

Japan

# Tokdo or Takeshima?

## The International Law of Territorial Acquisition in the Japan-Korea Island Dispute

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Disputes over offshore territory in East Asia are commonplace and have proven difficult to resolve. The region's seas are relatively small in comparison to the size of the 11 bordering states, and complicating this fact is the existence of a number of small rocky islets that are the subject of competing claims to offshore sovereignty. For example, Japan's territorial disputes with the Soviet Union over the Kurile Islands and with China over the Senkaku Islands, are well known. Japan, however, has an equally long-standing, and perhaps even more entrenched, dispute with South Korea over two tiny rock islets in the Sea of Japan. To the Japanese, these rocks are known as Takeshima. To Koreans, they are Tokdo.

Since the end of World War II, Korea and Japan have contested ownership of these islets, given the name Liancourt Rocks by French whalers in the mid-1800s and called that by neutral observers to this day.<sup>1</sup> The area is currently occupied by South Korea, which maintains that it has always belonged to the Republic of Korea. "Tokdo is our territory,

historically and under international law," noted the South Korean Foreign Ministry in a press release dated February 9, 1996.<sup>2</sup> In response to that assertion, in June 1997 the Japanese countered that Liancourt belonged to Japan. "Takeshima Island is an integral part of Japanese territory and this has been our long-standing position on Takeshima Island. There is no question about this," said Foreign Ministry Spokesman Nobuaki Tanaka.<sup>3</sup>

Japan's claims to Liancourt are based mainly on historical documentation and international law as evidenced by twentieth century agreements with Korea, formal declarations of ownership and protests against Korean activities on the islands. Conversely, South Korea claims that it originally discovered Liancourt and continues to administer and maintain a presence on the islands.<sup>4</sup> Moreover, the South Korean government argues that following its liberation from Japanese colonial rule, Japan returned Liancourt as a result of bilateral and multilateral treaties, including the two states' normalization agreements.

<sup>1</sup> For objectivity, in this paper Tokdo/Takeshima Island will be referred to as the Liancourt Rocks.

<sup>2</sup> Zeno Park, "South Korea Brushes Off Japanese Protests Over Disputed Islands," *Agence France Presse*, February 9, 1996.

<sup>3</sup> "Press Conference by the Press Secretary June 3, 1997," Japanese Foreign Ministry, June 3, 1997. <<http://www.mofa.go.jp/announce/press/1997/6/603.html#2>>.

<sup>4</sup> Benjamin Sibbett, "Tokdo or Takeshima? The Territorial Dispute Between Japan and Korea," *Fordham International Law Journal* 21 *Fordham Int'l L.J.* 1606 (April 1998), 1611.

Concomitant with these historical claims, economic interests also dominate any discussion of the Liancourt Rocks. With the introduction of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), sovereignty over offshore territory has become increasingly important and complicated. Parties to UNCLOS are entitled to as much as 200 nautical miles of maritime and jurisdictional exclusivity. States that have established sovereignty over offshore territory are granted an exclusive economic zone (EEZ) around the area, giving the state exclusive fishing rights and mining access to the seabed.<sup>5</sup> Both sides, therefore, serve to gain economically from formal ownership of the islands.

This dispute recently came to a head when South Korea began printing postage stamps showing pictures of flowers and seagulls. On January 16, 2004, South Koreans arrived en masse at post offices around the country to purchase the stamps. The series, “Nature of Tokdo,” included a painting of a lonely gray island, topped with vegetation like a green toupee.<sup>6</sup> After three hours, 2.2 million stamps were sold, setting off a diplomatic row in which Japanese and South Korean leaders showed renewed hostility toward one another. Japanese officials said the issue violates the cooperative spirit of the Universal Postal Union and proposed that Japan counterattack with a “Takeshima” stamp.<sup>7</sup> The dispute set off a rash of nationalist sentiment in both countries, demonstrating the continued sensitivity of the issue.

Considering the evidence presented by

“**SOUTH KOREA ESTABLISHES A STRONGER CLAIM TO THE LIANCOURT ROCKS BECAUSE IT HAS MANIFESTED GREATER AFFIRMATIVE ACTS OF SOVEREIGNTY...**”

both sides, South Korea establishes a stronger claim to the Liancourt Rocks because it has manifested greater affirmative acts of sovereignty – as necessitated by principles of international law – on and around the disputed area. Given the islands’ ambiguous past, the dispute turns on which country has demonstrated affirmative ownership as set out by historical precedents. Nevertheless, the two sides are considered unlikely to bring this dispute before an arbitrator as such direct involvement would risk renewed hostilities and further divisions.

