issue of acquiescence on several occasions, the fact-specific nature of territorial disputes has precluded the Court from establishing a clear-cut test for determining whether a country's protests have been sufficient to overcome a presumption of acquiescence. The Court has, however, identified several actions that are considered to be effective protests when performed under the proper circumstances. The following discussion looks first at the Court's decisions on disputes involving protests, and then examines Japan's activity in the years following Korea's physical occupation of Dokdo.

Standards of Effective Protest in Territorial Disputes. “Acquiescence,” which is a required element of a prescriptive claim,²⁸¹ has been defined as “letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned,” which “disqualifies the country concerned from asserting the continued existence of the title.”²⁸² A series of decisions by the International Court and other international tribunals address the issue of acquiring territory through prescription and the extent to which a country must acquiesce in order to effectuate a successful claim or, looking at the matter from the opposite perspective, the extent to which a country must protest to negate

such a claim. Although these decisions fail to provide absolute guidance for determining what action constitutes effective protest, the jurisprudence affords a framework through which the varying elements of a prescriptive claim can be measured.

International Tribunal Case Law on Effective Protest. In the *Palmas Arbitration*, the *Clipperton Island Arbitration*, the *Temple of Preah Vihear* case, and the 1994 *Libya/Chad Territorial Dispute* case, the tribunals ruled that a failure to protest the opposing state's sovereignty claim to disputed territory would lead to a presumption of acquiescence.²⁸³ In the *Chamizal Arbitration*, the *Eastern Greenland* case, and the 1951 *Norwegian Fisheries* case, the tribunals concluded that protests were sufficient to preserve the protesting state's claim to the territory.

Chamizal Arbitration (Mexico v. United States) (1911). In the *Chamizal Arbitration*,²⁸⁴ the United States' prescriptive claim to a tract of land adjoining the Rio Grande was based on what the United States characterized as the "undisturbed, uninterrupted, and unchallenged possession of the territory since the Treaty of 1848."²⁸⁵ The Republic of Mexico claimed that the United States' claim was not sound because its possession had been regularly challenged by the Mexican government. From the time the United States began to occupy the disputed territory in 1848 until the time the controversy was brought before a tribunal in 1895, Mexico raised the El Chamizal issue with the United States on numerous occasions through diplomatic channels, once in 1856 and several times between 1867 and 1884. The Arbitral Tribunal noted that a "characteristic of possession serving as a foundation for prescription is that it should be peaceable."²⁸⁶ Because any attempt by Mexico to take physical possession of the area would have resulted in violence, the Tribunal found that the milder form of protest through diplomatic correspondence was sufficient to nullify the peacefulness of the United States presence, thus interrupting possession by prescription:

however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.²⁸⁷

The Tribunal concluded that the United States' occupation was not sufficient to establish a prescriptive title, for it had been "constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents."²⁸⁸ The Mexican pressure went beyond mere paper protests and was sufficient to force the United States eventually to sign a convention formally recognizing the dispute and establishing a procedure to resolve it.

Island of Palmas Case (Netherlands v. United States) (1928). In this dispute between the Netherlands and the United States, over an island located between what is now the Philippines and Indonesia, arbitrator Max Huber held that the Netherlands' prescriptive claim was successful because of its "peaceful and continuous display of state authority over the island,"²⁸⁹ as compared to the U.S. claim, which failed to establish "that sovereignty... was effectively displayed at any time."²⁹⁰ The evidence showed that the Netherlands had exercised sovereignty over the islet peacefully from 1700 to 1906, and, most significantly, "no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands... has been recorded."²⁹¹ Spain's failure to protest the Netherlands' displays of sovereignty prior to 1898, and the United States' continued failure

to protest until 1906, therefore resulted in a presumption of acquiescence and a recognition of the Netherlands' sovereignty over Palmas Island.

Clipperton Island Case (Mexico v. France) (1931). This dispute was between France and Mexico over an uninhabited island off of Mexico's southwest coast.²⁹² France's claim to the island dated back to 1858, when the French navy landed on the island, claiming it for France, and later publishing its proclamation of sovereignty in *The Polynesian*, an English newspaper published in Honolulu, Hawaii.²⁹³ In 1897, France's Naval Division of the Pacific Ocean encountered three people residing on the island, who raised a U.S. flag upon sighting the French vessel.²⁹⁴ France protested to the U.S. government, but the United States denied any association with the island or its inhabitants.²⁹⁵ The Mexican government, on the other hand, on learning of France's territorial claim, dispatched a gunboat to the island and replaced the U.S. flag with a Mexican one.²⁹⁶

When the Italian king Victor Emmanuel III issued his opinion in 1931, he ruled in favor of France, concluding that Mexico did not have a historical claim to the island because it did not exercise sovereignty until 1897, "and the mere conviction that this was territory belonging to Mexico, although general and of long standing, cannot be retained."²⁹⁷ Because Mexico did not effectively protest France's claim and because France did challenge the actions of other countries on the island, the king concluded that sovereignty belonged to France.²⁹⁸

Legal Status of Eastern Greenland (Denmark v. Norway) (1933). In this case, brought by Denmark against Norway for occupying a section of Greenland that Denmark claimed as its territory, the Court ruled in favor of Denmark based on its display of authority over the disputed region and also because Denmark had promptly protested Norway's claim that the territory was *terra nullius* and could be acquired by Norway.²⁹⁹

Fisheries Case (Norway v. United Kingdom) (1951). In this case, the International Court addressed whether Great Britain had the right to fish in the deep fiords that indent into the rugged northern Norwegian coast.³⁰⁰ The issue dated back to the seventeenth century, when the king of Denmark and Norway issued protests regarding the presence of British fishermen in Norwegian coastal waters. For several centuries, Britain refrained from fishing in the area, but in 1906 British fishing vessels recommenced operations off the coast of Eastern Finnmark.³⁰¹ The Norwegian government took steps to reiterate its prohibition on foreign fishermen, and in 1911, following Norway's seizure of a British vessel in its coastal waters, negotiations commenced between the two countries.³⁰² The First World War interrupted the negotiations, however, and in 1922 British vessels returned to the area. In 1924, Norway again protested to Britain through diplomatic channels, and when British activity increased in 1932, Norway's seizure of British vessels also increased.³⁰³ In 1933, Britain complained to Norway that it made use of unjustifiable baselines in its delimitation of the Norwegian territorial sea. Two years later, a Norwegian Royal Decree provided details regarding the delimitation of the baselines, issued in a series of Royal Decrees in 1812, 1869, 1881, and 1889.³⁰⁴

When the matter was referred to the International Court, the United Kingdom argued that the Norwegian Royal Decree of 1935 was inconsistent with the standards of international law. Although the case did not involve prescriptive possession *per se*, the Norwegian claim to an extended fisheries zone raised the issues of consistent display and acquiescence. The Court found it necessary to consider whether Norway applied its system "consistently and uninterruptedly," as well as whether Norway "encountered any opposition from foreign

States.”³⁰⁵ The United Kingdom’s claim did not succeed because the Court ruled that Norway had engaged in a consistent and uninterrupted display of authority over its claimed fisheries zone, continuously protesting the British activity, and that the United Kingdom had not contested the system during the nineteenth century when Norway asserted its claim repeatedly.³⁰⁶

Temple of Preah Vihear Case (Cambodia v. Thailand) (1962).³⁰⁷ Thailand claimed sovereignty over the land surrounding the Temple of Preah Vihear, a temple that had cultural and religious significance for both states. Cambodia’s claim to the area was based on a topographical study jointly conducted by France and Siam, which depicted the area as falling within Cambodian territory.³⁰⁸ Following the independence of Cambodia from France, Cambodia and Thailand continued to use the map as an official government document.³⁰⁹ In 1954, after learning that a Thai police force had occupied the temple, Cambodia repeatedly protested to Thailand that it was illegally present in Cambodian territory, yet the Thai government failed to respond.³¹⁰

The matter was referred to the International Court in 1959 which ruled that Thailand did not have sovereign rights to the disputed territory based on two factors. First, Thailand had failed to protest the boundary line depicted in the Franco-Siamese map, even though it had ample opportunity to do so, and had continued to rely on the map as an official government document.³¹¹ Thailand was thus “estopped” from subsequently challenging the map that it had previously accepted and benefited from.³¹² Second, the Thai occupation of the temple was performed by local police rather than by a force representing the central government, and the Court held that this municipal occupation did not adequately represent an effective administration of the territory on behalf of the Thai government.³¹³

*Gulf of Fonseca Case (1992)*³¹⁴. With regard to Meanguera and Meanguerita Islands, the Chamber of the International Court found evidence of occupation (“effective possession and control”) of these islands by El Salvador since 1854, and found no effective protests by Honduras.³¹⁵ Honduras made one protest in 1991, but the Chamber viewed this effort as untimely.³¹⁶ The Chamber emphasized that Honduras should have protested a delimitation of the Gulf of Fonseca that had the effect of casting doubt on Honduras’s claim of sovereignty over Meanguera.³¹⁷

Case Concerning the Territorial Dispute (Libya v. Chad) (1994). The Great Socialist People’s Libyan Arab Jamahiriya (Libya) and the Republic of Chad (Chad), following years of conflict, sought a peaceful resolution to their territorial dispute by referring the matter to the International Court.³¹⁸ The area under dispute involved a uranium-rich stretch of land along the Libya-Chad border which both countries claimed. Delimitation of the border was first raised in 1955, when Libya and France signed the Treaty of Friendship and Good Neighbourliness.³¹⁹ Chad, which gained its independence from France in 1960, claimed that the Treaty provided a conventional border that placed the disputed area within Chad’s territory.³²⁰ Libya argued that the Treaty did not create a border, and furthermore that the peoples indigenous to the area were Libyan, and therefore that the area fell under its sovereignty.³²¹

The Court found that the 1955 Treaty did create a border and concluded that sovereignty of the disputed area belonged to Chad based on two reasons. First, Libya acquiesced to the border created in the 1955 Treaty.³²² The Court held that a lapse of time in asserting a protest can indicate acquiescence, stating that “[i]f a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have

been reflected in the 1966 Treaty.”³²³ The Court concluded that Libya’s failure to protest the conditions of the treaties indicated an acquiescence to Chad’s possession of the territory.³²⁴ The second reason underlying the Court’s decision was Chad’s persistent protests regarding Libyan presence in the disputed area. In 1971, Chad submitted a statement to the United Nations General Assembly protesting Libya’s encroachment on its territory, and repeated this protest in 1977 and 1978 and annually from 1982 until 1987.³²⁵ Based on Libya’s acquiescence and Chad’s persistent protest, the Court concluded that the area belonged to Chad.

Jurisprudence on Effective Protest. The international decisions summarized above reveal several elements of the acquiesce-protest dichotomy that help shape the framework of a prescriptive claim. First, because a claim to title based on acquisitive prescription requires that the claim be “unchallenged,” it will be difficult to establish a prescriptive title in the face of protests from another country. Furthermore, diplomatic protests have been found to be sufficient to nullify prescription in some cases if a more intense form of protest, such as physical repossession, would result in violence.³²⁶ Second, the required frequency of acts of sovereignty on behalf of the possessing state depends on the remoteness of the disputed territory, with more remote territory requiring less frequent acts of sovereignty. Third, acts of sovereignty need not span a prolonged period of time, but need only to have existed openly and publicly in the period immediately preceding the dispute. Fourth, evidence that relates directly to the possession of a territory is more important than indirect historical presumptions. Fifth, actions of a local government do not necessarily represent a country’s central authority and therefore are not necessarily indicative of sovereignty. Finally, a lapse of time in asserting a protest can indicate acquiescence.

Although the decisions outlined above provide a general framework for determining the success of a prescriptive claim, they have not laid out an absolute set of guidelines spelling out the specific actions that are required of a country to overcome a presumption of acquiescence. Scholars in the field have weighed in on the issue, but their lack of consensus indicates that accurate predictions of how an international tribunal will resolve a specific dispute involving instances of effective protest may be difficult. Some scholars, for example, have argued that diplomatic protests are *per se* sufficient.³²⁷ Others have believed that firmer measures are needed to abrogate a prescriptive claim, such as severing diplomatic relations or pressing for arbitration or judicial settlement.³²⁸

Scholars have tended to agree, however, on the importance of attempting to bring the matter before an international tribunal.³²⁹ Prior to the existence of international tribunals, diplomatic protest was one of the few alternatives to war through which a state could effectively challenge a territorial claim. The protesting state could use diplomatic channels to express its position to the possessing state in an attempt to resolve the dispute without military combat. With the establishment of the League of Nations, however, protesting states had a new avenue of addressing disputes over territory. Relying on diplomatic protest while failing to refer the matter to an international tribunal could be seen as a gesture merely for “form’s sake” that falls short of one that “means business.”³³⁰ Although this argument may disfavor those states that do not believe in international adjudication, or at least not in its present form, it nonetheless has some legitimacy, for an underlying purpose of these tribunals is to address and solve such disputes. Therefore, in this era of international tribunals, a state that relies solely on diplomatic protest may have trouble overcoming the presumption of acquiescence. Indeed, in order for the dispute to reach a tribunal, the protesting state must agree to such arbitration, and perhaps the only remaining argument for a state that initially refused such arbitration would be a change in perception of the adequacy of the tribunal.

Diplomatic protest can be effective when the possessing state refuses to refer the dispute to an international tribunal. Following such refusal, the protesting state can continue to lodge its protests with the possessing state in order to deny acquiescence. The International Court has ruled that a lapse of time for asserting a protest can indicate acquiescence, and therefore it is in the protesting state's best interest to continue protesting through diplomatic channels in the hope of future arbitration. The possibility of future arbitration under such circumstances may be limited, however, because the possessor's initial refusal to arbitrate was most likely based on either a weak claim to the territory or a lack of confidence in the international tribunal, and thus the possessor's unwillingness to accept international adjudication will frequently continue.

Japanese Protests Since 1952

Following the signing of the 1951 San Francisco Peace Treaty, Japan has issued a variety of protests over Korea's possession of Dokdo. During the early 1950s, neither country physically possessed the island for a continuous period of time, yet both issued protests to the other's sovereignty claims. After Korea erected a guarded lighthouse on the islets in 1954 and expanded its presence subsequently on the islets, Japan issued further protests, and proposed submitting the matter to the International Court. Japan's protests have been designed to establish that Japan has not acquiesced to Korea's possession of the island, but has Japan done enough?

1952–54: Neither State Possesses, Both Protest. On January 18, 1952, Korean President Syngman Rhee issued a presidential proclamation that created the "Peace Line," a territorial boundary averaging 60 miles off the coast of Korea that explicitly identified Dokdo as a Korean territory. Japan protested this Peace Line and declared that it did not recognize Korea's claim to Dokdo.³³¹ Several months later, Japan issued a tacit protest through the U.S.-Japan Security Treaty, which had designated Dokdo as an area for U.S. military training.³³² After receiving a similar protest from the Korean government, the U.S. military announced on February 27, 1953, that Dokdo would be excluded from its training area.³³³ In May 1954, citizens of both Japan and Korea, under the protection of patrol boats from their respective governments, landed on Dokdo and proceeded to erect signs of their nation's sovereignty while dismantling the signs erected by the other nation.³³⁴

1954–65: Korea Physically Possesses Dokdo, Rejects Japan's Adjudication Proposal, and Normalizes Relations with Japan in 1965 Treaty. After Korea erected a lighthouse in August 1954, the nature of the dispute changed. With Korea physically possessing the island, Japan increased its mode of protest and in September 1954 proposed that the matter be submitted to the "authoritative" International Court of Justice,³³⁵ but Korea rejected this proposal. Korean scholars have noted that Japan's position on submitting this matter to the International Court is inconsistent with its reluctance to submit other disputes to third-party determination.

It is quite interesting. . . to observe that Japan tries to avoid or even objects to submitting other territorial disputes involving Japan to the ICJ. Neither in the dispute with China over the Senkaku (Diaoyutai) Islands nor in the case against Russia over the so-called "Northern Territories" has Japan shown any willingness to submit these issues to the ICJ. This apparent contradictory position on the part of Japan seems to stem from its belief that it has nothing to lose in the case of Tokdo, whatever the judgement of the ICJ might be.³³⁶

Another example of Japanese resistance to third-party adjudication is the *Bluefin Tuna* case, where the Japanese (successfully) argued that the arbitral panel set up under Annex VII of the Law of the Sea Tribunal did not have jurisdiction over the dispute.³³⁷

Between 1952 and 1960, Japan sent 24 notes to Korea on the Dokdo matter and Korea responded with 18 notes back to Japan.³³⁸ The matter was also raised again through diplomatic channels during the 8-year negotiations that led to the signing of the 1965 Korea-Japan Treaty,³³⁹ but because of Korean resistance on this issue,

from 1957 when the talks were resumed until the signing in 1965, the Takeshima/Tokdo problem was never adopted as an official agenda item, to be recorded in the minutes. There is absolutely no direct reference to Takeshima/Tokdo in the various documents of the Korea-Japan Treaty signed in 1965. Originally, Japan thought of writing down the problem in the Treaty or failing that, as planned in advance, in the instruments to be exchanged agreeing to take the case to the International Court of Justice. However, the Korean side rejected both plans by arguing that Takeshima/Tokdo could not become an agenda item as it was Korea's inherent territory.³⁴⁰

According to the Japanese view of the negotiations, Japan preserved its position through a side agreement signed along with the Treaty stating that disputes regarding the Treaty are to be resolved "through arbitration in accordance with the procedure agreeable to both countries."³⁴¹ The Koreans have rejected the idea that Dokdo is covered by the side agreement, referring to this notion as "a far-fetched construction of the instruments" and stating that "since Takeshima/Tokdo was not an object of dispute, it could not be covered by the exchange document."³⁴² Korea stated that Dokdo was inherent Korean territory, and thus the island should not become an issue either in the Treaty or before the International Court.

