Who Owns Tok-Do/Takeshima? Should These Islets Affect the Maritime Boundary Between Japan and Korea?

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WHAT PROCEDURES SHOULD BE UTILIZED TO ADDRESS THIS DISAGREEMENT?

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This paper analyzes the legal issues related to two rocky islets and 32 even smaller outcroppings with a combined land area of 0.18 square kilometers in the East Sea/Sea of Japan, called Tok-Do by Korea, Takeshima by Japan, and the Liancourt Rocks by various Western explorers and colonial writers.[1] East Island (Dong-Do in Korean) has a circumference of 1.9 kilometers and West Island (Seo-Do) has a circumference of 2.8 kilometers.[2] These islets are located 87.8 kilometers (about 50 miles) from Korea's Ullung-Do[3] and can be seen from Ullung-Do on a clear day.[4] They are 90 miles from

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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 *Id.*

3 *Id.* at 10.

Japan's Oki Islands. Korean scholars contend that they have been claimed historically by Korea for centuries, but Japan claimed them in 1905 as *terra nullius* at the time Japan began exercising effective control over all of Korea. They have been occupied by the Republic of Korea since it regained its independence after World War II.

Because both Japan and Korea claim the islets, it has become difficult to address and delimit the exclusive economic zone and continental shelf boundaries between these two countries in the East Sea/Sea of Japan. This paper examines the issues related to sovereignty over the islets, the effect, if any, that Tok-Do 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 TOK-DO/TAKESHIMA

The international legal system has resolved ownership disputes over small islands by examining evidence related to the issues of (a) discovery, (b) effective occupation, (c) acquiescence, and (d) contiguity. Sometimes a claim based effective occupation and acquiescence will also be characterized as a claim of prescription.[5] Previously claims have been based on subjugation, but international law no longer recognizes the legitimacy of the acquisition of territory through force.[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 the historical evidence can also be important. As applied to Tok-Do, the recent occupation of the islets by the Republic of Korea since World War II is likely to be the most important factor that a tribunal would consider. But it will also be important to examine the

4 *See id.* at 68-69 (showing photographs of Ullung-Do as seen from Tok-Do at sunset); *see also* picture of Tok-Do taken from Ullung-Do at sunrise in March 1992 in Hongju Nah, A Study of Territorial Sovereignty over the Dokdo Islets in Light of International Law 6 (199?).

5 *See generally* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 Conn. J. Int'l L. 1, 19 (2000).

6 [U.N Charter; Kellogg-Briand Pact, etc.]

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 peace treaties ending the hostilities of World War II.

Korea's claim to Tok-Do is based on a series of historical episodes that demonstrated administrative control over the islets. In most of these incidents, Tok-Do was viewed by the Korean authorities as a part of or an appendage to Ullung-Do, and they were administered together.

Japan's claim to what it calls Takeshima is based on its view that the islets were *terra nullius* in 1905 when they were claimed by the Shimenioseki (sp?) Prefecture and subsequently administered as part of this prefecture for the next 40 years.[7] 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. It may also be significant that the Japanese reliance on the *terra nullius* argument effectively nullifies the relevance, from their perspective, of all the activities that concerned the islets prior to the annexation by the Shimane Prefecture in 1905.

A Survey of Decisions of International Tribunals Regarding Sovereignty Disputes of Small Islets.

All judicial and arbitral decisions regarding sovereignty disputes over islands since World War II have focused on which country has exercised actual governmental control over the feature during the previous century, rather than on earlier historical records.[8] The first major decision by the International Court of Justice regarding ownership of an isolated uninhabited island feature was the decision in the *Minquiers and Ecrehos Case,*[9]

7 *See Gulf of Fonseca Case*, 1992 ICJ 351. The ICJ awarded both the inhabited island of Meanguera and the uninhabited island of Meanguerita to El Salvador, concluding that Meanguerita was an appendage because of its dependency on the larger, inhabited island. [expand on this]

8 *See generally* Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, Sharing the Resources of the South China Sea 17-19 (1997).