This paper sets out to demonstrate why South Korea has a stronger claim to the Liancourt Rocks. First, it provides a brief history of the islands in the context of Japan-

Korea relations. Second, the paper sets out the international legal standards required for formal territorial acquisition and sovereignty over an island. Then, the paper analyzes each state’s claims and sets out why Korea has a stronger title claim. Lastly, it concludes by assessing the security implications of Korea’s possession of Liancourt.

### Historical Perspectives on the Islands

Contemporary Japanese-Korean relations reflect the past to a large degree. Koreans feel an emotional need to anchor their modern day policies to recollections of former Japanese occupation and conduct. This view is manifested in the idea of *han*, which represents a combination of resentment, regret and renewed suffering. *Han* influences how Koreans reflect on the past and often stimulates the desire to revive past events as

<sup>5</sup> Article 55 of the UN Convention of the Law of the Sea defines the exclusive economic zone as “an area beyond and adjacent to the territorial sea,” which provides coastal states with various sovereign rights over living and non-living resources.

<sup>6</sup> James Brooke, “A Postage Stamp Island Sets Off a Continental Debate,” *The New York Times*, January 27, 2004, 4.

<sup>7</sup> *Ibid.*

Japan bargaining chips when dealing with Japanese businesses and government officials.<sup>8</sup> Japan, on the other hand, prefers to concentrate on the present and replace the past with a new, fruitful relationship.

The dispute over Liancourt serves to illustrate these antithetical approaches. Japan and Korea are similar geographically and culturally yet their pasts cast a dark shadow on the present. Michael Lev, a renowned international correspondent for the *Chicago Tribune*, attributes the Liancourt dispute to historical differences rather than a desire for money or territory. While the disagreement at first glance appears to be economic, in a deeper sense, Lev writes, it is “about history, a previous war, and what Koreans emotionally consider to be unfinished business with Japan.” In this sense, Korea’s status as a former Japanese colony has complicated efforts to resolve the dispute.<sup>9</sup>

#### Aftermath of Japan’s Occupation of Korea

Following the Russo-Japanese War, Japan annexed Korea in a series of forced agreements made between 1905 and 1910. During this period, Japan laid claim to the islands by officially incorporating them into Shimane Prefecture. A notice issued on February 22, 1905 declared, “The island should be designated as ‘Takeshima’ and placed under the jurisdiction of Oki Islands.”<sup>10</sup>

The end of World War II and the Japanese occupation of Korea did little to resolve the issue. The status of the Liancourt Rocks was not addressed in Article 2(a) of the 1951 San Francisco Peace Treaty, which forced Japan

to recognize Korea’s independence. Instead, the treaty provided that “Japan, recognizing the independence of Korea, renounces all right, title, and claim to Korea, including the islands of Qualpart, Port Hamilton, and Dagelet.”<sup>11</sup> The Supreme Commander for the Allied Powers then removed the Liancourt Rocks from Japanese jurisdiction and put them under US armed forces control for use as a bombing range.

Shortly thereafter, on January 18, 1952, South Korean President Syngman Rhee issued the Korean Presidential Proclamation over the Adjacent Sea. The proclamation declared Korean sovereignty over a portion of the Sea of Japan, including the Liancourt Rocks, by creating the so-called Rhee Line. The text of the proclamation asserts “Korean jurisdiction over waters within a line running 60 nautical miles from the Korean coast,” thereby staking a direct claim to the disputed territory.<sup>12</sup> Japan responded by protesting Korea’s claim and by declaring its non-recognition of the Korean claim to the rocks, thus sparking the modern controversy.

Despite disagreement over the ownership of the Liancourt Rocks, in June 1965 the two claimants signed the Treaty on Basic Relations, which normalized their diplomatic relations. No mention was made of the status of Liancourt Rocks within the treaty’s text. Instead, both sides agreed to disagree and deleted all direct mention of the islands from the final document.<sup>13</sup> The two sides did, however, pledge to seek a peaceful settlement of any future disputes through diplomatic channels.<sup>14</sup>

<sup>8</sup> Victor Cha, Georgetown University, lecture, February 17, 2004.