Japan's Protests after the 1965 Treaty. In its diplomatic protests after 1965, Japan has indicated that it wishes to retain the peaceful and prosperous relationship that has emerged between the two states while maintaining its position in the Dokdo dispute. On February 16, 1996, for example, in reaction to Korean military exercises near Dokdo, the Japanese Ministry of Foreign Affairs reiterated that the Japanese position on the dispute had remained consistent, and stated that "both sides needed to make efforts so that differences over Takeshima would not undermine the friendly and cooperative ties between the two countries."³⁴³ It is perhaps significant that, although Japan expressed its concern regarding the Korean military activities around the islets, the press secretary to the Foreign Ministry would not describe the phone conversation between the Japanese vice minister for foreign affairs Sadayuki Hayashi and the Korean ambassador to Japan Kim Tae Zhee as a "protest."³⁴⁴ Similar statements were issued in press conferences on February 20, 1996,³⁴⁵ March 1, 1996,³⁴⁶ October 15, 1996,³⁴⁷ and December 10, 1996.³⁴⁸ The Japanese Diplomatic Bluebook of 1997 noted the conflicting positions taken by Japan and Korea, stating "it would not be appropriate to allow this issue to spark an emotional confrontation between the peoples of Japan and the [Republic of Korea] ROK that might harm the friendly and cooperative bilateral relations."³⁴⁹ The 2000 Diplomatic Bluebook stated similarly that "Japan has consistently held the position that, in light of the historical facts, as well as the rules and principles of international law, Takeshima is an integral part of Japan, and will take a course of continued and persistent dialogue with the ROK on this issue."³⁵⁰ The 2001,³⁵¹ 2002,³⁵² and 2003³⁵³ issues of the Diplomatic Bluebook included similar language. When Korea issued a postage stamp bearing the image of Dokdo in January of 2004, Japan's

Ministry of Foreign Affairs protested the act by stating that the island “is historically and legally Japanese sovereign territory,” and furthermore “that it is against the Charter of the Universal Postal Union to issue postage stamps using the picture of disputed issues between countries.”³⁵⁴ In March 2004, Japan’s Foreign Affairs Ministry issued another protest restating its position in regards to the Korean postage stamps, and reissuing its “consistent position” on Dokdo/Takeshima.

The occupation of Takeshima by the Republic of Korea is an illegal occupation undertaken with absolutely no basis whatsoever in international law. Any measures taken with regard to Takeshima by the Republic of Korea based on such an illegal occupation have no legal justification. (Note: The Republic of Korea has yet to demonstrate a clear basis for its claims that, prior to Japan’s effective rule over Takeshima and establishment of sovereignty, the Republic of Korea had previously demonstrated effective rule over Takeshima.)³⁵⁵

Japanese Topographical Protests. Japanese cartographers have published a series of maps depicting Dokdo as Japanese territory. Because these maps were either published through or approved by the Geographical Survey Institute of the Japanese Ministry of Construction, they can be considered a form of protest over Korea’s occupation of the islets.

In 1964, the Teikoku-Shoin Company published *Teikoku’s Complete Atlas of Japan*, which contained an overview map of the entire Japanese nation and included Dokdo in the color scheme.³⁵⁶ The 1982 and 1995 editions contained the same maps. *Japan Atlas* was published in 1991 by the Heibousha Cartographic Publishing Company, and it also depicted Dokdo as Japanese territory.³⁵⁷ The Geographical Survey Institute officially approved both atlases.

The Geographical Survey Institute itself published an atlas entitled *The National Atlas of Japan*, the first edition of which came out in 1977.³⁵⁸ This atlas contains more than 200 maps depicting Dokdo as part of Japan. In each case, the islets are distinguished not only through the color scheme, but also are highlighted by being named in the maps while many other islands and minor territories are not named. The *National Atlas* also lists Dokdo under the administrative area of Goku-mura, Shimane Prefecture.³⁵⁹

Should Japan Be Required to Do More than Issue Written Protests?. The United Nations Charter³⁶⁰ and principles of customary international law require countries to resolve their disputes by peaceful means rather than by force.³⁶¹ But, when one country exercises effective physical control over a territory, should another country that claims the territory be required to do something more than issue diplomatic protests to maintain the viability of its claim? Japan does send “patrol boats around the islets to back up its claims of ownership,”³⁶² but is this enough? According to one Korean writer, Japan once asked Professor Andre Gros, a member of the French team in the *Minquiers and Ecrehos* case, “for his opinion on Tokdo and was advised to take an effective action immediately,” but Japan declined to take this advice because it did “not want to place itself in a state of war with Korea.”³⁶³

Japan expressed its willingness to submit the dispute to the International Court of Justice in 1954, which is a necessary component of its effort to protest effectively against Korea’s occupation of the islets, but does not appear to have pressed for this approach in subsequent years.³⁶⁴ Scholars have noted that the “bringing of a matter before the United Nations or the International Court of Justice will be conclusive as to the existence of the dispute and thus of the reality of the protests,”³⁶⁵ and that “the failure to bring a claim before an international tribunal due to the negligence or laches of the claimant party may

cause an international tribunal eventually seized of the dispute to declare the claim to be inadmissible."³⁶⁶ Japan's position is viewed by Koreans as hypocritical because Japan has been reluctant to submit other disputes to the International Court of Justice and historically has resisted third-party adjudication.³⁶⁷

Japan has argued that, at a minimum, its regular protests block Korea's claim from vesting under the theory of "acquisitive prescription," whereby a country can acquire territory it has occupied for a long period of time if its possession has been "undisturbed, uninterrupted, and unchallenged."³⁶⁸ Japan's protests constitute "challenges" that undercut any claim that Korea's possession has been "unchallenged." One distinguished commentator has said that "if the state against which the prescriptive claim is being made, while making diplomatic protests from time to time, nevertheless desists from action which might lead to violence, such action cannot be held against it."³⁶⁹ But, something more than just repeated protests also appears to be required. A commentator noted in 1934 that the issuance of diplomatic protests "by itself was not effective indefinitely,"³⁷⁰ that "a protest not followed up by other action becomes in time 'academic' and 'useless,'"³⁷¹ and that the protesting country must try to take the dispute to the League of Nations (now the United Nations) and/or seek third-party adjudication. Because of this requirement:

The position now is that, if the matter is a proper one for 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 other reasons, 'paper protests' are still made from time to time.³⁷²

The establishment of "new machinery for settling international disputes" through the United Nations and the International Court of Justice "has largely altered the role of the protest in the matter of acquisitive prescription."³⁷³ "A protest since 1919 can be said to have amounted to no more than a temporary bar."³⁷⁴ "The proceedings in the *Minquiers and Ecrehos* case tend to endorse the view that protests may not of themselves be sufficient to prevent the acquisition of title by prescription and that courts will require evidence of the assumption by the protesting State of some positive initiative towards settlement of the dispute in the form of an attempt to utilize all available and appropriate international machinery for that purpose."³⁷⁵

Summary of This Section. Japan's protests would probably be sufficient to overcome a presumption of acquiescence if Korea's claim were based solely on its occupation of the islets since World War II under a theory of acquisitive prescription. But, because Korea's claim is based on activities that span many centuries, along with substantial evidence of Japanese acquiescence during the eighteenth and nineteenth centuries, and because Japan's claim stems from its expansionist period when it was in the process of wrongfully taking over Korea and on the weak proposition that the islets were *terra nullius* in 1905, this case appears to require additional Japanese efforts above and beyond its written protests.

Japan's situation is also weakened by its failure to bring this matter to closure at the time it entered into the 1965 Treaty to normalize relations with Korea. The fact that the Dokdo issue was never listed as an official agenda item for discussion during the protracted negotiations that produced this Treaty could be seen as a waiver by Japan of its claim, leading to the conclusion that Japan is estopped from continuing to raise the matter.

Dokdo and the 1998 Fisheries Agreement Between Korea and Japan

In 1998, Japan and Korea entered into a new fisheries agreement³⁷⁶ designed to accommodate their continuing dispute over the area around Dokdo, which introduced two “provisional zones” or “intermediate zones” in disputed areas, where fishing vessels from each country can operate, and also included a commitment by both countries to reduce their overall catch. One shared zone is in the East Sea/Sea of Japan near the disputed islets of Dokdo and the other is in the East China Sea south of Cheju Island and just north of the Japan-China Provisional Measure Zone. Third countries do not have rights to fish in these shared zones. The agreement also gave each country a zone that extends 35 nautical miles from the coastlines, which is called an EEZ, allowing each country, after the first 3 years during which historic fishing rights are phased out, to harvest an equal amount from the other’s zone.

The 1998 treaty established a compromise joint-use zone around the Dokdo islets, and carefully regulated how much fish of each species could be caught within the zone, and in the adjacent national jurisdiction zones. The agreement had the effect of reducing South Korean fishing in Japanese waters, but South Korea did retain access to part of the productive Yamato bank, where some 1,000 South Korean vessels had been catching about 25,000 metric tons of squid each year (but the Korean catch was to be gradually reduced to the same level as that of the Japanese vessels).

This agreement has been seen as a “provisional agreement” as called for in Article 74(3) of the 1982 Law of the Sea Convention³⁷⁷ pending final determination of the maritime boundary, and it should not have any effect one way or the other on claims of sovereignty over Dokdo or the final delimitation of the boundary between the two countries in the East Sea/Sea of Japan.³⁷⁸

Contiguity

The geographical location of a disputed territory and its proximity to other territories of the nations claiming it will never be decisive in resolving a dispute, but it is certainly not irrelevant. The fact that Dokdo can be seen from Ullungdo on a clear autumn day³⁷⁹ reinforces the linkage between the two islands and supports the view that it was understood that these islets were linked and historically were both subject to Korean sovereignty.³⁸⁰ Dokdo can never be seen from Japan’s Oki Islands, and the 40 additional miles from these islets to Dokdo, as compared to the distance from Ullungdo would have been significant in the days before motorized transport.³⁸¹

Arbitrator Max Huber rejected contiguity as a basis for a claim of title in the *Palmas Arbitration*,³⁸² and a number of countries include land areas quite distant from other parts of the country. Nonetheless a land area closely linked to another land area, and utilized by residents of the adjacent area, may “belong” to that adjacent area as a matter of logic, common sense, and historical practice. Some islets are viewed as “dependent” on other islands, and some groups of islands have historically been viewed as units; in these cases, it would not be logical to divide such islands between two different sovereigns. Even Arbitrator Huber acknowledged that “[a]s regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest.”³⁸³ The International Court of Justice viewed, for instance, the Minquiers group as a “dependency” of the Channel Islands (Jersey and Guernsey) and thus ruled that they should be subject to the same sovereign authority.³⁸⁴ In the *Gulf of Fonseca* case, the Chamber of the International Court concluded that Meanguerita was an

“appendage” to or “dependency” of Meanguera, and thus should be awarded to El Salvador along with its larger neighbor.³⁸⁵

The recent development of the regimes of the continental shelf and the EEZ, as well as the extension of the territorial sea from 3 to 12 nautical miles in the 1982 Law of the Sea Convention, are all to some extent based on a recognition of the importance of “contiguity.”³⁸⁶ Another clear example of a tribunal’s reliance on concepts of contiguity can be found in the 1998–99 *Eritrea-Yemen Arbitration*. The Tribunal awarded to Yemen the lone island of Jabal al-Tayr and the al-Zubayr group because Yemen’s activities on these barren islands were greater, and because they are located on the Yemen side of the median line between their uncontested land territories.³⁸⁷ The Tribunal recognized the relevance of geographical proximity or contiguity, utilizing the “presumption that any islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a clearly better title.”³⁸⁸ The Mohabbakahs and the Haycock Islands were thus awarded to Eritrea because they were mostly within 12 nautical miles of the Eritrean coast.³⁸⁹

The close physical and historical link between Ullungdo and Dokdo therefore, must, be viewed as a factor that supports Korea’s claim to sovereignty over the islets.

Conclusions Regarding the Sovereignty of Dokdo

Japan’s claim to sovereignty over Dokdo/Takeshima is based on incorporation of the islets into the Shimane Prefecture in 1905 as “*terra nullius*,” the physical occupation of the islets from 1905 to 1945, and the persistent protests issued by Japan against Korean occupation of them during the past half century. In recent years, Japan has also asserted that it had “occupied” the islets before 1905, but the “*terra nullius*” claim in 1905 must be seen as a Japanese acknowledgment that its contacts with the islets prior to that time were not sufficient to establish sovereignty over them, and several events in the late nineteenth century also provide evidence that Japan recognized then that it had no viable sovereignty claim to the islets.³⁹⁰ Just as Thailand was estopped from being allowed to denounce the legitimacy of a map that had been an integral part of its previous boundary settlement with Cambodia in the *Preah Vihear Temple* case,³⁹¹ Japan would appear to be estopped from now arguing that prior Japanese governments had “occupied” Dokdo when such a claim is directly inconsistent with the basis for its 1905 claim to the islets and with governmental documents issued in the late nineteenth century.³⁹²

Japan’s claim is not strengthened by its occupation of the islets between 1905 and 1945, because it was effectively occupying all of Korea during this period in a manner that has long since been established as wrongful. Japan’s incorporation of Dokdo/Takeshima in January 1905 was part of its expansionist effort to control all of Korea, and hence this action is viewed by most observers as tainted and illegitimate. From the Korean perspective, “Tokdo was ‘expropriated’ and then ‘incorporated’ as the first victim of Japan’s aggressive design, five years before all Korea was absorbed by Japan.”³⁹³ When thinking of Japan’s annexation of Korea and its current quest for Dokdo, Koreans see Japan as a country that stole “the whole bakery and now wants the crumbs.”³⁹⁴ “It seems to Koreans that Japan’s attempt to dispute the ownership of Tokdo might be a legacy of Japanese colonialism and imperialism.”³⁹⁵ In order to gain support for its claim to Dokdo, Japan would have to overcome the almost impossible hurdle of convincing others that its annexation of the islets was not part of its expansionist military activities in Northeast Asia, which led to the subjugation of Korea and caused enormous suffering to the Korean people.

Japan has issued written and oral protests regularly since the early 1950s but, given the weakness of its claim, it should have done more to keep its claim alive. Japan's failure to address this issue during the long negotiations that led to the 1965 Treaty normalizing relations with Korea will be seen by many as a waiver of the claim, leading again to the conclusion that it is estopped from continuing to pursue this claim. Koreans do not view the Dokdo matter as a "legal dispute," but rather as a "political dispute" lingering from the period in which Japan annexed and subjugated all of Korea.³⁹⁶

The historical evidence, in any event, certainly favors Korea more than Japan. Because the islets were "remote, access was difficult, and, above all, [they] were uninhabitable,"³⁹⁷ constant physical occupation was not required,³⁹⁸ and the occasional visits by Korean fishers accompanied by displays of sovereignty, usually under the view that Dokdo was an appendage or dependency of Ullungdo, served as adequate evidence of "occupation."³⁹⁹ Significant evidence of Japanese "acquiescence" to Korea's sovereignty can be found in the maps issued by Japanese cartographers in the late eighteenth century, which place Dokdo as part of Korea's territory and make no claim on behalf of Japan.⁴⁰⁰ Also of substantial significance are the Japanese actions in the late nineteenth century indicating recognition that Japan did not possess the islets.⁴⁰¹ Korean officials and commentators did attempt to protest the Japanese annexation of Dokdo, which was not widely publicized at the time, when they learned about it a year later in 1906, but the Korean Peninsula was occupied by Japanese military forces during this period and the Korean government was effectively being run by Japanese "advisors." "To expect or infer a possibility of protest or opposition of a government, completely powerless in the face of Japanese aggression in the age of imperialism, is not a convincing argument."⁴⁰²

The Instructions issued by the U.S. occupation forces in the years immediately following World War II treated Dokdo as being outside the territory of Japan,⁴⁰³ but the 1951 San Francisco Peace Treaty is silent on the status of these islets, and the drafting history of this Treaty provides conflicting and ambiguous guidance regarding this issue.⁴⁰⁴ After World War II, Korea acted vigorously to occupy the islets and establish a physical presence on them, which it has maintained for the past half century. Although Japan has protested persistently, Korea's efforts to consolidate its hold on the islets must be viewed as significant.