<sup>9</sup> Michael Lev, “A Point of Contention in the Sea of Japan: Seoul Testily Asserts Old Claim,” *Chicago Tribune*, March 4, 1996, pg. Lexis-Nexis.

<sup>10</sup> Mark Lovmo, “The Territorial Dispute Over Tokdo,” <<http://www.geocities.com/mlovmo/page4.html>>.

<sup>11</sup> Seokwoo Lee, “The 1951 San Francisco Peace Treaty With Japan and the Territorial Disputes in East Asia,” *Pacific Rim Law & Policy Journal*, 11 Pac. Rim L. & Pol’y 63 (2002), pg. Lexis-Nexis.

<sup>12</sup> Brian Bridges, *Japan and Korea in the 1990s* (Cambridge, UK: University Press, 1993), 65.

<sup>13</sup> Ibid.

<sup>14</sup> Kwan Bong Kim, *The Korea-Japan Treaty Crisis and the Instability of the Korean Political System* (New York: Praeger Publishers, 1971), 69.

## The International Law of Territorial Acquisition

The sea has always been a source of food, travel, communication links and trade. With modern technological innovations in offshore drilling and shipbuilding, the natural resources of the sea have become increasingly important. International law has thus focused on creating mechanisms for the equitable exploitation of marine resources. Subsequent international agreements, such as the 1982 Convention on the Law of the Sea, the International Maritime Organization and the International Seabed Authority, aim to govern the international use of the seas in order to prevent overexploitation and to set rules for the exclusive economic zones (EEZ) of states.

As of 2004, UNCLOS boasted 157 signatories, including Japan and the Republic of Korea. The convention entitles coastal states to 200 nautical miles of sovereign access to living and mineral resources within an exclusive economic zone. In addition, any islands and in some instances rocks that are capable of sustaining human life, over which states establish sovereignty, are also accorded individual maritime zones.<sup>15</sup> Within the EEZ, the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the fish stocks of the zone. Concurrent with the convention entering into force in February 1996, Japan and South Korea created economic exclusion zones around their respective territories, and each of these zones included the Liancourt

Rocks.<sup>16</sup> Among its other benefits, sovereign title to Liancourt would offer unilateral access to lucrative fishing areas in the Sea of Japan.

## Economic Value of the EEZ

There is little information on fish catch and the status of stocks in the area surrounding the Liancourt Rocks. In 1985, before the Korea-Japan fisheries agreement of 1998 in which both states agreed to regard the waters around Liancourt as neutral territory, total fish production was about 12 million tons. Under the 2002 Korea-Japan Fishery Agreement, South Korea was allowed to catch 149,200 tons of fish while Japan was limited to 94,000 tons. In January 2002, the actual fishing industry output by Koreans was 149,218 tons, while the Japanese caught 93,773 tons.<sup>17</sup> The East-West Center projects that the total catch could be increased to about 13 million tons if the quotas were eliminated.<sup>18</sup> Furthermore, the species composition of the catch from Liancourt's waters has changed over time. This may be due in part to the use of different fishing gear but it also implies changes in the ecosystem. Coastal fisheries stocks are in reasonable shape but there is specific concern about the stocks of flying fish, Pacific herring, sandfish, halibut, Alaska pollack, and Japanese sardine.<sup>19</sup>

## Rightful Claims to Territory

International legal scholars do not have a consensual standard for determining

“ ... SOVEREIGN TITLE TO LIANCOURT WOULD OFFER UNILATERAL ACCESS TO LUCRATIVE FISHING AREAS IN THE SEA OF JAPAN. ”

<sup>15</sup> Article 121(3) of the UN Convention on the Law of the Sea (1982) states: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

<sup>16</sup> Peregrine Hodson, “Tokyo’s Island Dispute with Seoul Worsens,” *The Daily Telegraph*, February 21, 1996, pg. Lexis-Nexis.

<sup>17</sup> Kunwoo Kim, “Korea-Japan Fish Dispute,” *Inventory of Conflict & Environment Case Studies*, April 23, 2002, <<http://www.american.edu/TED/ice/korea-japan-islands.htm>>.

<sup>18</sup> Mark Valencia (East-West Center) “Ocean Management Regimes in the Sea of Japan: Present and Future,” *ESENA Workshop*, July 12, 1998 <<http://www.nautilus.org/papers/energy/ValenciaESENA2.pdf>>.

<sup>19</sup> *Ibid.*

Japan legitimate territorial acquisition. “Once granted, however, sovereignty, in relation to a portion of the surface of the globe, gives a state a legal right to include such a portion into its territory,” writes Douglas Shaw in *International Law*.<sup>20</sup> Customary international law provides the following five principles by which international tribunals can resolve sovereignty disputes.

Cession of state territory is the peaceful transfer of territory by the owner to another state. According to R.Y. Jennings in *The Acquisition of Territory in International Law*, “The cession of a territory means the renunciation made by one State in favor of another of the rights and title which the former may have to the territory in question. This is affected by a treaty of cession expressing agreement to the transfer.”<sup>21</sup> International treaties or bilateral agreements in which the ceding state must intend to relinquish and pass sovereignty to the other state conclude these transfers. Furthermore, the receiving state must willfully accept the territory. Agreements imposed by force are void because Article 52 of the Vienna Convention on the Law of Treaties nullifies treaties procured by the threat or use of force.<sup>22</sup>

Related to this standard is the principle of subjugation, which refers to title by conquest. It is the act by which one state acquires territory by annexation following military victory. Acquisition of territory following armed conflict, however, requires further action of an international nature in addition to domestic legislation to annex, including a treaty of cession or international recognition.<sup>23</sup>

Prescription is the process of acquiring territory through a “continuous and undisturbed exercise of sovereignty lasting long enough to create a widely held conviction that the possession conforms to the standards of the international community.”<sup>24</sup> No general rules govern the length of time required to create this conviction, but if many other states protest the claim, the prescription standard is generally questioned.

Occupation is a state’s intentional claim of sovereignty over territory treated by the international community as *terra nullius*, or territory that does not belong to any other state. It is, Jennings write, “the appropriation by a state of a territory, which is not at the time subject to the sovereignty of any other state.”<sup>25</sup> Acquiring states substantiate their claim by establishing administration over the territory. In the Eastern Greenland case, the International Court of Justice stated that claims to sovereignty “based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involve 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.”<sup>26</sup>

### Empirical Examples and Case Law

In addition to the prescribed rules for establishing justified and legal claims to territory, a number of similar disputes shed light on the South Korea-Japan dispute. Resolving the Liancourt claims necessitates a comparison of the existing facts with relevant legal precedent, and several decisions by

<sup>20</sup> Douglas Shaw, *International Law* (Cambridge, UK: Grotius Publications Limited, 1991), 278.

<sup>21</sup> R.Y. Jennings, *The Acquisition of Territory in International Law* (New York, NY: Oceana Publications, 1963), 16.

<sup>22</sup> Article 52 states: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

<sup>23</sup> Shaw, 288.

<sup>24</sup> Jennings, 21.

<sup>25</sup> *Ibid.*, 20.

<sup>26</sup> “Legal Status of Eastern Greenland Case” P.C.I.J. (1933), quoted in Shaw, 299.

international adjudicatory bodies provide a framework for this analysis.

The Island of Palmas dispute between the United States and the Netherlands involved a case similar to Liancourt. The issue concerned ownership of the island of Palmas, located off the Philippine coast. The United States based its title to Palmas on discovery and Spain's subsequent cession of the Philippines to the US pursuant to the Treaty of Paris, which concluded the Spanish-American War. Spain had sovereign rights over the Philippines until the war, thus enabling the cession. The Netherlands, on the other hand, based its claim on the colonization of Palmas by the Dutch East India Company and on its subsequent uninterrupted and peaceful exercise of sovereignty over Palmas. The Netherlands claim that this sovereignty arose out of conventions entered into with the island's native princes.<sup>27</sup>

In the Permanent Court of Arbitration's decision, rendered by Justice Max Huber, the court stressed the importance of continuous and peaceful displays of sovereignty. Rejecting the United States' claims of discovery, the court awarded Palmas to the Netherlands, concluding that discovery is insufficient to establish sovereignty over an island. The court decided:

If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title – cession, conquest, occupation, etc. – superior to that which the other state might possibly bring forward against it. However, if the contestation is based on the fact that the other party has actually displayed sovereignty, it cannot be sufficient to

establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.<sup>28</sup>

Thus the court held that effective occupation completed title of the territory claimed to have been part of the Netherlands. Mere discovery of land cannot compete against the continuous and peaceful display of sovereignty by another state.