Because of the complexity of the issues involved in this matter, a tribunal asked to determine sovereignty would not be likely to identify one single "critical date" when the dispute vested, and would be unlikely to exclude evidence related to recent activities on the islets. Several dates are certainly important—1905, when Japan announced that the islets were *terra nullius* and incorporated them into Shimane Prefecture;⁴⁰⁵ 1954, when Japan proposed submitting the matter to the International Court of Justice;⁴⁰⁶ and 1965, when Japan and Korea entered into the treaty normalizing relations⁴⁰⁷—but a tribunal would want to examine the entire sequence of historical events in order to understand completely the positions of the two countries. Korea's occupation of the islets for the past half century is certainly an important aspect of the matter, as is the potency of Japan's protests during that period and its failure to pursue the matter during the negotiations leading to the 1965 Treaty.

The final factor that supports Korea's claim is geography. Dokdo is physically closer to Korea's Ullungdo (and can be seen from it) than to Japan's Oki Islands, and would be on Korea's side of the maritime boundary if an equidistance line were to be drawn between Ullungdo and the Oki Islands.

Korea's claim to sovereignty over Dokdo is thus substantially stronger than that of Japan, based on the historical evidence of Korea's exercise of sovereignty during previous centuries and the recognition of Korea's claim by Japanese cartographers and government

officials during the eighteenth and nineteenth centuries; based on the implausibility of the Japanese assertion in 1905 that the islets were “*terra nullius*,” on the link between the 1905 incorporation of the islets and Japan’s expansionistic military activities leading to the complete subjugation of Korea, and on the inability of Korea to protest effectively during that time because of Japanese military domination over the Korean government; based on the principle of contiguity (because the islets are closer to Korea’s Ullong-do than to Japan’s Oki Islands); and, finally, based on Korea’s actual physical control of the islets during the past half century.

What Effect Should Dokdo Have on the Maritime Boundary Between Korea and Japan in the East Sea/Sea of Japan?

The effect that Dokdo should have on the delimitation of the EEZs and continental shelves between Korea and Japan presents a separate and equally important issue requiring analysis. This topic requires examining first the status of these disputed islets under the international law of the sea and whether they are entitled to generate an EEZ or continental shelf. After this topic is addressed, the principles that govern the delimitation of maritime boundaries can be applied to Dokdo.

Is Dokdo Entitled to Generate an EEZ or Continental Shelf Under International Law?

Article 121 of the 1982 United Nations Law of the Sea Convention⁴⁰⁸ says that every island is entitled to generate an EEZ and continental shelf, as well as a territorial sea, but paragraph (3) of this Article has an exception for “rocks” that “cannot sustain human habitation or economic life of their own,” which “shall have no exclusive economic zone or continental shelf.” The terms in this provision are not defined elsewhere in the Convention, and commentators have debated whether a geological feature must literally be a “rock” to be denied an EEZ or continental shelf or whether all features that “cannot sustain human habitation or economic life of their own” are in this category.⁴⁰⁹ Judge Budislav Vukas has recently explained that the latter interpretation is the correct one because of the underlying purposes of establishing the EEZ regime.⁴¹⁰ The reason for giving exclusive rights to the coastal states was to protect the economic interests of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves.⁴¹¹ This rationale does not apply to uninhabited islands because they have no coastal fishing communities that require such assistance.⁴¹² The EEZ regime may also be “useful for the more effective preservation of the marine resources,”⁴¹³ but it is not necessary to give exclusive rights to achieve this goal, and multilateral solutions such as Convention on the Conservation of Antarctic Marine Living Resources⁴¹⁴ can serve to protect fragile resources.⁴¹⁵

An important example of “state practice” relevant to the meaning of Article 121(3) occurred in 1997 when the United Kingdom renounced any claim to an EEZ or continental shelf around its barren granite feature named Rockall which juts out of the ocean northwest of Scotland.⁴¹⁶ Rockall is a towering granite feature measuring about 200 feet (61 meters) in circumference, which is about 70 feet (21 meters) high.⁴¹⁷

An earlier example of state practice on this issue occurred in 1970, when the Republic of China (Taiwan) issued a reservation when ratifying the 1958 Convention on the Continental Shelf,⁴¹⁸ apparently with reference to the Daioyu-Dao (Senkakus), stating that in “determining the boundary of the continental shelf of the Republic of China, exposed rocks

and islets shall not be taken into account.”⁴¹⁹ One prominent scholar from the People’s Republic of China has reported that the position of the China is similar: “China holds that the Diaoyudao Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have a continental shelf.”⁴²⁰

Whatever emerges as the ultimate definition of “rock” in Article 121(3) of the 1982 Convention, it would appear to be clear that Dokdo will be covered by this term. The two tiny rocky islets that make up Dokdo consist of barren and windswept structures with limited water sources. In a 1966 publication, the features of the islets were described as follows:

Both islets are barren and rocky, with the exception of some grass on the eastern islet, and their coasts consist of precipitous rocky cliffs. There are numerous caves where sea-lions resort. These islets are temporarily inhabited during the summer by fishermen.⁴²¹

Fishing vessels have visited the islets during the mild summer months, and since 1954 the Republic of Korea has kept about 45 marine police on them. One family tends to stay during the summer, but no one has ever taken up permanent year-round residence on these remote rocky structures. Korean scholars have acknowledged that these islets are unsuitable for human habitation.⁴²² Two distinguished foreign commentators have stated that: “These islets are uninhabitable, and under Article 121 of the 1982 U.N. Convention on the Law of the Sea should not have an EEZ or continental shelf.”⁴²³ Another widely published Korean scholar has written, after discussing the language in Article 121(3), that “the natural conditions of the Dokdo Islands would suggest that these islands might not generate their own EEZs or continental shelves.”⁴²⁴ One of the early Korean names given to the islets was “Sokdo,” which is significant because “sok” means “rock” in Korean.⁴²⁵

Japan, on the other hand, has tended to take the position that all islands and islets, no matter how small, should be able to generate extended maritime zones, without regard to their size or habitability, and Japan has apparently claimed an EEZ around all its islets, no matter how small or uninhabitable. Japan ratified the Law of the Sea Convention on June 7, 1996, and promulgated its Law on the Exclusive Economic Zone and the Continental Shelf on July 20, 1996, but the exact extent of the Japanese EEZ remains unclear. A Japanese foundation has published a map that draws 200-nautical-mile zones around every Japanese islet, no matter how small and uninhabitable, but the Japanese government has never produced a map showing the full extent of its claims.⁴²⁶ Japan has apparently argued that Dokdo qualifies as “an island and should not be disregarded in a continental shelf delimitation, without indicating the weight to be attributed to [it] in a delimitation.”⁴²⁷ A 1996 newspaper article quoted a Japanese Foreign Ministry official, who requested anonymity, as saying that “I think Takeshima actually can sustain some human habitation.”⁴²⁸ Some other countries, including the United States,⁴²⁹ have also been expansive in claiming extended maritime space around features that are clearly rocks, and the legitimacy of such claims remains in dispute.⁴³⁰

The Republic of Korea has tended to argue that small uninhabited islets should not be able to generate EEZs and continental shelves, following the language of Article 121(3) of the 1982 United Nations Law of the Sea Convention and the decision of the United Kingdom regarding Rockall.⁴³¹ This certainly would appear to be the better approach, and if Japan and Korea could agree that Dokdo would not be entitled to generate a continental shelf or EEZ, that agreement might go a long way toward reducing the tension over sovereignty of the islets. If the maritime boundary eventually becomes the equidistance line between

Korea's Ullungdo and Japan's Oki Island, as explained below, then Dokdo would be on the Korean side and should not affect the boundary delimitation. If some other approach is used, and Dokdo is somehow on the Japanese side of the boundary, its maritime zone should be limited to a 12-nautical-mile territorial sea enclave.

Delimiting the Maritime Boundary in the East Sea/Sea of Japan

Rich squid, crab, and mackerel fishing grounds can be found near Dokdo, and hydrocarbon resources may exist in the area. These islets have served as a fishing station for harvesting abalone and seaweed and hunting seals.⁴³² Japan and the Republic of Korea have had difficulty delimiting their EEZ/continental shelf boundary in the East Sea/Sea of Japan because of their dispute over Dokdo and also because they disagree on the ability of tiny islands to generate zones. Should Dokdo be given full effect, half effect, or no effect?⁴³³ As explained above, although its position is not crystal clear, Korea has generally taken the position that neither the tiny Japanese islet of Danjo Gunto nor Dokdo should generate an EEZ or continental zone because they are uninhabitable rocks and thus do not qualify for such zones under Article 121(3) of the Law of the Sea Convention. Japan, on the other hand, has argued that all its insular possessions, no matter how tiny, should be entitled to generate EEZs and continental zones, and it appears to take that position for Dokdo/Takeshima. As the materials below demonstrate, even if Dokdo were a true "island" entitled to generate an EEZ and continental shelf, it would not necessarily have a full effect on the maritime boundary of the East Sea/Sea of Japan. Japan and Korea have reached pragmatic agreements to regulate fishing, but both recognize that a longer-term or permanent solution would be desirable.

The Principles that Govern Maritime Boundary Delimitation. In order to analyze the positions taken by the Republics of Korea and Japan regarding their disputed maritime boundary, it is useful first to summarize the principles that have emerged from recent judicial and arbitral decisions on boundary disputes. Articles 74 (on the EEZ) and 83 (on the continental shelf) of the Law of the Sea Convention both state that boundary delimitations are to be "effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." This reference to "an equitable solution" mirrors the original statement promulgated by the United States when it claimed sovereignty over its continental shelf in 1945 and stated that: "In cases where the continental shelf extends to the shore of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles."⁴³⁴ Although some commentators have argued that the term "equitable" has no definite meaning, fairly specific "equitable principles" have in fact emerged during the past three decades:⁴³⁵

The equidistance or median-line approach can be used as an aid to analysis, but it is not to be used as a binding or mandatory principle. In the 1985 *Libya/Malta* case,⁴³⁶ the *Gulf of Maine* case,⁴³⁷ and the *Jan Mayen* case,⁴³⁸ among others, the International Court of Justice examined the equidistance or median line⁴³⁹ as an aid to its preliminary analysis, but then adjusted the line in light of the differences in the length of the coastlines of the contending parties.⁴⁴⁰ The Court has made it clear in all these cases that the equidistance line is *not* mandatory or binding.

The proportionality of coasts must be examined to determine if a maritime boundary delimitation is "equitable." It has now become well established that an essential element of a boundary delimitation is the calculation of the relative lengths of the relevant coastlines.

If this ratio is not roughly comparable to the ratio of the provisionally delimited maritime space allocated to each country, then a tribunal will generally make an adjustment to bring the ratios into line with each other.⁴⁴¹ In the *Libya/Malta* case, for instance, the International Court started with the median lines between the countries, but then adjusted the line northward through 18 degrees of latitude to take account of the “very marked difference in coastal lengths” between the two countries.⁴⁴² The Court then confirmed the appropriateness of this solution by examining the “proportionality” of the length of the coastlines of the two countries⁴⁴³ and the “equitableness of the result.”⁴⁴⁴ In the *Jan Mayen* case, the International Court determined that the ratio of the relevant coasts of Jan Mayen (Norway) to Greenland (Denmark) was 1:9, and ruled that this dramatic difference required a departure from reliance on the equidistance line. The final result was perhaps a compromise between an equidistance approach and a proportionality-of-the-coasts approach, with Denmark (Greenland) receiving three times as much maritime space as Norway (Jan Mayen).⁴⁴⁵

*Geographical considerations will govern maritime boundary delimitations and non-geographic considerations will only rarely have any relevance.*⁴⁴⁶ The *Gulf of Maine* case was perhaps the most dramatic example of the Court rejecting submissions made by the parties regarding nongeographic considerations, such as the economic dependence of coastal communities on a fishery, fisheries management issues, and ecological data.

“Natural prolongation” is no longer a prominent factor in maritime delimitations. The concept of the continental shelf as a “natural prolongation” of the adjacent continent is a geographical notion, but it has not played any significant role in decisions rendered during the past two decades. It was first recognized in the *North Sea Continental Shelf* cases⁴⁴⁷ and is found in Article 76(1) of the Law of the Sea Convention (defining continental shelves that extend beyond 200 nautical miles), but it appears to have been rejected as a factor relevant to maritime boundary delimitation in, for instance, the *Libya/Tunisia* case,⁴⁴⁸ the *Libya/Malta* case,⁴⁴⁹ and *Gulf of Maine* case.⁴⁵⁰ In the *St. Pierre and Miquelon* case,⁴⁵¹ the Arbitral Tribunal stated that the continental shelf was generated by both Canada’s and France’s land territories, and thus that it was not a “natural prolongation” of one country as opposed to the other. The abandonment of the natural prolongation approach in all recent decisions has required countries to adjust their negotiation strategies in agreements, and may have a significant effect in Northeast Asia, because China and the Republic of Korea have both made arguments based on this theory.⁴⁵² To some extent, the “principle of non-encroachment,” discussed next, has taken the place of the natural prolongation idea, but it leads to some different results.

The principle of nonencroachment. This principle is included explicitly in Article 7(6) of the Law of the Sea Convention, which says that no state can use a system of straight baselines “in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.” It played a significant role in the delimitation of the EEZ in the *Jan Mayen* case, where the Court emphasized the importance of avoiding the blockage of a coastal state’s entry into the sea. Even though Norway’s tiny Jan Mayen Island was minuscule in comparison with Denmark’s Greenland, Norway was allocated a maritime zone sufficient to give it equitable access to the important capelin fishery that lies between the two land features.⁴⁵³ The unusual 16-nautical-mile-wide and 200-nautical-mile-long corridor drawn in the *St. Pierre and Miquelon* case⁴⁵⁴ appears to have been based on a desire to avoid cutting off these islands’ coastal fronts into the sea. But, at the same time, the Arbitral Tribunal accepted Canada’s argument that the French islands should not be permitted to cut off the access of Canada’s Newfoundland coast to the open ocean.

The principle of maximum reach. This principle first emerged in the *North Sea Continental Shelf* cases,⁴⁵⁵ where Germany received a pie-shaped wedge to the equidistant point even though this wedge cut into the claimed zones of Denmark and the Netherlands. Professor Charney reported in 1994 that this approach had been followed in later cases: “No subsequent award or judgment has had the effect of fully cutting off a disputant’s access to the seaward limit of any zone.”⁴⁵⁶ The decisions during the past decade have confirmed the importance of this principle. In the *Gulf of Fonseca* case, the Court recognized the existence of an undivided condominium regime in order to give all parties access to the maritime zone and its resources,⁴⁵⁷ and in the *St. Pierre and Miquelon* case, France was given a narrow corridor connecting its territorial sea with the outlying high seas.⁴⁵⁸ The geographical configuration in the *Jan Mayen* case presented different issues, but even there the Court gave Norway more than it “deserved” given the small coastline and tiny size of Jan Mayen Island, apparently to enable it to have at least “limited geographical access to the middle of the disputed area,”⁴⁵⁹ which contained a valuable fishery. Several interests are served by the maximum reach principle: “status” (by recognizing that even geographically disadvantaged countries have rights to maritime resources), the right “to participate in international arrangements as an equal,” navigational freedoms, and “security interests in transportation and mobility.”⁴⁶⁰

Each competing country is allocated some maritime area. This principle is similar to the nonencroachment and maximum reach principles, but must be restated in this form to emphasize how the International Court of Justice has approached maritime boundary delimitations. Although the Court has attempted to articulate consistent governing principles, its approach to each dispute has, in fact, been more like the approach of an arbitrator than that of a judge. Instead of applying principles uniformly without regard to the result they produce, the Court has tried to find a solution that gives each competing country some of what it has sought, and has tried to reach a result that each country can live with.⁴⁶¹ In that sense, the Court has operated like a court of equity, or as a court that has been asked to give a decision *ex aequo et bono*.⁴⁶² Perhaps such an approach is inevitable, and even desirable, given that the goal of a maritime boundary delimitation, as stated in Articles 74 and 83 of the Law of the Sea Convention, is to reach an “equitable solution.”