In another case, the Clipperton Island dispute between France and Mexico, the court applied the *Palmas* rules to Clipperton, an unpopulated island in the Pacific Ocean. In the dispute, Mexico claimed that Spain originally discovered the island and as the successor of the Spanish state, Mexico should be awarded full title to the land. France, for its part, argued that it obtained Clipperton in November 1858 as a result of a French Navy lieutenant's discovery of the island and the subsequent proclamation, declaration, and notification of the French consulate.<sup>29</sup>

The arbitrator found no decisive proof that Spain discovered Clipperton. It concluded that even if one assumes that Spain discovered Clipperton, Mexico did not support its claims with the requisite manifestations of sovereignty. Consequently, Clipperton Island was *terra nullius* when France staked its original claim. Therefore, the question posed to the court was whether either claimant had completed its ownership claims by actual manifestations of

<sup>27</sup> Sibbett, 1625.

<sup>28</sup> Jennings, 92.

<sup>29</sup> Shaw, 296.

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sovereignty as determined by the *Palmas* case.

According to Shaw’s *International Law*, “The arbiter concluded that the actual, and not the nominal taking of possession was a necessary condition of occupation.”<sup>30</sup> Since Mexico engaged only in the symbolic act of hoisting its flag, it did not display the requisite peaceful and continuous acts of sovereignty. In granting Clipperton to France, the arbiter found that France manifested its sovereignty over the island by a formal proclamation of sovereignty, a formal protest to Mexico’s assertions of title, a formal naval landing on the island and the creation of a guano procurement station. As such, Shaw writes, both the *Palmas* and *Clipperton* decisions demonstrate that “in the case of uninhabited areas, little is required by way of displaying actual physical authority over the territory to effectuate possession.”<sup>31</sup> These acts, however, are necessary to complete a state’s title to any territory.

“ THE ARBITER CONCLUDED THAT THE ACTUAL, AND NOT THE NOMINAL TAKING OF POSSESSION WAS A NECESSARY CONDITION OF OCCUPATION ”

only acquired title to the island during its illegal occupation of the Korean peninsula and that Korea’s subsequent liberation gives it a legal claim to the land.

*Japan’s Claims to Takeshima*

The earliest Japanese records documenting the existence and ownership of Takeshima date to 1650 and indicate the granting of the territory to what is known today as Tottori Prefecture. Japan also asserts that numerous pre-nineteenth century documents provide a sound basis for its historical claim. The Japanese Ministry of Foreign Affairs, for example, points to a 1779 map by Sekisui Nagakubo, which represents the location of Takeshima as part of Japan. Furthermore, the Foreign Ministry points to historical documents dating to 1618, which purport to provide evidence of Japanese fishermen’s use of the Liancourt Rocks. Japan also contends that it occupied Takeshima during the Seven

Years’ War and the Russo-Japanese War.

Most important for Japan’s case, however, was its annexation of Korea between 1905 and 1910. The Japanese claim to have incorporated Liancourt – land they considered to be *terra nullius* – into Shimane Prefecture on February 22, 1905. After having declared Takeshima as a part of Imperial Japan in February 1905, Japanese officials registered the island in the State Land Register for Okinokuni, District 4.<sup>32</sup>

Japan contends that as part of its annexation of Korea, all Korean territory became Japanese. It asserts, “the measures to incorporate Takeshima reaffirmed the

**International Legal Claims to the Liancourt Rocks**

As noted above, Japan’s claims to Takeshima are based on historical documentation and international law. The Japanese government points to agreements with the Korean government, formal declarations of ownership, and formal protests against Korea’s activities on the island. In response, Korea argues that it originally discovered Liancourt and continues to administer and maintain a presence on the island. It contends that Japan

<sup>30</sup> Ibid., 296.  
<sup>31</sup> Ibid., 297.  
<sup>32</sup> Lovmo.

intention of the Japanese government to claim territorial rights as a modern nation over Takeshima. In addition, the incorporation of Takeshima was reported in the newspapers and was not undertaken secretly, hence it was implemented validly.”<sup>33</sup> Accordingly, in Japan’s view the annexation of Korea consisted of a peaceful, voluntary, and negotiated merging of both countries.

Following Japan’s defeat in World War II, the Allied Powers invalidated Japan’s title to Takeshima. The Supreme Commander for the Allied Powers (SCAP) issued SCAPIN 677, which outlined Japanese territory and specifically instructed that the disputed islets were to be excluded from Japanese administrative authority. The directive included a caveat, however, stating that the document would not represent a final decision regarding the attribution of Japanese sovereign territory.<sup>34</sup> Japan therefore maintains that Takeshima rightfully belongs to it and ought to be returned.

During negotiations over the 1951 San Francisco Peace Treaty, Japan tried to regain administrative ownership of Takeshima. These efforts were unsuccessful, however, and the issue remained off the table largely because of Syngman Rhee’s announcement of the “Rhee Line” just months before the San Francisco talks.

Japan’s confidence in its position resurfaced in September 1954 when it threatened to refer the matter to the International Court of Justice. Since then, Japan dispatches an annual notice to Seoul to remind the Korean government of Japan’s claims to the island. It also regularly sends Maritime Safety Agency vessels to the area in order to hoist the Japanese flag.

### *South Korea’s Claims to Tokdo*

The South Korean claim to Tokdo is based on earlier, more numerous precedents than that of Japan. Korean experts claim that numerous eighth-century historical records prove that the area was first incorporated into the Korean Shilla Dynasty in 512 A.D. In addition, Korea asserts that numerous maps, including one by Japanese cartographer Dabuchi Tomohiko, verify its title to Tokdo.<sup>35</sup>

“The Japanese government cites the *Onshu Shicho Goki* (Records on Observation in Oki Province) edited by Saito Hosen in 1667 as the first record on Tokdo,” writes Yong-Ha Shin in *A Historical Study of Korea’s Title to Tokdo*. “Saito was a retainer of the *daimyo* of Izumo and at his lord’s behest made an observation trip to Oki Island. In Saito’s report, Tokdo and Ullungdo were both ascribed to Korea and Oki to Japan as its westernmost border. This first Japanese record on the islands clearly places Oki within Japan’s territory and Tokdo within Korea’s.”<sup>36</sup>

Korea also maintains that it was in a weakened position vis-à-vis Japan in 1905, when Tokdo was incorporated into Shimane Prefecture. The South Korean government argues that Korea was unable to protest the Japanese move at the time because Japan had forcibly taken control of Korea’s foreign affairs under the Protectorate Treaty. Furthermore, South Korea claims that after World War II, Japan returned Tokdo as part of the 1943 Cairo Declaration and the 1945 Potsdam Proclamation, which ended Japanese control of Korea. The Cairo Declaration pledged that Korea would be free and independent after declaring, “Japan shall be stripped of all the islands in the Pacific

<sup>33</sup> “The Issue of Takeshima,” The Japanese Ministry of Foreign Affairs, March 2004 <<http://www.mofa.go.jp/region/asia-paci/takeshima/position.html>>.

<sup>34</sup> Ibid.

<sup>35</sup> Lovmo.

<sup>36</sup> Yong-Ha Shin, “First Japanese Record on Tokdo,” from *A Historical Study of Korea’s Title to Tokdo* <[http://www.tokdo.com/english/tokdo\\_02.htm](http://www.tokdo.com/english/tokdo_02.htm)>.



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which she has seized or occupied . . . Japan will also be expelled from all other territories which she has taken by violence and greed.”<sup>37</sup>

In 1946 SCAP issued Directives No. 677 and No. 1033, in which Japan is defined as including the four main islands and approximately a thousand smaller adjacent islands. The directive, however, specifically excluded Ullungdo, Chejudo and Tokdo. Given that the directive was made without the participation of Korean diplomats, Tokdo was clearly recognized as Korean territory by the international community.<sup>38</sup> Furthermore, the Treaty of Peace with Japan stated in its territory clause that Japan, “recognizing the independence of Korea, renounces all right, title and claim to Korea, including Chejudo, Komundo and Ullungdo.”<sup>39</sup> The names of the islands were cited as illustrations but obviously not as an exhaustive enumeration. Therefore, all other small islands around the Korean Peninsula, including Tokdo, were not mentioned but should not be considered as excluded.

Subsequent to the end of the Japanese occupation, Tokdo saw its first Korean inhabitants. Since then, there has been a continual Korean presence of at least one or two fishing families and a permanent coast guard. The South Korean government has also taken steps to develop the area. In 1995 for example, the government began building harbor facilities and announced plans to install a desalinization plant to provide drinking water for Tokdo’s inhabitants. Beginning in March 1996, tourists were allowed to visit the island and upgraded navigational facilities made access to Tokdo easier.<sup>40</sup> Such measures are part of a larger

campaign to make the South Korean government’s claims to territory clear and to establish a permanent presence on Tokdo.