Islands have a limited role in resolving maritime boundary disputes. Article 121 of the Law of the Sea Convention says that all islands, except “rocks” that “cannot sustain human habitation or an economic life of their own,” generate EEZs and continental shelves, but the International Court and arbitral tribunals have not, in fact, given islands equal ability to generate zones when they are opposite continental land areas or substantially larger islands.⁴⁶³ Islands have been given a diminished role in generating maritime zones in the *North Sea Continental Shelf* cases,⁴⁶⁴ the *Anglo-French Arbitration*,⁴⁶⁵ the *Libya/Tunisia* case,⁴⁶⁶ the *Libya/Malta* case,⁴⁶⁷ the *Gulf of Maine* case,⁴⁶⁸ the *Guinea/Guinea-Bissau* case,⁴⁶⁹ the *Jan Mayen* case,⁴⁷⁰ and the *St. Pierre and Miquelon Arbitration*.⁴⁷¹

With regard to very small islands, tribunals have given them only limited power to generate maritime zones if their zones would reduce the size of zones created by adjacent or opposite continental land masses. Tiny islets are frequently ignored altogether, as in the *North Sea Continental Shelf* and *Libya/Malta* cases, but even substantial islands are given less power to generate zones than their location would warrant, as in the *Libya/Tunisia* and *Libya/Malta* cases. This approach was also followed in the recent *Eritrea-Yemen Arbitration*, where the Tribunal gave no effect whatsoever to the Yemenese island of Jabal al-Tayr and to those in the al-Zubayr group, because their “barren and inhospitable nature and their position well out to sea. . . mean that they should not be taken into consideration in computing the boundary line.”⁴⁷²

Similarly, in the recent *Qatar-Bahrain* case, the International Court of Justice ignored completely the presence of the small, uninhabited, and barren Bahraini islet of Qit'at Jaradah, situated about midway between the main island of Bahrain and the Qatar Peninsula, because it would be inappropriate to allow such an insignificant maritime feature to have a disproportionate effect on a maritime delimitation line.⁴⁷³ The Court also decided to ignore completely the "sizeable maritime feature" of Fasht al Jarim located well out to sea in Bahrain's territorial waters, which Qatar characterized as a low-tide elevation and Bahrain called an island, and about which the Tribunal said: "at most a minute part is above water at high tide."⁴⁷⁴ Even if it cannot be classified as an "island," the Court noted, as a low-tide elevation it could serve as a baseline from which the territorial sea, EEZ, and continental shelf could be measured.⁴⁷⁵ But, using the feature as such a baseline would "distort the boundary and have disproportionate effects"⁴⁷⁶ and, in order to avoid that undesirable result, the Court decided to ignore the feature altogether.

The vital security interests of each nation must be protected. This principle was recognized, for instance, in the *Jan Mayen* case, where the Court refused to allow the maritime boundary to be too close to Jan Mayen Island,⁴⁷⁷ and it can be found in the background of all the recent decisions. The refusal of tribunals to adopt an "all-or-nothing" solution in any of these cases illustrates their sensitivity to the need to protect the vital security interests of each nation. The unusual decision of the Chamber of the International Court in the *Gulf of Fonseca* case, concluding that El Salvador, Honduras, and Nicaragua hold undivided interests in the maritime zones seaward of the closing line across the Gulf of Fonseca,⁴⁷⁸ illustrates how sensitive tribunals are to the need to protect the interests of all countries. It has also become increasingly common for countries to establish joint development areas in disputed maritime regions.⁴⁷⁹

Summary of maritime boundary delimitation principles. With regard to the unresolved maritime boundary between the Republics of Korea and Japan in the East Sea/Sea of Japan, the key principles that emerge from the decisions rendered during the past 25 years are: (1) very small islands tend to be ignored altogether and larger islands also have a reduced role in affecting a maritime boundary because their coastlines will inevitably be shorter than that of an opposite continental landmass or larger island; (2) countries appear to have a right to avoid being totally suffocated by an ocean zone of a neighbor that cuts them off from access to the seas altogether and innovative corridors have been constructed to avoid that result; and (3) decision makers tend to give each competing country some of what they seek, to protect their vital security interests, and, to some extent, to split the difference between the countries in order to achieve the "equitable solution" sought by Articles 74 and 83 of the Law of the Sea Convention. Another important emerging trend is that most countries now prefer a single maritime boundary that divides the EEZ and the continental shelf at the same location. The factors governing these two separate delimitations are the same, and it is convenient in most regions to have the same line for both boundaries.

The Relationship Between the East Sea/Sea of Japan Boundary to Other Unresolved Maritime Boundaries. It would probably promote the ultimate acceptance by Japan of Korea's sovereignty over Dokdo if Korea were to state clearly that very small islets, including Dokdo, should have little or no effect on maritime boundary delimitations.⁴⁸⁰ This position would allow the maritime boundary with Japan in the East Sea to be drawn (without having to address sovereignty over Dokdo⁴⁸¹) as the equidistance line between Korea's Ullungdo and Japan's Oki Islands, which would put Dokdo on the Korean side of the line, thereby further strengthens Korea's claim to the Dokdo islets. If Korea were to take this position, it would also strengthen Korea's position with regard to Japan in the disputed area south

of Cheju Island now governed by the Joint Development Zone (because Japan's islands to the east of this zone are small). It will also have the effect of recognizing that North Korea should be entitled to some larger maritime area in the West Sea and that South Korea's five tiny islets along the North Korean coast should not have the permanent effect of limiting North Korea's access to the sea in that area.⁴⁸²

Japan's position on the ability of Dokdo/Takeshima to generate an EEZ and continental shelf appears to be linked to its many other small uninhabitable islands, such as Okinotorishima, which would bring vast ocean areas under Japan's jurisdiction if allowed to generate EEZs and continental shelves. Okinotorishima is Japan's southernmost piece of territory, 1740 kilometers south of Tokyo, but it consists of tiny islets, with the total land area of two king-size beds, and is not entitled to generate a continental shelf or EEZ under Article 121(3) of the Law of the Sea Convention.⁴⁸³ Japan persists in claiming an EEZ around these outcroppings, however, and the matter has become complicated recently because China has engaged in hydrographic surveying around the reef system and has contended that Japan's claimed EEZ violates the terms of the Law of the Sea Convention and international law.⁴⁸⁴

Applying These Principles to the Maritime Boundary in the East Sea/Sea of Japan. Dokdo is entitled to have a 12-nautical-mile territorial sea drawn around it, but because it is uninhabitable, it should not be allowed, under Article 121(3) of the Law of the Sea Convention, to generate an EEZ or continental shelf. It therefore, should, be ignored in the maritime delimitation, and the boundary between Korea and Japan in the East Sea/Sea of Japan should be the equidistance line drawn between Korea's Ullungdo and Japan's Oki Islands. This line would put Dokdo on the Korean side of the boundary, and would reinforce the logic of Korea's claim to the islets under the contiguity approach. Korean authors seem generally to embrace this approach, which essentially separates the ocean resources from the sovereignty question.⁴⁸⁵ Japan has, however, been reluctant to accept the idea that Dokdo should not be able to generate a continental shelf and EEZ, perhaps because of its concern about how such a move would affect Japan's claims to ocean space around other isolated islets, such as Okinotorishima.

What Procedures Should be Utilized to Address This Disagreement?

Do maritime delimitations in other regions that have dealt with similar problems help in providing negotiating options regarding this issue? The process of addressing the disagreement over Dokdo is particularly challenging because Korea does not recognize this as a disputed issue and contends that the Korean sovereignty over Dokdo cannot be questioned. Koreans view the idea of presenting the issue of sovereignty over Dokdo to the International Court of Justice as ridiculous because it is impossible to doubt Korean sovereignty. And, Koreans reinforce their views by explaining that it would be equally absurd to pick out an island that has long been recognized as Japanese, such as Okinoshima, for instance, claim it as Korean, and then demand that Japan agree to submit the question of its sovereignty to the International Court.

From the Korean perspective, Japan claimed Dokdo at about the same time it established a protectorate over all of Korea (in 1905) and later formally annexed Korea into part of Japan (1910), and hence the claim to Dokdo is part of the same imperialistic oppressive activity that led to World War II and has been universally condemned by the world. Furthermore, the Koreans argue that the Japanese did not insist on resolving the dispute when relations were normalized in the 1965 Treaty between the two countries and hence have

waived their claim and are estopped from pursuing it at this point. The Korean position therefore is that this matter has been taken off the table and should no longer be a matter of dispute.

Japan's position, on the other hand, is that it claimed Dokdo/Takeshima in January 1905, before it took control of Korea proper, and incorporated the islets into Shimane Prefecture, thus administering them differently from the manner in which the rest of Korea was administered. Japan argues further that the 1951 San Francisco Peace Treaty did not return Dokdo/Takeshima to Korea, thus leaving it in Japanese hands. Although Korea has physically controlled the islets since the early 1950s, Japan's continuous protests along with its willingness to submit the matter to the International Court have, according to Japan, preserved its position regarding the islets.

In recent years, according to Korea's former foreign minister and ambassador to Japan, Gong Ro-Myung, the two countries have agreed to disagree: "Both governments try to keep the issue out of the basic relations between the two countries, although we realize this is a quite serious issue."⁴⁸⁶ Both Japan and Korea, however, have an interest in bringing closure to their differences regarding Dokdo and in delimiting the maritime boundary in the East Sea/Sea of Japan. One respected Korean scholar has explained that unless the territorial dispute regarding Dokdo is "resolved, which is highly unlikely, it may not be possible to delimit the boundaries."⁴⁸⁷

Articles 74 and 83 of the 1982 Law of the Sea Convention say that countries which are having difficulty in delimiting their boundaries "shall make every effort to enter into provisional arrangements of a practical nature," which "shall be without prejudice to the final delimitation."⁴⁸⁸ The 1998 Fisheries Agreement described above⁴⁸⁹ is a "provisional arrangement" that meets the spirit of this provision. These Articles also state that "[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV."⁴⁹⁰ Part XV of the Convention spells out the procedures for the "Settlement of Disputes."⁴⁹¹ This language would appear to be obligatory—"shall resort to the procedures. . . ."

International law has long stressed the "duty to cooperate"⁴⁹² and in recent years has emphasized the duty to settle disputes peaceably.⁴⁹³ The duty to cooperate includes the responsibility to exchange relevant information, to negotiate in good faith with the goal of reaching an agreement acceptable to both countries, to address the issues at the highest level of decision making, and finally, if the conflict remains unresolved, to use third-party dispute resolution through nonbinding mechanisms such as conciliation or mediation, or binding devices through arbitration or an international tribunal.⁴⁹⁴

But, disputes over territory have proved to be the most intractable. One scholar has explained that countries have been particularly reluctant to submit such disputes to an international tribunal for resolution:

Disputes over title to territory. . . tend to drag on for centuries, because of the virtually indestructible character of territory; moreover, the complexity and uncertainty of the facts in most territorial disputes makes judicial decisions particularly unpredictable, and the strong emotional attachment felt by peoples for every inch of their territory, however useless the territory in dispute may be, increases the unpopularity of international courts as a means of settling such disputes.⁴⁹⁵

The dispute over the sovereignty of Dokdo involves different versions of the historical record and, more importantly, some uncertainty over the governing law leading to some

unpredictability in the outcome, although as explained above, Korea's claim to the islets seems overwhelmingly stronger.

But, the most challenging aspect of an effort to "resolve" this matter is that Korea does not accept that the matter is "in dispute."⁴⁹⁶ Korean scholars have pointed out that a country cannot characterize any matter as a "dispute" and require another country to litigate the matter in a tribunal:

To prove the existence of a dispute, it is not sufficient for one side to simply assert that a dispute exists with the other side. The views concerning a question expressed by a party should be coherent, reasonable and substantial enough to be submitted to a third party. The Korean side believes. . . that Japanese allegations over Tokdo are tenuous as well as unjust. Japan is attempting to conjure up a territorial dispute where none exists.⁴⁹⁷

Korea's reluctance to accept the invitation to submit the dispute to the International Court of Justice probably cannot be viewed as undercutting its position that it has sovereignty over Dokdo. Certainly, such a position cannot be characterized as "acceptance" or "acquiescence" of the Japanese position because Korea remains very much in physical control of the islets. Japan may have considered presenting the argument that Korea's position against third-party adjudication should be viewed as inconsistent with the duty to cooperate, but Japan's refusal to submit other disputes to such adjudication prevents it from making such an argument without seeming to be hypocritical.

Korea has put forward its legal and historical justification for its sovereignty over Dokdo repeatedly in a more thorough and detailed manner than has Japan. Korea has explained on numerous occasions that it views the Dokdo matter as no longer open for discussion, viewing the 1965 Treaty normalizing relations between Japan and Korea as bringing closure to the matter. Korea, like many other countries that were subjected to subjugation during the imperialistic era, views international law, to some extent, as being a body of principles designed to protect the interests of the great powers. And, it views the International Court of Justice, to some extent, as a body that enforces and perpetuates "existing imperialistic international law" rather than recognizing the changes that have occurred in the world community.⁴⁹⁸ Korea is apprehensive about whether the International Court "will acknowledge Japanese incorporation [of Dokdo/Takeshima in 1905] as imperialist aggression or the formalities of its effective occupation as defective, even if it accepts all the historical facts that Korea claims."⁴⁹⁹

Some Korean scholars have promoted the idea of an International Court of Justice for Asia that "would settle territorial disputes between the colonialists and the colonized in Asia on the basis of oriental wisdom, not on western traditions to justify the imperialist mode of territorial acquisition."⁵⁰⁰ Of course, an arbitral panel composed solely of Asians could be put together to address this dispute, or a conciliation panel that would have only recommendatory authority. But, Korea would be reluctant to allow any outside body to have input at this point because it does not accept that any legitimate questions can be raised regarding Korea's sovereignty over the islets. Korea's approach, has therefore been to solidify its physical possession of the islets, thus making it clear that it is exercising "effective control" over them, and to assume that the passage of time will make it clear to all that the islets are within Korean sovereignty.

Ultimately, Korea and Japan must find some mechanism to bring closure to this matter, perhaps as part of a comprehensive treaty addressing and resolving the range of issues related to maritime boundaries and resource allocation. Although some Asian countries have

submitted disputes over small islands to the International Court, such as the island disputes between Malaysia and Indonesia⁵⁰¹ and between Malaysia and Singapore,⁵⁰² the Dokdo matter does not seem well suited for this solution because the Koreans view the Japanese claim as a continuing example of its colonial arrogance and they are not prepared to consider the possibility of losing control of Dokdo, no matter how remote such a possibility might be.

What's Next?

Both Japan and Korea have an interest in putting the Dokdo matter to rest so that the two neighbors can strengthen their relations in other areas and promote the mutual prosperity of their citizens. The maritime boundary between the two countries apparently cannot be resolved until the two countries reach an understanding regarding the islets. Without a clear boundary delimitation, petty disputes will continue to erupt, such as the Japanese tear gas attack on a Korean fishing vessel in May 2004 thought to be fishing in Japanese waters, which injured the eye of the Korean captain.⁵⁰³

As explained in the materials above, Korea's claim to sovereignty over Dokdo is substantially stronger than that of Japan, based on the historical evidence of Korea's exercise of sovereignty over the islets. Korean scholars have published numerous articles substantiating Korea's claim, but this historical scholarship should continue, as should efforts to explain that the legal principles utilized by international tribunals to resolve sovereignty disputes support Korea's claim. Although Korea has been reluctant to consider submitting the dispute to the International Court of Justice, the Court would almost certainly award the islets to Korea if the matter were presented to it for resolution. Perhaps, when this outcome is confirmed by further analysis and papers written by neutral scholars, then Japan may be willing to drop its claim.

Some years ago in 1987, the Australian geographer J. R. V. Prescott wrote that "[i]t is possible that Japan would consider withdrawing its claim to the islands in return for a seabed boundary that totally discounted Take Shima."⁵⁰⁴ This solution would appear to be acceptable to many Korean commentators and still remains the logical outcome. Because Dokdo is uninhabitable, it is not entitled to generate a continental shelf or EEZ under Article 121(3) of the Law of the Sea Convention. The maritime boundary should be delimited as the equidistance/median line between Korea's Ullungdo and Japan's Oki Islands. Dokdo should be accepted as Korean territory, based on Korea's many displays of sovereignty during past centuries, Japan's acquiescence to Korea's sovereignty on several key occasions, and Korea's effective control of the islets. Dokdo would be on Korea's side of the maritime boundary and also would be entitled to a 12-nautical-mile territorial sea. Japan may be worried about how such a solution would affect its other territorial and maritime boundary claims,⁵⁰⁵ but each situation should be evaluated on its own merits, and the other unresolved issues should not forever prevent bringing closure to the Dokdo matter.

Notes

1. The rugged beauty of these rocky islets and its surrounding flora and fauna are brought to life in *Beautiful Island, Dokdo* (Republic of Korea: Ministry of Maritime Affairs and Fisheries, 2000). The dimensions of the islets are given on page 11 of this book.

2. See *id.*, at 68–69 (showing photographs of Ullungdo as seen from Dokdo at sunset). See also picture of Dokdo taken from Ullungdo at sunrise in March 1992 in Hongju Nah, *A Study of Territorial Sovereignty over the Dokdo Islets in Light of International Law* 6 (1997).

3. “South Korea’s Ullung-Do is only 47 nm from Take Shima, whereas Japan’s Oki Gunto is 86 nm distant from the disputed islands.” J. R. V. Prescott, *Maritime Jurisdiction in East Asian Seas* 48 (East-West Environment and Policy Institute Occasional Paper no. 4, 1987).

4. Traditional international law texts list the methods of acquiring territory as cession, occupation, accretion, subjugation, and prescription. See, e.g., 1 *Oppenheim’s International Law* 679, 9th ed; eds., Sir Robert Jennings and Sir Arthur Watts (1992). A variation on this list is used here because cession and accretion are not relevant to the present dispute and neither claimant has used the language of “subjugation” with regard to its position. In previous eras, territory has been acquired through the means of subjugation, but international law no longer recognizes the legitimacy of acquiring territory through force. United Nations Charter, art. 2(4); and D. H. N. Johnson, “Acquisitive Prescription in International Law,” 27 *British Year Book of International Law* 332, 342 (1950) (“war is now definitely outlawed”).

5. See generally Johnson, *supra* note 4, at 353–354; and Seokwoo Lee, “Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal,” 16 *Connecticut Journal of International Law* 19 (2000).

6. Johnson, *supra* note 4, at 348–349.

7. See *infra* text, at notes 339–342.

8. See *infra* text, at notes 393–395.

9. See *infra* text, at notes 119 and 201–205.

10. The material in this section is adapted and updated from Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea* 17–19 (1997); and Jon M. Van Dyke, “An Analysis of the Aegean Disputes Under International Law,” 36 *Ocean Development and International Law* 63–117 (2005).

11. *The Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)*, 2 R.I.A.A. 829 (Apr. 4, 1928), reprinted in 22 *American Journal of International Law* 867, 909 (1928) [herein after cited as *Palmas Arbitration*].

12. Philip C. Jessup, “The Palmas Island Arbitration,” 22 *American Journal of International Law* 735, 735 (1928).

13. At the time, Judge Huber was the president of the Permanent Court of International Justice.

14. See, e.g., Johnson, *supra* note 4.

15. *Eritrea-Yemen Arbitration*, available at www.pca-cpa.org (1998–99), 1998 Award, para. 104.

16. *Palmas Arbitration*, *supra* note 11, at 867.

17. *Id.*, at 893–94. See *infra* text at notes 379–389, where this topic is discussed in more detail. After the Philippines became independent in 1946, it was reluctant to accept Judge Huber’s 1928 ruling, but in December 2003, Ambassador Alberto Encomienda, the director of the Maritime and Ocean Affairs Center in the Philippines Department of Foreign Affairs, said that the Philippines had renounced its claim to Palmas (Miangas) during a recent meeting with Indonesia on maritime and ocean concerns. Carina I. Roncesvalles, “RP Avoids Dispute with Indonesia on Las Palmas,” *Business World*, Dec. 18, 2003, at 12.

18. *Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, Jan. 28, 1931, 26 *American Journal of International Law* 390 (1932) [hereafter cited as *Clipperton Arbitration*]. See generally Jon Van Dyke and Robert A. Brooks, “Uninhabited Islands and the Ocean’s Resources: The *Clipperton Island* Case,” in *Law of the Sea: State Practice in Zones of Special Jurisdiction* 351–392, ed. Thomas A. Clingan (1982); and Jon M. Van Dyke and Robert A. Brooks, “Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources,” 12 *Ocean Development and International Law* 265–300 (1983).

19. *Clipperton Arbitration*, *supra* note 18, at 393.

20. *Id.*, at 394.

21. *Id.*

22. *Id.*, at 393.
23. *Legal Status of Eastern Greenland (Denmark v. Norway)*, [1933] *P.C.I.J.*, Ser. A/B, no. 53, at 22, 75.
24. *Id.*, at 46.
25. *Id.*
26. *Id.*, at 50–51.
27. *Id.*, at 54.
28. *Minquiers and Ecrehos case (France/United Kingdom)*, [1953] *I.C.J. Rep.* 47.
29. *Id.*, at 57. [Emphasis added.]
30. Each group contains “two or three habitable islets, many smaller islets and a great number of rocks.” *Id.*, at 53.
31. The Court noted that “even if the Kings of France did have an original feudal title” to the adjacent Channel Islands, “such a title must have lapsed as a consequence of the events of the year 1204 and following years.” *Id.*, at 56. “To revive its legal force today by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations.” *Id.*, at 57.
32. Derek W. Bowett, *The Legal Regime of Islands in International Law* 52 (1978). The United Kingdom submitted evidence that the Jersey courts had exercised criminal jurisdiction over the Ecrehos and Minquiers islets during the nineteenth and twentieth centuries, that the few habitable houses on the islets had been required to pay property taxes, that deeds conveying property had been registered in Jersey, that custom houses had been established by Jersey officials in both islet groups, and that Jersey officials visited the islets on occasion to license boats, collect census data, and supervise construction of maritime safety facilities. *Minquiers and Ecrehos case*, *supra* note 28, at 65–66, 69.
33. *Eritrea-Yemen Arbitration*, 1998 Award, *supra* note 15, para. 450.
34. *Minquiers and Ecrehos case*, *supra* note 28, at 53, 67, 72.
35. *Id.*, at 71.
36. *Western Sahara, Advisory Opinion of 16 October 1975*, [1975] *I.C.J. Rep.* 12, 43 (quoting from *Eastern Greenland case*, *supra* note 23, at 46).
37. *Id.* (quoting from *Minquiers and Ecrehos case*, *supra* note 28, at 57).
38. *Id.*, at 68.
39. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, [1992] *I.C.J. Rep.* 351, 606–609, para. 415–420 [herein after cited as *Gulf of Fonseca case*].
40. *Eritrea-Yemen Arbitration*, 1998 Award, *supra* note 15.
41. *Id.*, para. 239.
42. *Gulf of Fonseca case*, *supra* note 39, at 380–381, para. 29, and 558, para. 333.
43. *Id.*, at 380–381, para. 29.
44. The Chamber quoted the “classic dictum” of Judge Huber in the *Palmas Arbitration* that “practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.” *Id.* at 563, para. 342 (quoting from *Palmas Arbitration*, *supra* note 11, at 839). The Chamber then went on to say with regard to the dispute before it: “Where the relevant administrative boundary was ill-defined or its position disputed, in the view of the Chamber the behaviour of the two newly independent States in the years following independence may well serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other. . . . This aspect of the matter is of particular importance in relation to the status of the islands, by reason of their history”. *Id.*, at 565, para. 345.
45. *Id.*, at 566, para. 347.
46. *Id.*, at 566–570, para. 348–355.
47. *Id.*, at 570, para. 356.
48. *Id.*, at 570–579, para. 356–368. Honduras made one protest in 1991, but the Chamber viewed this effort as untimely. *Id.*, at 575–577, para. 362–364. The Chamber also emphasized that Honduras should have protested a delimitation of the Gulf of Fonseca that had the effect of casting doubt on Honduras’s claim of sovereignty over Meanguera. *Id.*, at 577–578, para. 365–366.

49. *Id.*, at 579, para. 368.

50. *Eritrea-Yemen Arbitration*, 1998 Award, *supra* note 15, at para. 450 (citing *Minquiers and Ecrehos*, *supra* note 28, at 47).

51. *Id.*, para. 239.

52. *Id.*, para. 451–452.

53. *Id.*, para. 507–508.

54. *Id.*, para. 509–524.

55. *Id.*, para. 458.

56. *Id.* para. 472, 476–480 (citing, among other things, art. 6 of the 1923 Lausanne Peace Treaty, 28 *L.N.T.S.* 11 (1924), also published in 2 *The Treaties of Peace 1919–1923*, at 959 (Carnegie Endowment of Peace, 1924), to support the presumption that islands within territorial waters are under the same sovereignty as the nearby mainland).

The Tribunal also included at the end of its opinion the enigmatic, but perhaps important, statement that “Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.” *Id.*, para. 525. At another point (paragraph 446), the Tribunal said “there is the problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.”

57. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, [2002] *I.C.J. Rep.* 625, available on the Web site of the International Court of Justice at www.icj-cij.org.

58. *Id.*, para. 14.

59. *Id.*

60. *Id.*, para. 58, 72, 80, 92, 94, 96, 114, and 124.

61. *Id.*, para. 126 (citing *Frontier Dispute (Burkina Faso/Republic of Mali)*, [1986] *I.C.J. Rep.* 554, 587, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, [1994] *I.C.J. Rep.* 38, para. 75–76; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, [2002] *I.C.J. Rep.* 303, para. 68, available on the Web site of the International Court at www.icj-cij.org).

62. *Id.*, para. 132.

63. *Id.*, para. 134 (quoting from *Eastern Greenland* case, *supra* note 23, at 45–46).

64. *Id.* (quoting from *Eastern Greenland* case, *supra* note 23, at 45–46).

65. *Id.* (quoting from *Eastern Greenland* case, *supra* note 23, at 45–46). In this regard, the Court noted that it was significant that Indonesia’s map of its archipelagic baselines “do [*sic*] not mention or indicate Ligitan and Sipadan as relevant base points or turning points.” *Id.*, para. 137. The Court also found significant that neither Indonesia nor its predecessor the Netherlands “ever expressed its disagreement or protest” regarding the construction of lighthouses on Ligitan and Sipadan in the early 1960s. *Id.*, para. 148.

66. *Id.*, para. 135.

67. *Id.*, para. 140.

68. Yonhap News Agency, “South Korea Commissions New Patrol Boat for Disputed Isle Area,” July 13, 2001.

69. *Minquiers and Ecrehos* case, *supra* note 28, at 69.

70. *Id.*

71. *Id.*, at 59–60. See Tao Cheng, “The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition,” 14 *Virginia Journal of International Law* 221, 229 (1974).

72. *Eastern Greenland* case, *supra* note 23, at 45.

73. *Palmas Arbitration*, *supra* note 11, at 907.

74. *Id.*, at 908.

75. *Id.*, at 907.

76. *Id.*, at 872.

77. Id., at 896. Other significant events between 1898 and 1906 are described id., at 907. “[E]vents subsequent to 1906 must in any case be ruled out.” Id., at 906.

78. *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, supra note 57, para. 135.

79. Treaty on Basic Relations between Korea and Japan, June 22, 1965, 583 *U.N.T.S.* 33. See infra text at notes 339–342.

80. Han Key Lee, “Korea’s Territorial Rights to Tokdo in History and International Law,” 29 *Korea Observer* 1, 89 (1998), translated and reprinted from Lee Han-key, in “Tokdo,” in *Han’guk ui Yongt’o* [Korea’s Territory] 227–303 (Seoul: Seoul National University Press, 1969).

81. See text at notes 339–342.

82. See, e.g., Han Key Lee, supra note 80, at 58.

83. See infra text at notes 142–230.

84. See *Beautiful Island, Dokdo*, supra note 1, at 68–69.

85. See Kazuo Hori, “Japan’s Incorporation of Takeshima into Its Territory in 1905,” 28 *Korea Observer* 477, 479 (1997), as revised from an earlier publication in *Chosenshi Kenkyukai Ronbunshu* [A Collection of Articles on Korean History], no. 24 (Tokyo: 1987) (noting that *The Annals of the Kingdom of Silla* were compiled in 1432 and formally published in 1454). See also Yong-Ha Shin, “A Historical Study of Korea’s Title to Tokdo,” 28 *Korea Observer* 333, 333 (1997) (citing Kim Pu-sik, compiler, *Samguk Sagi* [History of the Three Kingdoms] (1146), in 4 *Silla pan’gi* [Annals of the Kingdom of Silla]).

86. See Hoon Lee, “Dispute over Territorial Ownership of Tokdo in the Late Choson Period,” 28 *Korea Observer* 389, 393 (1997) (quoting *The Annals of the Kingdom of Silla*, supra note 85, as saying: “In the 13th year of King Chi-jung, in the summer of June, Usan’guk was subjugated. Usan’guk is an island in the middle of the sea due east of Myongju, and it is called Ullungdo”). See also Yong-Ha Shin, supra note 85, at 333 (quoting the Annals of the Kingdom of Silla, which describes the invasion of Usan’guk and notes that Usan’guk consisted of an area of approximately 2.44 square miles).

87. See Yong-Ha Shin, supra note 85, at 334 (citing *Man’gi yoram* [Handbook of State Affairs], ed. Sim Sang-gyu et al. Seoul (1808) (stating that “Usando and Tokdo all belonged to Usan’guk [Ullungdo], and Usando is what Japanese call Matsushima”).

88. *Yong-Ha Shin*, supra note 85, at 334.

89. Hideki Kajimura, The Question of Takeshima/Todoka, 28 *Korea Observer* 423, 442 (1997), reprinted from the original Japanese version in *Chosen Kenkyu* [Study of Korea], no. 182, Sept. 1978.

90. See text at notes 4–68.

91. See, e.g., *Palmas Arbitration*, supra note 11.

92. K. T. Chao, “East China Sea: Boundary Problems Relating to the Tiao-Yu-T’ai Islands,” [1982] *Chinese Yearbook of International Law and Affairs* 45, 52 (citing *Minquiers and Ecrehos* case, supra note 28, at 47).

93. See, e.g., Hoon Lee, supra note 86, at 393. See also Yong-Ha Shin, supra note 85, at 334–335, Hori, supra note 85, at 484–485; and Kajimura, supra note 89, at 444 (noting that “[t]his policy was taken in 1416 and implemented in earnest in 1438” and continued until 1881).

94. See Hoon Lee, supra note 85, at 397–398 (citing *The Annals of King T’aejong*, 16th year, September, and *The Annals of King T’aejong*, 17th year, February) (describing how King T’aejong sent the Commissioner of Pacification to Ullungdo to bring back its inhabitants) and Choung Il Chee, *Korean Perspectives on Ocean Law Issues for the 21st Century* 6 (The Hague: Kluwer, 1999).

95. See Myung-Ki Kim, “A Study on Legal Aspects of Japan’s Claim to Tokdo,” 28 *Korea Observer* 359, 363 (1997) (citing *Kuksa p’yongch’an wiwonhoe*, *Choson wangjo sillok* [Annals of the Choson Dynasty] V, *Sejong sillok* [Annals of King Sejong] IV 680–81 (Seoul: 1956)).

96. See Hoon Lee, supra note 86, at 398 (noting that “from that time on, explorations and surveys on Ullungdo and Tokdo were conducted until the end of the Choson period even on an irregular basis, and that can be confirmed by the Annals of the Dynasty of Choson”).

97. See Yong-Ha Shin, supra note 85, at 336 (citing vol. 45, Section on *Uljinhyon in Sinjung tongguk yoji sungnam* [Revised and Augmented Survey of the Geography of Korea], ed. Yi Haeng (Seoul: 1531).

98. See Hoon Lee, *supra* note 86, at 398.

99. See Yong-Ha Shin, *supra* note 85, at 336 (citing Yi Ch'an, "Choson kojido eso bon tokdo," [Tokdo as Seen in the Old Korean Maps] in *Ullungdo Tokdo haksul chosa yon'gu* ([Academic Survey and Research on Ullungdo and Tokdo]) (Seoul: 1978)) (listing the three major maps, i.e., *Tongguk chido* [The Map of Korea] by Chong Sang-gi (1678–1752), *Haewja chondo* of 1822, and *Choson chondo* [(A Complete Map of Korea)] by Kim Tae-gon (1821–46)).

100. Choung Il Chee, *supra* note 94, at 7 (citing Taijudo Kanae, *Take Shima Funso*, vol. 64, (*Kokusaiho-gaiko-sashi* (1966), at 112 [(in Japanese)]).

101. See Kajimura, *supra* note 89, at 13.

102. See Yong-Ha Shin, *supra* note 85, at 337 (citing Saito Hosen, "Onshu shicho goki" [Records on Observations in Oki Province], vol. I, in *Kawakami Kenzo, Takeshima no rekishi chirigakuteki kenkyu* [(A Historical and Geographical Study of Takeshima)] (Tokyo: 1966).

103. *Id.*

104. *Id.*

105. See Hoon Lee, *supra* note 86, at 400–418.

106. *Id.*

107. *Id.*, at 417 (quoting an answer given by the Tsushima emissary to the Shogunate government regarding the status of Dokdo in the late 1690s, which says "We understand that it [Dokdo] is the island, together with Takeshima [Ullungdo], where Japanese are forbidden to fish, but it is difficult to answer that the injunction was so definitely made" (quoting from *Tsushima Soka Kamonsho* [So Family of Tsushima Records] no. 4751 kept in the library of NHCC) and Yong-Ha Shin, *supra* note 85, at 343 ("By 1699 the diplomatic notes had been exchanged and all the formalities had been cleared to recognize Korean title to Ullungdo and Tokdo.") (citing Japan, ed., Dajokan, *Kobunrok, 1877: Naimusho no bu*, Annexed Document no. 4 of the Genroku Era (1688–1704) (Official Documents 1877: The Ministry of Home Affairs, Tokyo, National Archives)).

108. See Kajimura, *supra* note 89, at 449–450 (noting that "the Japanese government did not state clearly whether or not Matsushima (Takeshima/Tok-Do Today) was covered in the injunction. That is why the two sides are continuing to exchange inconclusive notes, with the Korean side claiming that Takeshima/Tokdo was also included in the prohibition under the concept of treating Takeshima and Matsushima as one, while the Japanese side is asserting that no clearly-written ban was made for the island.").

109. *Id.*

110. Choung Il Chee, *supra* note 94, at 6.

111. Suh Myun Choe, "Tokdo in Old Maps," 29 *Korea Observer* 187, 193 (1998)).

112. See Yong-Ha Shin, *supra* note 85, at 344.

113. *Id.* This map is reproduced in Hongju Nah, *supra* note 2, at 21; and in Suh Myun Choe, *supra* note 111, at 194.

114. Hongju Nah, *supra* note 2, at 21 (referring to another map by Hayashi entitled *Dainihonzu* [(A Great Japan's Map)], and a map called *Soezu* [A Complete Illustrated Map]).