#### *Superior Claims Under International Law*

In order for either state to gain the exclusive economic zone afforded by Liancourt, it must first establish internationally recognized sovereignty over the island. Considering the claims of both sides to the Liancourt Rocks, Korea has established the stronger claim because it has manifested greater acts of sovereignty in the area. While Korea offers limited arguments that it acquired Liancourt as a result of a particular method of territorial acquisition, it has demonstrated ownership by manifesting relevant, affirmative acts of sovereignty as necessitated by the *Palmas* and *Clipperton* decisions.

Despite Japan’s reliance on the 1905 and 1910 annexation treaties by which it argues that all Korean territory became Japanese, it is questionable whether Korea intended to give up its title and pass sovereignty to the Japanese, as is required for a valid cession. Indeed, Korea resisted the annexation period with uprisings, protests, and a continual struggle to gain independence. Additionally, when news of Japan’s incorporation of Tokdo reached Korea, the Minister of Home Affairs rejected the Japanese claim, stating, “it is totally groundless for the Japanese to lay claim to Tokdo and I am shocked at the report.”<sup>41</sup> The Korean State Council responded by issuing Directive No. III on April 29, 1906, wherein the council denounced the Japanese claim as groundless.

Japan points to the absence of any action

<sup>37</sup> “Cairo Declaration of 1943,” from the National Diet Library of Japan <<http://www.ndl.go.jp/constitution/e/etc/c03.html>>.

<sup>38</sup> Sun Myong Kim, “Tokdo,” University of Tennessee-Knoxville, 1996. <<http://enigma.phys.utk.edu/~kim/tokdo.html>>.

<sup>39</sup> Ibid.

<sup>40</sup> “Lighthouse Planned on a Disputed Islet,” *Wall Street Journal*, December 13, 1996.

<sup>41</sup> Yong-Ha Shin, “Korean Government’s Reaction,” from *A Historical Study of Korea’s Title to Tokdo* <[http://www.tokdo.com/english/tokdo\\_07.htm](http://www.tokdo.com/english/tokdo_07.htm)>.

on the part of the Korean government when the area was annexed but does not acknowledge that the Japanese Resident-General in Korea was responsible for foreign affairs, leaving the Korean government no diplomatic channel for disputing the Japanese claim. Protestations of a peaceful transfer reflect more on the harsh control of the Japanese over Korea during the occupation period than on actual events. Finally, any argument that Korea voluntarily merged into Japan as a result of peaceful negotiations has been refuted repeatedly by a variety of documentary sources. As such, Japanese claims to title based on cession fail.

Japan and South Korea would have difficulty propounding any claims under the prescription standard. South Korea continually protests Japan's annexation rule and Japan continuously protests South Korea's presence on Takeshima. These protests undermine prescription's requirement of an undisturbed exercise of sovereignty and a general conviction that the claim conforms to the international order. While Japan could argue that the international community did not protest its occupation of Tokdo or the entire peninsula between 1905 and 1945, Japan cannot demonstrate that its sovereignty remained undisturbed after granting Korea independence.<sup>42</sup>

Japan has a strong claim to acquiring Liancourt by subjugation. By issuing a formal annexation order following its conquest of Korea, Japan established sovereignty over the peninsula and its holdings. An international adjudication body might consider this a handover of title to Japan. If, however, South Korea can prove that Japan forced Korea to

cede Liancourt to Japan, such an act would be cession rather than subjugation. As noted earlier, since Korea did not intentionally relinquish title to Japan, Japanese claims based on cession are likely to fail.

Japanese claims to sovereignty based on occupation are also weak. Occupation presumes that the occupied territory did not already belong to a state. Liancourt's history, however, appears to show that the island initially belonged to Korea. Furthermore, Japanese claims to sovereignty based on the annexation treaties negate any claim to have discovered Takeshima because the treaties concede a lack of initial ownership. If, on the other hand, South Korea can prove that it had original title based on discovery, then it has

good chance of establishing complete title by effective occupation as set out by the *Palmas* decision. Under the *Palmas* and *Clipperton* standards, Korea's manifestations of sovereignty, including permanent Korean

inhabitants and the construction of infrastructure, should prove sufficient to demonstrate effective occupation.<sup>43</sup> Japan's occupation, by contrast, was not continual and only occurred during times of unrest. There is no indication of a Japanese presence on the island since World War II ended.