115. Suh Myun Choe, *supra* note 111, at 196–197.

116. See *infra* text at notes 200–207.

117. See *infra* text at notes 242–252.

118. Japan has sought to strengthen its claim by referring to pre-1905 contact since at least 1962, when its Ministry of Foreign Affairs issued an memorandum stating that "[t]he Japanese Government has made clear the position of its claim that Takeshima is Japan's inherent territory from olden times and is now reconfirming repeatedly that position." Myung-Ki Kim, *supra* note 95, at 361 (quoting from a memorandum dated July 13, 1962).

119. Japan, Ministry of Foreign Affairs, "The Issue of Takeshima" (March 2004), available at www.mofa.go.jp/region/asia-pacitakeshima/position.html (visited Aug. 25, 2004).

120. *Id.*

121. See, e.g., Yong-ho Ch'oe, "Sino-Korean Relations, 1866–1876: A Study of Korea's Tributary Relationship to China," 9 *Journal of Asiatic Studies* 131, 133–138 (1966) (discussing how the East Asian international order was based on the Confucian doctrine of societal relations, with China

occupying the position of head of the family of East Asian nations and periphery states assuming the roles of junior members).

122. Id., at 131–132.
123. Id., at 135.
124. Id.
125. Id. (quoting William W. Rockhill, *China's Intercourse with Korea from the XVth Century to 1895*, at 4 (1905)).
126. Id., at 136.
127. Id., at 137.
128. Ki-Baik Lee, *A New History of Korea 262–263*, trans. Edward W. Wagner and Edward J. Schultz (Ilchokak, 1984).
129. Id., at 264.
130. Id.
131. Id., at 264–266.
132. See, Lee T. Oei, “Japan’s Annexation of Korea (1868–1910): An Exposition and Analysis of Japanese Perspective,” 7 *American Asian Review* 49, 49 (1989).
133. Id.
134. Id., at 49–50.
135. Id.
136. Id., at 51.
137. See, e.g., Ki-Baik Lee, *supra* note 128, at 298–299.
138. Id., at 275.
139. Id., at 275–276.
140. See, C. I. Eugene Kim and Han-kyo Kim, *Korea and the Politics of Imperialism 1876–1910*, at 13–14 (University of California Press, 1967).
141. See, Ki-Baik Lee, *supra* note 128, at 268.
142. See, e.g., C. I. Eugene Kim and Han Kyo Kim, *supra* note 140, at 16–17.
143. See, e.g., Ki-Baik Lee, *supra* note 128, at 268.
144. Id., at 268–269.
145. Id., at 272.
146. Id., at 272–273.
147. Id., at 273–274.
148. Id., at 274.
149. See, Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895–1910*, at 54 (University of California Press, 1995).
150. See, e.g., Ki-Baik Lee, *supra* note 128, at 275.
151. Id., at 275–276.
152. Id., at 277 (quoting Kim Ok-kyun, *Kapsin illok* [Journal of 1884] (n.p., n.d.)).
153. Id., at 278.
154. Id., at 279.
155. Id., at 279–280.
156. Id., at 280.
157. Id.
158. Id.
159. See, e.g., Duus, *supra* note 149, at 66.
160. Id., at 67.
161. See, e.g., Ki-Baik Lee, *supra* note 128, at 289.
162. Id., at 289–290. The 1895 Treaty of Shimonoseki is reprinted in C. Parry (ed.), *The Consolidated Treaty Series*, vol. 181, 217–224 (1979).
163. Id., at 290–292.
164. Id., at 306.
165. See, e.g., Seung Kwon Synn, *The Russo-Japanese Rivalry over Korea, 1876–1904*, at 291–292, (Yuk Phub Sa, 1981).

166. See, e.g., Ki-Baik Lee, *supra* note 128, at 307.
167. See, e.g., Seung Kwon Synn, *supra* note 165, at 318.
168. *Id.*, at 341.
169. *Id.*, at 341–343. See also Ki-Baik Lee, *supra* note 128, at 307.
170. See Harold Hak-won Sunoo, *Korea: A Political History in Modern Times 187–188* (Korean-American Cultural Foundation and Kunkuk University Press, 1970) (quoting H. Chung, *Korean Treaties* 213 (1919)). See also Ki-Baik Lee, *supra* note 128, at 308.
171. See Ki-Baik Lee, *supra* note 128, at 308.
172. Han Key Lee, *supra* note 80, at 58.
173. See Harold Hak-won Sunoo, *supra* note 170, at 189–190 (quoting Chung, *supra* note 170, at 214).
174. *Id.*
175. See Ki-Baik Lee, *supra* note 128, at 308–309.
176. *Id.*, at 308.
177. See Myung-Ki Kim, *supra* note 95, at 364.
178. See Kajimura, *supra* note 89, at 453–454.
179. See Myung-Ki Kim, *supra* note 95, at 364.
180. See Kajimura, *supra* note 89, at 453–454.
181. *Id.* The reluctance of the Japanese government to authorize their nationals to exploit the resources around the islands east of the Korean Peninsula in the late nineteenth century undercuts its argument in 1905 that the islet was *terra nullius*. A similar issue was addressed in the *Minquiers and Ecrehos* case, involving the request in 1784 by a French national for a concession in respect to the Minquiers group. France refused to grant the concession, and the Court noted that “the correspondence between the French authorities, relating to this matter, does not disclose anything which could support the present French claim to sovereignty, but it reveals certain fears of creating difficulties with the English Crown.” *Minquiers and Ecrehos*, *supra* note 28, at 70 [emphasis added.] The Japanese officials may have harbored similar fears with regard to difficulties with Korea when they declined to grant concessions to their nationals.
182. Lee Keun-Gwan, “Preliminary Report on the Question of Neutrality in the Context of the Japanese Annexation of Korea and a New Methodological Approach to the Annexation Question 5” (paper presented at the Workshop on the 1905 Convention, Kookmin University, Seoul, Oct. 3, 2004) (citing *Nihon gaiko monjo*, vol. 3, Doc. no. 87 (Apr. 15, 1870) and Shin Yong-Ha, *Korea's Territorial Rights to Tokdo: A Historical Study* (Seoul: Tokdo yeongu bojeon hyeophoe [Tokto Research and Preservation Association], 1997), at 89–92). Shin Yong-Ha's cited study can be found at plaza.snu.ac.kr/~bigbear1/data3-1.htm, and this matter is discussed at 26–27. These events are also discussed in Hori, *supra* note 85, at 489–493, and in Myung Chul Hyun, “The Japanese Perception of Tokdo During the Opening of Ports,” 29 *Korea Observer* 93, 103–109 (1998).
183. Lee Keun-Gwan, *supra* note 182 (citing Dajokan, Kobunroku (Mar. 20, 1877); and Shin Yong-Ha, *supra* note 182, at 99–100); Yong-Ha Shin, *supra* note 85, at 345–346; and Myung Chul Hyun, *supra* note 182, at 111–114. It is clear that the reference to “another island” is to Dokdo, because an attached document describes it as 80 nautical miles from Oki and as a place where “Trees and bamboo are scanty. Sea lions live there.” Myung Chul Hyun, *supra* note 182, at 112–113.
184. Yong-Ha Shin, *supra* note 85, at 346 (referring to *Chosen Jenzu* [Complete Map of Korea] published by the Ministry of the Army in 1875 and *Chosen Tokai Kaiganzu* [Map of the Eastern Coast of Korea] published by the Hydrographic Bureau of the Ministry of the Navy in 1876). These maps were followed by another published by the Ministry of the Navy in 1886 called *Chosen Suirosi* [Korean Sealanes], which also showed Dokdo in Korean territory. *Id.*, at 347.
185. Hori, *supra* note 85, at 496.
186. Kajimura, *supra* note 89, at 453.
187. *Id.*
188. *Id.*, at 454. See also Myung-Ki Kim, *supra* note 95, at 364.

189. Kajimura, *supra* note 89, at 454. See also Myung-Ki Kim, *supra* note 95, at 364 (citing Park Kwan-sook, “Tokdo ui popchok chiwi” [The Legal Status of Tokdo], *Korean Journal of International Law* 34 (1956)).
190. Kajimura, *supra* note 89, at 454.
191. *Id.* (citing Yi Kyu-won’s report, published by Korea Public Information Co. (1965)).
192. Yong-Ha Shin, *supra* note 85, at 349.
193. *Id.* Another commentator has written that: “According to an early investigation by the Japanese government, some 200 Japanese were staying at Ullungdo about the year 1900, and the number rose to over 1,000 depending on the season.” Hori, *supra* note 85, at 499.
194. Yong-Ha Shin, *supra* note 85, at 349.
195. See Hori, *supra* note 85, at 511–512; and Yong-Ha Shin, *supra* note 85, at 351.
196. Hori, *supra* note 85, at 514.
197. *Id.*, at 513 (citing *Gunkan tsushima senji nisshi* [The Logbook of Warship *Tsushima* During the War] (kept in the Self-Defense Agency War History Department)).
198. *Id.*
199. *Id.*, at 514.
200. *Id.*; and Yong-Ha Shin, *supra* note 85, at 351.
201. Han Key Lee, *supra* note 80, at 36 (quoting from Nakai Yozaburo’s application, which was reprinted in Kawakami Kenzo, *Takeshima No Rekishi Chiragakuteki Kenkyu* [Historical and Geographical Study of Takeshima] 209–211 (Tokyo: Kinkoshoten, 1966)).
202. Yong-Ha Shin, *supra* note 85, at 352 (quoting from the minutes of the Japanese cabinet meeting of Jan. 28, 1905).
203. Hori, *supra* note 85, at 519–520; and Yong-Ha Shin, *supra* note 85, at 352. See also Myung-Ki Kim, *supra* note 95, at 364.
204. Hori, *supra* note 85, at 520.
205. *Id.*
206. *Id.*, at 523 (quoting from *Taehan Maeil Shinbo* [Korea Daily News], May 1, 1906).
207. *Id.*, at 522 (citing “Local Ullungdo Report to the Home Ministry,” *Hwangsong sinmun* [Capital Gazette] (Seoul), May 9, 1906)).
208. The Treaty of Portsmouth, Sept. 5, 1905, Japan-Russia, reprinted in Parry, *supra* note 162, vol. 199, at 144.
209. *Id.*, art. 3.
210. *Id.*, art. 2.
211. Han Key Lee, *supra* note 80, at 42.
212. See, e.g., Ki-Baik Lee, *supra* note 128, at 309.
213. See Harold Hak-won Sunoo, *supra* note 170, at 196–197 (quoting Tyler Dennett, *Roosevelt and the Russo-Japanese War* 110 (2d ed. 1925)).
214. *Id.*, at 195 (quoting from J. V. A. MacMurray, *Treaties and Agreement with and Concerning China, 1894–1919* 516 (1921)).
215. *Id.*
216. *Id.*
217. See Ki-Baik Lee, *supra* note 128, at 310.
218. See Harold Hak-won Sunoo, *supra* note 170, at 200 (quoting MacMurray, *supra* note 214, at 516).
219. Yong-Ha Shin, *supra* note 85, at 354.
220. See Ki-Baik Lee, *supra* note 128, at 310–311.
221. Yong-Ha Shin, *supra* note 85, at 355 (referring to Directive no. III, Apr. 29, 1906). Korean newspapers and commentators also denounced this move. *Id.*, at 355–356.
222. See Harold Hak-won Sunoo, *supra* note 170, at 200.
223. See Ki-Baik Lee, *supra* note 128, at 311.
224. See Harold Hak-won Sunoo, *supra* note 170, at 202 (quoting from Lee wi-jang, “A Plea for Korea,” 63 *Independence* n.p. (1907)).
225. *Id.* See also Ki-Baik Lee, *supra* note 128, at 311.

226. See Hilary Conroy, *The Japanese Seizure of Korea: 1868–1910*, at 350 (University of Pennsylvania Press, 1960) (quoting from *New York Tribune*, (part. 1 and 2) (July 20, 1907, and July 26, 1907)).

227. See Harold Hak-won Sunoo, *supra* note 170, at 202–203.

228. See *id.*, at 203.

229. Choung Il Chee, *supra* note 94, at 23.

230. *Id.*, at 24–25.

231. See generally Daniel Dzurek, “The Senkaku/Diaoyu Islands Dispute,” available at www-ibru.dur.ac.uk/docs/senkaku.html (site visited Oct. 23, 2004); William B. Heflin, “Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart,” 1 *Asian-Pacific Law and Policy Journal* 18 (2000); K. T. Chao, *supra* note 92; Ying-jeou Ma, “The East Asian Seabed Controversy Revisited: Relevance (or Irrelevance) of the Tiao-yu-T’ai (Senkaku) Islands Territorial Dispute,” [1982] *Chinese Yearbook of International Law and Affairs* 1; Thomas R. Ragland, “A Harbinger: The Senkaku Islands,” 10 *San Diego Law Review* 664 (1973); and Toshio Okuhara, “The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf,” 15 *Japanese Annual of International Law* 97 (1971).

232. But, Japan had refused three earlier applications by the Okinawa Prefecture (in 1885, 1890, and 1893) to incorporate the Senkakus because of concern that such a move might lead to conflict with China. Choon-ho Park, “Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy,” in *East Asia and the Law of the Sea* 33 (Seoul: Seoul National University Press, 1983).

233. See generally Jean-Marc F. Blanchard, “The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands,” *The China Quarterly* 95 (no. 161, Mar. 2000).

234. Treaty of Shimonoseki, *supra* note 162.

235. Declaration of the Three Powers—Great Britain, the United States and China regarding Japan, Nov. 27, 1943, available at www.ndl.go.jp/constitution/e/etc/c03.html [herein after cited as Cairo Declaration]. See generally text at notes 259–260.

236. Proclamation Defining Terms for Japanese Surrender, July 26, 1945, available at www.ndl.go.jp/constitution/e/etc/c06.html [hereafter cited as Potsdam Proclamation]. See generally text at note 262.

237. San Francisco Peace Treaty, 8 September 1951, 136 *U.N.T.S.* 45. See generally text at notes 274–278.

238. Tao Cheng, *supra* note 71, at 253–260.

239. Lee Keun-Gwan, *supra* note 182, at 4.

240. *Id.*, at 4–5.

241. *Id.*, at 6.

242. See generally James Simsarian, “The Acquisition of Legal Title to *Terra Nullius*,” 53 *Political Science Quarterly* 111–128 (1938).

243. In the Case Concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), [1962] *I.C.J. Rep.* 6, at 32–33, the International Court utilized the doctrine of estoppel ruling that Thailand could not challenge the legitimacy of a map that was “an integral part” of an earlier boundary settlement after having “enjoy[ed] the benefits of the settlement” for more than half a century.

244. Werner Levi, *Contemporary International Law* 130, 2nd ed. (Westview Press, 1991).

245. Michael Akehurst, *A Modern Introduction to International Law* 141, 3rd ed. (London: George Allen and Unwin Ltd., 1977).

246. Levi, *supra* note 244, at 130.

247. *Palmas Arbitration*, *supra* note 11; and *Eastern Greenland* case, *supra* note 23.

248. *Eastern Greenland* case, *supra* note 23, at 38, 40, 44, 46, 73, 75.

249. *Gulf of Fonseca* case, *supra* note 39, at 563–565.

250. *Western Sahara* case, *supra* note 36, at 40.

251. *Id.*, at 39.

252. *Eritrea-Yemen Arbitration*, 1998 Award, *supra* note 15, at para. 165. In paragraph 445, the Tribunal characterized the islands as being in “an objective state of indeterminacy.”

253. As described above, Japan established a protectorate over Korea in 1905 and formally annexed the peninsula in 1910. It has long been established that a country which is administering a territory cannot acquire that territory by acquisitive prescription. See Johnson, *supra* note 4, at 344 (referring to situations involving Cyprus and Bosnia-Herzegovina, and concluding that “a protectorate, no matter how long it is exercised, can never be converted into a title by acquisitive prescription”).

254. Cairo Declaration, *supra* note 235.

255. The Yalta Agreement, Feb. 11, 1945, available at www.ndl.go.jp/constitution/e/etc/c04.html.

256. Potsdam Proclamation, *supra* note 236.

257. San Francisco Peace Treaty, *supra* note 237.

258. See Seokwoo Lee, “The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia”, 11 *Pacific Rim Law and Policy* 63, 96 (2002) (citing Oral communication from Hubert Graves, counselor, British Embassy, to Hugh Borton, acting special assistant to the director, Office of Far Eastern Affairs, State Dep’t Decimal File no. 740.0011 PW (PEACE)/10-847, State Dep’t Records, Record Group 59 (Oct. 8, 1947) (on file with the U.S. National Archives and Records Administration in College Park, MD)).

259. Cairo Declaration, *supra* note 235. [Emphasis added].

260. See Seokwoo Lee, *supra* note 258, at 97 (citing William J. Sebald, U.S. political advisor for Japan, Views on Peace Treaty with Japan, State Dep’t Records, Record Group 59 (Feb. 10, 1950) (on file with the U.S. National Archives and Records Administration in College Park, MD)).

261. Yalta Agreement, *supra* note 255.

262. Potsdam Proclamation, *supra* note 236.

263. Instrument of Surrender, Sept. 2, 1945, Japan-United States, available at www.ndl.go.jp/constitution/e/etc/c05.html.