South Korea has an enormous advantage over Japan because it has *de facto* possession of the islands and has undertaken a variety of infrastructure projects and improvements. As the *Palmas* decision shows, international judicial bodies highlight establishing sovereignty through positive acts, especially when occupying a territory. Effective possession of the Liancourt Rocks generally entitles Korea to the claim.

“ JAPAN AND SOUTH KOREA WOULD HAVE DIFFICULTY PROPOUNDING ANY CLAIMS UNDER THE PRESCRIPTION STANDARD. ”

<sup>42</sup> Sibbett, 1641.

<sup>43</sup> Ibid.

Japan

Japan may claim that formal protests such as hoisting the Japanese flag on the island and sending ships to the area are sufficient signs of sovereignty, but a judicial body might find otherwise. In the *Clipperton* case, Mexico tried to substantiate its claim by raising a Mexican flag on the island and by sending a warship to defend the island from takeover. Nonetheless, the court in the case found these acts insufficient to substantiate Mexico's claim.

Ultimately, South Korea has a stronger claim to Liancourt than does Japan. Japan's claims rest largely on numerous agreements with the Korean government, implying that the islands originally belonged to Korea. Accordingly, assuming Korea originally possessed Liancourt and can prove that it completed its original claim by subsequent affirmative manifestations of sovereignty, a judicial body should find in its favor.

**An Atmosphere of Compromise**

Throughout the post-World War II history of Korea and Japan, the two governments have been embroiled in disputes over Tokdo/Takeshima. Central to this dispute are the economic implications of access to the island's exclusive economic zone. Both states believe that the area is one of their most important fishing fields given the size of fish stocks in its waters. For this reason, the longstanding issue will likely feature in bilateral discussions and cause frictions in the years to come, although neither country seems willing to break off relations over a minor territorial dispute. Despite a history of tensions related to the island, none has risen to the level of extreme discord. Instead, both states appear willing to compromise and

cooperate. Negotiations, including agreements granting the Japanese access to Tokdo's fishing areas, are one way in which the South Korean government is trying to mend relations with its former colonizer.

Flare-ups do occur periodically, however, as in the 1999 example in which Tokyo and Seoul tried to register permanent addresses on the islands. Seoul reacted by sending a letter to Tokyo calling for "immediate cancellations of the registrations." Tokyo responded by stating it "cannot bar its residents from shifting census registrations, as the island is part of its territory."<sup>44</sup> Despite this exchange of letters, neither country was willing to escalate tensions and each dropped the issue within days.

Additionally, after South Korea announced plans to construct a lighthouse and permanent coast guard stations on the Liancourt Rocks, Japan protested by sending a formal letter to Seoul but quickly dropped the issue. The postage stamp dispute mentioned above, while initially a matter of contention, has subsided; both sides have essentially agreed to disagree. Thus, while both states maintain their claims to the islands and are angered by measures to assert title by the other side, they are willing to compromise.

In November 1998, South Korea and Japan agreed to renew a 1965 treaty that set a provisional fishing zone around the islands. Under the agreement, fishing boats from Japan and South Korea were allowed to operate in each other's 200 nautical mile exclusive economic zones if they obtained permits, while fishing quotas and conditions for such operations were to be decided by the two countries every year.<sup>45</sup> This agreement

“ULTIMATELY, SOUTH KOREA HAS A STRONGER CLAIM TO LIANCOURT THAN DOES JAPAN.”

<sup>44</sup> Roger Dean Du Mars, "Address Registration Revives Islands Dispute," *South China Morning Post*, December 28, 1999.  
<sup>45</sup> "South Korea, Japan Agree Fisheries Treaty," *BBC Monitoring Asia Pacific*, November 28 1998.

laid the foundation for a subsequent 2002 fisheries accord in which each state agreed to lower its catch quota in order to preserve depleting fish stocks around the islands.

Despite this paper's conclusion that South Korea has a better legal claim to Tokdo, the two states are unlikely to bring the issue before an international arbitrator. Instead, Japan will likely remain adamant in its claim but not push the issue formally as long as other, more important territorial disputes exist. Given the need for a close

bilateral relationship between Japan and South Korea, the two sides will likely resolve any remaining disputes related to Tokdo by compromise and agreement. Korea will likely maintain possession of the islands in order to protect its historical claims. Since Japan is mainly concerned with its economic interests, however, it will continue to pursue fishery agreements similar to the 2002 pact to ensure its continued access to the lucrative waters of the Sea of Japan.