264. Supreme Commander for the Allied Powers, *Governmental and Administrative Separation of Certain Outlying Areas from Japan*, SCAPIN no. 677 (Jan. 29, 1946), available in scanned form at www.geocities.com/mlovmo/temp10.html.

265. *Id.*, art. 1.

266. See Seokwoo Lee, *supra* note 258, at 106 (citing Incoming Telegram to Secretary of State from Muccio, U.S. Ambassador in Korea, State Dep’t Decimal File no. 694.95B/11–2851, State Dep’t Records, Record Group 59 (Nov. 28, 1951) (on file with the U.S. National Archives and Records Administration in College Park, MD)).

267. See SCAPIN no. 677, *supra* note 264, art. 6.

268. See Seokwoo Lee, *supra* note 258, at 105 (citing Outgoing Telegram from John F. Dulles, Secretary of State, State Dep’t Decimal File no. 661.941/6–3055, State Dep’t Records, Record Group 59 (July 1, 1955) (on file with the U.S. National Archives and Records Administration in College Park, MD)).

269. Supreme Commander for the Allied Powers, *Area Authorized for Japanese Fishing and Whaling*, SCAPIN no. 1033 (June 22, 1946).

270. Supreme Commander for the Allied Powers, *Memorandum for Japanese Government: Liancourt Rocks Bombing Range*, SCAPIN no. 1778 (Sept. 16, 1947).

271. *Id.*, art. 1.

272. Kajimura, *supra* note 89, at 462.

273. *Id.*, at 463.

274. San Francisco Peace Treaty, *supra* note 237, Introduction.

275. See Seokwoo Lee, *supra* note 258, at 129–142.

276. *Id.* (citing numerous State Department Records in footnotes 286–290, 306).

277. *Id.* (citing numerous State Department Records in footnotes 303, 308, 309, 334).

278. *Id.* (citing numerous State Department Records in footnotes 315, 319, 331, 332, 338, 344–346).

279. See text at notes 4–6.

280. Prescott, *supra* note 3, at 48.

281. See, e.g., Malcolm Shaw, *International Law* 427, 5th ed. (2003) (noting that it is necessary “for the possession to be peaceful and uninterrupted, [which] reflects the vital point that prescription rests upon the implied consent of the former sovereign to the new state of affairs. This means that protests by the dispossessed sovereign may completely block any prescriptive claim.” (citing Johnson, supra note 4, at 343–348)).

282. *Temple of Preah Vihear* case, supra note 243, at 45 (separate opinion of Judge Alfaro).

283. “If a protest was reasonably to be expected but is not forthcoming, the silent state or organization can no longer deny the legality of the fact or event (estoppel).” Levi, supra note 244, at 200.

284. *Chamizal Arbitration (United States v. Mexico)*, reprinted in *5 American Journal of International Law* 782 (1911).

285. *Id.*, at 791.

286. *Id.*, at 806–807.

287. *Id.*, at 807.

288. *Id.*, at 806.

289. *Palmas Arbitration*, supra note 11, at 908. See text at notes 11–17 for additional discussion of this Arbitration.

290. *Id.*, at 907.

291. *Id.*, at 909.

292. *Clipperton Island* case, supra note 18. See text at notes 18–22 for additional discussion of this case.

293. *Id.*, at 391.

294. *Id.*, at 392.

295. *Id.*

296. *Id.*

297. *Id.*, at 393.

298. *Id.*

299. *Eastern Greenland* case, supra note 23. See text at notes 23–27 for additional discussion of this case.

300. *Fisheries case (United Kingdom v. Norway)*, [1951] *I.C.J. Rep.* 116.

301. *Id.*, at 124.

302. *Id.*

303. *Id.*

304. *Id.*, at 124–125.

305. *Id.*, at 136–137.

306. *Id.*, at 138–139.

307. *Temple of Preah Vihear* case, supra note 243.

308. *Id.*, at 17.

309. *Id.*, at 27.

310. *Id.*, at 32.

311. *Id.*, at 27.

312. *Id.*, at 32.

313. *Id.*, at 27.

314. *Gulf of Fonseca* case, supra note 39. See text at notes 39–49 for additional discussion of this case.

315. *Id.*, at 570–579, para 356–368.

316. *Id.*, at 575–577, para 362–364.

317. *Id.*, at 577–578, para 365–366.

318. *Territorial Dispute (Libya v. Chad)* case, supra note 61.

319. *Id.*, at 15.

320. *Id.*

321. *Id.*, at 12–13.

322. *Id.*, at 35–36.

323. *Id.*, at 35.

324. *Id.*, at 36.

325. *Id.*

326. See *infra* text at notes 331–375, where this topic is addressed more directly in the context of the Dokdo matter.

327. See Shaw, *supra* note 281, at 427–428 (noting that “diplomatic protests will probably be sufficient,” but also acknowledging that this view “is not accepted by all academic writers, and it may well be that in serious disputes further steps should be taken such as severing diplomatic relations or proposing arbitration or judicial settlement”). See also Ian Brownlie, *Principles of Public International Law* 160, 3rd ed. (1979) (answering the question “what suffices to prevent possession from being peaceful and uninterrupted” by stating that “[i]n principle the answer is clear: any conduct indicating a lack of acquiescence. Thus protests will be sufficient.”).

328. See Johnson, *supra* note 4, at 353–354 (1950). See also I. C. MacGibbon, “Some Observations on the Part of Protest in International Law”, 30 *British Year Book of International Law* 293, 310 (1953).

329. See Shaw, *supra* note 281, at 428; Brownlie, *supra* note 327, at 157; and MacGibbon, *supra* note 328, at 310.

330. See Charles A. Schiller, “Closing a Chapter of History: Germany’s Right to Compensation for the Sudetenland”, 26 *Case Western Reserve Journal of International Law* 401, 430 n.187 (1994) (citing *Chamizal Arbitration*, *supra* note 284, where “Mexico not only protested the U.S.’s claim to territory diplomatically, but also brought enough diplomatic pressure to bear on the U.S. so that the U.S. eventually signed a convention, formally acknowledging that a dispute over the given territory existed between the two countries”).

331. See Seokwoo Lee, *supra* note 258, at 94 (citing *The Practice of Japan in International Law 1961–1970*, at 67–71 (Shigeru Oda and Hiyashi Owada eds. 1982)).

332. See Security Treaty, Apr. 28, 1952, U.S.-Japan, 3 *U.S.T.* 3329.

333. See Kajimura, *supra* note 89, at 424.

334. *Id.*, at 425.

335. *Id.*, at 465; and Benjamin K. Sibbett, “Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea”, 21 *Fordham International Law Journal* 1606, 1636 (1998) (citing document entitled “Takeshima” received from the Japanese Mission to the United Nations, Feb. 6, 1998).

336. Hee Kwon Park and Jong-In Bae, “Korea’s Territorial Sovereignty over Tokdo”, 29 *Korea Observer* 121, 161–162 (1998).

337. See, e.g., *Bluefin Tuna case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, Aug. 7, 2000 (art. VII Arbitral Tribunal), available at www.worldbank.org/icsid/bluefintuna/pressrelease2.htm (where Japan successfully argued that the arbitral tribunal did not have authority to reach the merits of the dispute).

338. Kajimura, *supra* note 89, at 430.

339. See Korea-Japan Basic Relations Treaty, *supra* note 79.

340. Kajimura, *supra* note 89, at 465.

341. *Id.*, at 466.

342. *Id.* (referring to testimony by Korean Foreign Minister Lee Dong-won to the Korean National Assembly after the negotiation of the 1965 Treaty). See also the summary of this matter in Han Key Lee, *supra* note 80, at 3.

343. Japan, MOFA, “Press Conference by the Press Secretary, 16 February 1996,” available at www.mofa.go.jp/announce/press/1996/2/216.html.

344. *Id.*

345. Japan, MOFA, “Press Conference by the Press Secretary, 20 February 1996,” available at www.mofa.go.jp/announce/press/1996/2/220.html. (“Our position on territorial rights over Takeshima has been the same all along—it is consistent. However, we do not want to see differences over Takeshima undermine the friendly and cooperative ties between Japan the Republic of Korea. We

value our ties with the Republic of Korea. I understand that the Republic of Korea is of the same position.”)

346. Japan, MOFA, “Press Conference by the Press Secretary, 1 March 1996,” available at www.mofa.go.jp/announce/press/1996/3/301.html (similar language).

347. Japan, MOFA, “Press Conference by the Press Secretary, 15 October 1996,” available at www.mofa.go.jp/announce/press/1996/10/1015.html (“The position of the Government of Japan [on Takeshima] has been made public for a long time, and the position has been consistent. However, we feel and are confident that we should not let this issue develop into an emotional conflict and jeopardize the friendly relations between the two countries [Japan and Korea]. Unfortunately, the two countries have a sad history. However, we have been trying to overcome the difficulties, and we would like to establish and develop good relations in that case even if we have difficulties in front of us—we have to endeavor to maintain self constraint and try to solve the issue in a quiet atmosphere.”).

348. Japan, MOFA, “Press Conference by the Press Secretary, 10 December 1996,” available at www.mofa.go.jp/announce/press/1996/12/1210.html (similar language).

349. Japan, MOFA, “1997 Diplomatic Bluebook,” available at www.mofa.go.jp/policy/other/bluebook/1997/I-b.html (“In February 1996, the different positions of the two countries regarding the Takeshima Islands became the focus of attention, but in light of the view that it would not be appropriate to allow this issue to spark an emotional confrontation between the peoples of Japan and the ROK that might harm the friendly and cooperative bilateral relations, it was confirmed during the Summit Talks in March that measures to be taken according to the ratification of the UN Convention on the Law of the Sea would be on the basis of not affecting respective positions regarding the Takeshima Islands.”).

350. Japan, MOFA, “2000 Diplomatic Bluebook,” available at www.mofa.go.jp/policy/other/bluebook/2000/I-c.html.

351. Japan, MOFA, “2001 Diplomatic Bluebook,” available at www.mofa.go.jp/policy/other/bluebook/2001/chap1-d.html.

352. Japan, MOFA, “2002 Diplomatic Bluebook,” available at www.mofa.go.jp/policy/other/bluebook/2002/chap1-e.pdf.

353. Japan, MOFA, “2003 Diplomatic Bluebook,” available at www.mofa.go.jp/policy/other/bluebook/2003/chap2-a.pdf.

354. Japan, MOFA, “Press Conference, 16 January 2004,” available at www.mofa.go.jp/announce/press/2004/1/0116.html#4.

355. Japan, MOFA, “The Issue of Takeshima” (Mar 2004), available at <http://www.mofa.go.jp/region/asia-paci/takeshima/position.html>.

356. *Teikoku's Complete Atlas of Japan* 11–12 (Editorial Department of Teikoku-Shoin Co., 1964).

357. *Japan Atlas* 10–11, 14–15 (Heibousha Cartographic Publishing Co., 1991).

358. *The National Atlas of Japan* (Geographical Survey Institute, Japanese Ministry of Construction, 1977).

359. *Id.*, at 210.

360. United Nations Charter, art. 33.

361. See Johnson, *supra* note 4, at 342.

362. Nicholas D. Kristof, “Seoul Sinks Imaginary Foe (aka Tokyo) Defending Islet”, *New York Times*, Feb. 16, 1996, at A7, col. 3.

363. Han Key Lee, *supra* note 80, at 89.

364. See text at notes 335–337.

365. Shaw, *supra* note 281, at 427.

366. Brownlie, *supra* note 327, at 157.

367. See text at notes 336–337.

368. See Johnson, *supra* note 4, at 340.

369. *Id.*, at 341 (discussing the *Chamizal Arbitration*, *supra* note 284).

370. *Id.*, (quoting from Verykios, *La Prescription en Droit International Public* 101 (1934)).

371. *Id.*, at 346 (quoting from Verykios, *supra* note 370).

372. *Id.*, at 342 (citing Verykios, *supra* note 370, at 99–109).

373. *Id.*, at 346

374. *Id.* (citing Sorensen, *Nordisk Tidsskrift for International Ret* 252 (1932) for the proposition that a “protest that leads to no subsequent result only has the effect of postponing the date of the final acquisition by prescription”).

375. MacGibbon, *supra* note 328, at 313. In the *Minquiers and Ecrehos* case, *supra* note 28, the United Kingdom had argued “that, under international law, diplomatic protests may act as a temporary bar to the acquisition of title, but that they do not act as a complete bar unless, within a reasonable time, they are followed up by reference of the dispute to the appropriate international organization or international tribunal—where such a course is possible—or, at the least, by proposals to that effect, which the other party rejects or fails to take up.” *Id.*, at 314 n. 4 (quoting from the Reply submitted by the United Kingdom, para. 230).

376. Japan-Republic of Korea Agreement on Fisheries of 28 November 1998, entered into force Jan. 22, 1999; revised Mar. 17, 1999.

377. United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc. A/CONF.62/122, reprinted in 21 *I.L.M.* 1261 (1982) and *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, UN Sales No. E.83.V.5 (1983).

378. Lark-Jung Choi, *Lessons from Korea’s Bilateral Fisheries Agreements with Japan and China* 4 (Republic of Korea Ministry of Maritime Affairs and Fisheries, Jan. 2002).

379. See *supra* note 2.

380. See, e.g., Kajimura, *supra* note 89, at 437 (explaining that “in ancient times, the Japanese regarded the two islands [Ullungdo and Dokdo] as such [‘brother islands’]”).

381. Choung Il Chee, *supra* note 94, at 29.

382. *Palmas Arbitration*, *supra* note 11, at 893–894. Palmas is an isolated island, but when one looks at a map it seems to be closer to the Philippines than Indonesia because it is 48 miles from the large Philippine island of Mindanao and the Indonesian islands it is near (it is 51 miles from Nanusa) are small and seem isolated themselves. Arbitrator Huber wrote that: “Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size).” *Id.*, at 893. Any such rule, he explained, would be “wholly lacking in precision and would in its application lead to arbitrary results.” *Id.*

383. *Id.*, at 855.

384. *Minquiers and Ecrehos* case, *supra* note 28, at 71.

385. *Gulf of Fonseca* case, *supra* note 39, at para. 368.

386. See, e.g., H. Lauterpacht, “Sovereignty over Submarine Areas”, 27 *British Year Book of International Law* 428 (1950).

387. *Eritrea-Yemen Arbitration*, 1998 Award, *supra* note 15, at para. 509–524.

388. *Id.* para. 458.

389. *Id.*, para. 472 (citing Bowett, *supra* note 32, at 48, and Lindley, *The Acquisition and Government of Backward Territory in International Law* 7 (1926), for the proposition that it is presumed that islands within territorial waters are under the sovereignty of the mainland state), 476–480 (citing, among other things, art. 6 of the 1923 Lausanne Peace Treaty, 28 *L.N.T.S.* 11 (1924), also published in 2 *The Treaties of Peace 1919–1923*, at 959 (Carnegie Endowment of Peace, 1924), to support the presumption that islands within territorial waters are under the same sovereignty as the nearby mainland).

390. See text at notes 182–185.

391. *Temple of Preah Vihear* case, *supra* note 243, discussed in text at notes 307–313.

392. The inconsistency in Japan’s 1905 claim that the islets were *terra nullius* and its later assertion that it had “occupied” the islets earlier is also pointed out in Hee Kwon Park and Jong-In Bae, *supra* note 336, at 124.

393. Han Key Lee, *supra* note 80, at 39.

394. Mary Jordan and Kevin Sullivan, "S. Korea Challenges Japan over Islands—Seoul Says It Will Conduct Military Exercises Near Disputed Territory", *Washington Post*, Feb. 13, 1996, at A15 (quoting Judge Choon-ho Park).

395. Hee Kwon Park and Jong-In Bae, *supra* note 336, at 162.

396. See, e.g., Han Key Lee, *supra* note 80, at 82 (reporting that Professor D. Bowett also "does not see this as a legal dispute," citing *Review of Contemporary Law* no. 2, at 14 (Brussels, 1965).

397. Choung Il Chee, *supra* note 94, at 4.

398. See *Palmas Arbitration*, *supra* note 11 and discussed in text at notes 11–17 and 289–291.

399. See text at notes 84–115.

400. See text at notes 111–115.

401. See text at notes 182–185.

402. Han Key Lee, *supra* note 80, at 58.

403. See text at notes 264–273.

404. See text at notes 274–278.

405. See text at notes 200–207.

406. See text at note 335.

407. See text at notes 339–342.

408. Law of the Sea Convention, *supra* note 377.

409. See, e.g., Van Dyke and Brooks, *supra* note 18; Valencia, Van Dyke, and Ludwig, *supra* note 10, at 41–45; Jon M. Van Dyke, Joseph R. Morgan, and Jonathan Gurish, "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ", 25 *San Diego Law Review* 425 (1988); and Barbara Kwiatkowska and Alfred H.a. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", 21 *Netherlands Yearbook of International Law* 153 (1990).

410. "Volga" (*Russian Federation v. Australia*), *Prompt Release, Judgment, Declaration of Judge Vukas*, *ITLOS Reports* 2002, available at www.itlos.org/start2_en.html.

411. *Id.*, para. 3–5.

412. *Id.*, para. 6.

413. *Id.*, para. 7.

414. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, reprinted in 19 *I.L.M.* 837 (1982).

415. Vukas Declaration, *supra* note 410, para. 8.

416. Fishery Limits Order (United Kingdom), S.I. 1997, no. 1750. See generally D.h. Anderson, "British Accession to the UN Convention on the Law of the Sea," 46 *International and Comparative Law Quarterly* 761, 778 (1997) (citing House of Commons Hansard, vol. 298, written answers, col. 397).

417. Van Dyke, Morgan, and Gurish, *supra* note 409, at 452. See generally O'Donnell, "Rockall—The Smallest British Isle", 23 *Sea Frontiers* 342 (1977).

418. Convention on the Continental Shelf, Apr. 29, 1958, 15 *U.S.T.* 471, *T.I.A.S.* 5578, 499 *U.N.T.S.* 311.

419. See Clive Symmons, *The Maritime Zones of Islands in International Law* 136 and 270 n.539 (1979) (citing Allen and Mitchell, "The Legal Status of the Continental Shelf of the East China Sea", 51 *Oregon Law Review* 789, 808 (1972)).

420. Ji Guoxing, "The Diaoyudao (Senkaku) Disputes and Prospects for Settlement", 6 *Korean Journal of Defense Analysis* 285, 306 (1994). See also Ji Guoxing, *Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement* (before footnote 22) (Institute on Global Conflict and Cooperation, University of California at San Diego, Policy Paper no. 19, Oct. 1995) ("China holds that the Senkaku Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have continental shelf.")

421. "Hydrographer of the Navy," 1 *Japan Pilot* 200 London; (HMSO, 1966). See also Kajimura, *supra* note 89, at 434 ("As the entire islets are rocks, there is almost no sand, let alone soil.")

422. See, e.g., Choung Il Chee, *supra* note 94, at 15 (stating that Dokdo "is a rocky island and unsuitable for human inhabitation"); Han Key Lee, *supra* note 80, at 5 ("These natural features make

Tokdo unfit for sustained human habitation.”); and *Id.*, at 33 (“this barren group of islets unfit for sustained human habitation”).

423. Douglas M. Johnston and Mark J. Valencia, *Pacific Ocean Boundary Problems—Status and Solutions* 113 (1991).

424. Jin-Hyun Paik, “Evolution of Maritime Boundary Delimitation Law and Its Implications on Northeast Asia Law” 4-2-13 (paper delivered at the 1st Annual Korean-US Marine Policy Forum, Seoul, Oct. 22–23, 1998).

425. Choung Il Chee, *supra* note 94, at 8–9.

426. For an example of what Japan’s EEZ would look like if it were claimed around every Japanese islet, see Mark J. Valencia, “Domestic Politics Fuels Northeast Asian Maritime Disputes,” 2 *Asia Pacific Issues* 43 (Apr. 2000).

427. Alex G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation* 302 (1994) (citing 29 *Japanese Ann. Int’l L.* 131(1986)).

428. Cameron W. Barr, “Tiny Islands Emerge as Big Disputes”, *Christian Science Monitor*, Feb. 16, 1996, at 6.

429. See generally Van Dyke, Morgan, and Gurish, *supra* note 409, at 429–433.

430. Statement of Robert Smith (U.S. Department of State), at Second Biennial Forum on Joint Marine Policy Research, University of Rhode Island, Oct. 8, 2004 (stating that the United States has taken the same position as Japan regarding the interpretation of Art. 121(3) of the Law of the Sea Convention, and pointing out that Dokdo does now support human habitation—the marine police stationed there by Korea).

431. See Johnston and Valencia, *supra* note 423, at 113; and Daniel J. Dzurek, “Deciphering the North Korean-Soviet (Russian) Maritime Boundary Agreements”, 23 *Ocean Development and International Law* 31, 42 (1992). In June 2006, however, Korean negotiators told their Japanese counterparts that they agreed with Japan that Dokdo should be considered to be an “island” rather than a “rock” under Article 121 of the Law of the Sea Convention.

432. Choung Il Chee, *supra* note 94, at 1–2.

433. A map showing the lines of equidistance that would be generated using Dokdo as a basepoint opposite both to Ullungdo and the Oki Islands (assuming first that it belongs to Japan and then that it belongs to Korea) can be found in Victor Prescott and Clive Schofield, “Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean”, *Maritime Briefing*, vol. 3, no. 1, at 51 (Durham, United Kingdom: Int’l Boundaries Research Unit, 2001). These authors also point out that “[i]f there was not territorial dispute it is possible that the country which did not own Liancourt Rocks would argue that it has a disproportionate effect on the course of the line of equidistance and that it should be discounted or ignored.” *Id.*, at 52.

434. Proclamation no. 2667 (usually referred to as the Truman Proclamation), Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 *Fed. Reg.* 12,303 (1945).

435. The material that follows is adapted and updated from Jon M. Van Dyke, “The Aegean Sea Dispute: Options and Avenues,” 20 *Marine Policy* 397, 398–401 (1996); Jon M. Van Dyke, Mark J. Valencia, and Jenny Miller Garmendia, “The North/South Korea Boundary Dispute in the Yellow (West) Sea,” 27 *Marine Policy* 143, 150–153 (2003); and Jon M. Van Dyke, “The Republic of Korea’s Maritime Boundaries”, 18 *International Journal of Marine and Coastal Law* 509–516 (2003).

436. *Continental Shelf (Libya v. Malta)*, [1985] *I.C.J. Rep.* 13 [hereafter cited as *Libya/Malta* case].

437. *Case Concerning Delimitation of the Maritime Boundary in Gulf of Maine Area (U.S. v. Canada)*, 1984 *I.C.J. Rep.* 246 [hereafter cited as *Gulf of Maine* case].

438. *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] *I.C.J. Rep.* 38 [hereafter cited as *Jan Mayen* case].

439. In the context of maritime delimitation, the terms “equidistance line” and “median line” seem to be used interchangeably.

440. Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law”, 88 *American Journal of International Law* 230, 244–245 (1994).

441. This approach has been used in the *Gulf of Maine* case, supra note 437, the *Libya/Malta* case, supra note 436, the *Jan Mayen* case, supra note 438, and the *Delimitation of the Maritime Areas Between Canada and France (St. Pierre and Miquelon)*, 31 *I.L.M.* 1149 (1992) [hereafter cited as the *St. Pierre and Miquelon* case]. See generally Charney, supra note 440, at 241–243.

442. *Libya/Malta* case, supra note 436, para. 66.

443. *Id.*, para. 74.

444. *Id.*, para. 75. In the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, 25 *I.L.M.* 252 (1986) [hereafter cited as *Guinea/Guinea-Bissau* case], the Arbitral Tribunal also evaluated the “proportionality” of the coasts to determine whether an “equitable solution” had been achieved by the boundary line chosen. *Id.*, para. 120.

445. *Jan Mayen* case, supra note 438, at 64–69. See also the *Eritrea-Yemen Arbitration*, 1999 Award, supra note 15, where the Tribunal relied on the test of “a reasonable degree of proportionality” to determine the equitableness the boundary line. The Tribunal was satisfied that this test was met, in light of the Eritrea-Yemen coastal length ratio (measured in terms of their general direction) of 1:1.31 and the ratio of their water areas of 1:1.09. 1999 Award, para. 20, 39–43, 117, 165–68.

446. See Charney, supra note 440, at 236 (discussing the *Libya/Malta* case, supra note 436, and the *St. Pierre and Miquelon* cases, supra note 441).

447. *North Sea Continental Shelf* cases (*Fed. Rep. of Germany v. Denmark; F.R.G. v. Netherlands*), [1969] *I.C.J. Rep.* 3.

448. *Continental Shelf (Tunisia v. Libya)*, [1982] *I.C.J. Rep.* 18 [hereafter cited as *Libya/Tunisia* case].

449. *Libya/Malta* case, supra note 436.

450. *Gulf of Maine* case, supra note 437.

451. *St. Pierre and Miquelon* case, supra note 441.

452. See Van Dyke, “Korea’s Maritime Boundaries”, supra note 435, at 528–530, 533–534.

453. *Jan Mayen* case, supra note 438, at 69, para. 70, 79–81, para. 92.

454. *St. Pierre and Miquelon* case, supra note 441.

455. *North Sea Continental Shelf* cases, supra note 447, at 45, para. 81.

456. Charney, supra note 440, at 247.

457. *Gulf of Fonseca* case, supra note 39, at 606–609, para. 415–420.

458. *St. Pierre and Miquelon* case, supra note 441, at 1169–1171, para. 66–74.

459. Charney, supra note 440, at 248.

460. *Id.*, at 249.

461. This point was developed in more detail in Mark B. Feldman, “International Maritime Boundary Delimitation: Law and Practice from the Gulf of Maine to the Aegean Sea,” in *Aegean Issues—Legal and Political Matrix* 1 (ed., Seyfi Tashan Ankara, Turkey: Foreign Policy Institute, 1995). Feldman observed that tribunals adjudicating international maritime boundary cases “never award[] a party the whole of its claim. The result is always a compromise of one form or other.” *Id.*, at 2.

462. Normally the Court will issue a decision *ex aequo et bono* only “if the parties agree thereto. . . .” *I.C.J. Statute*, art. 38(2).

463. See generally Jon M. Van Dyke, “The Role of Islands in Delimiting Maritime Zones: The Case of the Aegean Sea,” in *The Aegean Sea: Problems and Prospects* 263, ed. (Foreign Policy Institute (Ankara) Turkey: Foreign Policy Institutes, 1989); also published in *Ocean Yearbook* 8 at 44, 54–64, ed., Elisabeth Mann Borgese, Norton Ginsburg, and Joseph R. Morgan (1990); and in 61 *Trasporti* (Trieste, Italy) 17 (1993) (discussing the *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 18 *U.N.R.I.A.A.* 74 (1977), reprinted in 18 *I.L.M.* 397 (1979) [hereafter cited as *Anglo-French Arbitration*]; *Libya/Tunisia* case, supra note 448; *Gulf of Maine* case, supra note 437; and *Libya/Malta* case, supra note 436).

464. *North Sea Continental Shelf* cases, supra note 447, at para. 101(d) (“the presence of islets, rocks, and minor coastal projections, the disproportionality distorting effects of which can be eliminated by other means” should be ignored in continental shelf delimitations).

465. *Anglo-French Arbitration*, supra note 463. The Arbitral Tribunal did not allow the Channel Islands, which were on the “wrong side” of the median line drawn between the French mainland and England, to affect the delimitation at all (giving them only 12-nautical-mile territorial sea enclaves), and gave only “half effect” to Britain’s Scilly Isles, located off the British Coast near Land’s End.

466. *Libya/Tunisia* case, supra note 448, para. 129. The Court gave only half effect to Tunisia’s Kerkennah Islands, even though the main island is 180 square kilometers and had a population of 15,000, and it completely disregarded the island of Jerba, an inhabited island of considerable size, in assessing the general direction of the coastline. *Id.*, para. 120, 79.

467. *Libya/Malta* case, supra note 436, at 48 para. 64. The Court ruled that equitable principles required that the uninhabited tiny island of Filfla (belonging to Malta, 5 kilometers south of the main island) should not be considered at all in delimiting the boundary between the two countries. Even more significantly, the Court refused to give full effect to Malta’s main island, which is the size of Washington, DC, and contains hundreds of thousands of individuals, and adjusted the median line northward because of the longer length of the Libyan coast and its resulting greater power to generate a maritime zone.

468. *Gulf of Maine* case, supra note 437, at para. 222. The Chamber gave half effect to Seal and Mud Islands. Seal Island is 2½ miles long and is inhabited year-round.

469. In the *Guinea/Guinea-Bissau* case, supra note 444, the Arbitral Tribunal gave no role to Guinea’s small islet of Alcatraz in affecting the maritime boundary.

470. In the *Jan Mayen* case, supra note 438, the Court allowed the barren island of Jan Mayen to generate a zone, but did not give it a full zone because of its small size in comparison to the opposite landmass—Greenland.

471. In the *St. Pierre and Miquelon* case, supra note 441, the Tribunal gave the small French islands only an enclave and a 200 mile corridor to the high seas because of their limited size in comparison to Newfoundland.

472. *Eritrea-Yemen Arbitration*, 1999 Award, supra note 15, para. 147–148. The Tribunal also gave the Yemenese islands in the Zuqar-Hanish group less power to affect the placement of the delimitation line than they would have had if they had been continental landmasses. These islets, located near the middle of the Bab el Mandeb Strait at the entrance to the Red Sea, were given territorial seas, but the median line that would otherwise be drawn between the continental territory of the two countries was adjusted only slightly to give Yemen the full territorial sea around these islets. The Tribunal did not therefore view these islets as constituting a separate and distinct area of land from which a median or equidistant line should be measured, illustrating once again that small islands do not have the same power to generate maritime zones as do continental landmasses. *Id.*, para. 160–161.

473. *Qatar-Bahrain Maritime Delimitation and Territorial Questions*, [2001] *I.C.J. Rep.* 40, para. 219 (citing *North Sea Continental Shelf* cases, supra note 447, para. 57, and *Libya/Malta*, supra note 436, para. 64, for the proposition that “the Court has sometimes been led to eliminate the disproportionate effect of small islands”). The Court reached this conclusion even though it asserted, in para. 185, that art. 121(2) of the Law of the Sea Convention, supra note 377, “reflects customary international law” and that “islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.”

474. *Id.*, para. 245–248.

475. *Id.*, para. 245.

476. *Id.*, para. 247 (quoting from the *Anglo-French Arbitration*, supra note 463, at para. 244).

477. *Jan Mayen* case, supra note 438, at para. 81.

478. See Charney, supra note 440, at 230, 235 (discussing *Gulf of Fonseca* case, supra note 39, at 606–609 para. 415–420).

479. See generally, *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development*, ed., Mark Valencia (1981); and Valencia, Van Dyke, and Ludwig, supra note 10, at 183–187.

480. See, e.g., Prescott and Schofield, *supra* note 433, at 52 (“In the unlikely event that Japan or South Korea decided to withdraw its claim to Liancourt Rocks it might be on the basis that those islands were not used to make any maritime claims other than territorial waters.”).

481. See, e.g., Johnston and Valencia, *supra* note 423, at 114 (“By treating [Dokdo] as a sovereignty issue rather than a boundary problem, [Japan and Korea] may simply be content to agree to disagree, and leave it at that.”).

482. See Van Dyke, Valencia, and Garmendia, *supra* note 435.

483. See Clyde Haberman, “Japanese Fight Invading Sea for Priceless Speck of Land,” *New York Times*, Jan. 4, 1988, at 1, col. 3, and Jon Van Dyke, “Letter to the Editor,” *New York Times*, Jan. 21, 1988.

484. “Japan to Protest China Survey Near Okinotori—Exclusive Economic Zone in Question,” *Japan Times*, May 10, 2004.

485. See text at notes 422–425. See also Han Key Lee, *supra* note 80, at 90–91 (“For a reasonable settlement, the question of sovereignty and that of fisheries should be separately treated as in the *Minquiers and Erehos* case.”).

486. Steve Herman, “Territorial Dispute Between Japan, S. Korea Flares Up,” *Voice of America*, May 31, 2004.

487. Jin-Hyun Paik, *supra* note 424, at 4-2-2.

488. See generally Rainer Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” 78 *American Journal of International Law* 345 (1984).

489. See text at notes 376–378.

490. Law of the Sea Convention, *supra* note 377, art. 74(2) and 83(2).

491. *Id.*, art. 279–299. See generally, Jon M. Van Dyke, “Louis B. Sohn and the Settlement of Ocean Disputes,” 33 *George Washington International Law Review* 31–47 (2000).

492. See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, U.N. G.A. Res. 2625, 25 U.N. GAOR, supp. no. 28, at 121, U.N. Doc. A/8028 (1971) (“States have a duty to co-operate with one another. . .”). See also Levi, *supra* note 244, at 237–243.

493. See, e.g., United Nations Charter, art. 33.

494. See Jon M. Van Dyke, “Sharing Ocean Resources—in a Time of Scarcity and Selfishness,” in *The Law of the Sea—The Common Heritage and Emerging Challenges* ed. Harry N. Scheiber (The Hague: Kluwer, 2000).

495. Akehurst, *supra* note 245, at 235.

496. See text at notes 335–342.

497. Hee Kwon Park and Jong-In Bae, *supra* note 336, at 162.

498. Kajimura, *supra* note 89, at 468; and Han Key Lee, *supra* note 80, at 84 (referring to the “distrust prevailing among developing countries in the current composition of the judges in the ICJ and in the laws it applies”).

499. Kajimura, *supra* note 89, at 469.

500. Han Key Lee, *supra* note 80, at 84.

501. *Pulau Ligitan and Pulau Sipadan* case, *supra* note 57.

502. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, I.C.J. (pending).

503. “Japan’s Patrol Boat Opens Fire, Korean Captain Hurt,” KBS, May 24, 2004.

504. Prescott, *supra* note 3, at 48; and see text at notes 480–481.

505. See text at notes 483–484.