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."[10] This view was followed in the *Gulf of Fonseca Case*,[11] where the court focused on evidence of actual recent occupation and acquiescence by other countries to determine title to disputed islets, and in the recent decisions in the *Eritrea-Yemen Arbitration*,[12] 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: 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.[13]

This same approach was utilized by the International Court of Justice in its recent decision resolving a dispute between Malaysia and Indonesia over two tiny islets Ligitan and Sipadan.[14] The larger of the islets (Sipadan) is 0.13 square kilometers in size.[15] Neither has been inhabited historically, but both have lighthouses on them and Sipadan has recently been developed into a tourist resort for scuba-diving.[16] The Court first addressed arguments based on earlier treaties, maps, and succession, but found that they did not establish any clear sovereignty.[17] It then looked at the *effectivites* 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.[18]

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9 *Minquiers and Ecrehos Case (France/United Kingdom)*, 1953 I.C.J. 47.
10 *Id.* at 57 (emphasis added).
11 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, 1992 I.C.J. 351, 606-09, paras. 415-20 [hereafter cited as *Gulf of Fonseca Case*].
12 *Eritrea-Yemen Arbitration*, <http://www.pca-cpa.org> (1998-99).
13 *Id.*, 1998 Award, para. 239.
14 *Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. (Dec. 17, 2002).
15 *Id.* para. 14.
16 *Id.*
17 *Id.* paras. 58, 72, 80, 92, 94, 96, 114, and 124.
18 *Id.* para. 126 (*citing Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986 I.C.J. 587 para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J. 38 paras. 75-76; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial*

Indonesia claimed title based on various naval exercises in the area conducted by themselves and previously by their 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.[19]

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 Tok-Do/Takeshima. 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.[20] In areas in thinly populated or unsettled countries, the Court has been satisfied with very little,[21] but the contrary claims of other countries will also be relevant.[22] The Court relied upon 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.[23] 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.[24]

The consistent reasoning in these ICJ decisions appears to strengthen Korea's claim of sovereignty to Tok-Do. Korea was not in a position to exercise control during the first part of the twentieth century, because it had been annexed by Japan, but as soon as it regained its independence it asserted control over the islets, and has

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Guinea intervening), 2002 I.C.J. , para. 68).

19 *Id.* para. 132.

20 *Id.* para. 134 (quoting from *Legal Status of Eastern Greenland (Denmark v. Norway)*, P.C.I.J. Series A/B, No. 53, at 45-46).

21 *Id.* para. 134 (quoting from *Legal Status of Eastern Greenland, id.*, at 45-46).

22 *Id.* para. 134 (quoting from *Legal Status of Eastern Greenland, id.* at 45-46). In this regard, the Court noted that it was significant that Indonesia's map of its archipelagic baselines do 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.

23 *Id.* para. 135.

24 *Id.* para. 140.

continued to exercise sovereignty over them since then. In July 2001, the South Korean National Maritime Police Agency announced it would commission a 5,000-ton-class vessel carrying a crew of 97 entitled the *Sambong*, the name of Tok-do during the Choson Dynesty to patrol the waters around Tok-do beginning in February 2002.[25]

The Historical Record Regarding Exercises of Sovereignty by Korea and Japan Regarding Tok-Do/Takeshima

512 - 1416: Korea Subjegates and Administers Ullung-Do. A survey of the Silla Kingdom published during the Choson dynasty in 1454, called The Annals of the Kingdom of Silla,[26] included the report that the Silla Kingdom conquered the kingdom of Usan'guk on what is now called Ullung-Do in 512, and Korean scholars contend that this conquest included Tok-Do as well. The early records are confused and difficult to interpret, in part, because the names of these islands appear to have changed during the years. As for the Korean appellation, Todko was originally called Usando, implying its derivation from Usan'guk.[27] Although the records regarding activity connected with these islands during this early period are very limited as far as Ullungdo is concerned, there is evidence that Koreans lived there and the government attempted to control it politically.[28]

1416 - 1881: Korea's Vacant Island Policy. From 1416 until 1881, Korea removed the inhabitants of Ullung-Do because of what Korean scholars have termed a vacant island policy.[29] This policy, initiated by King T'aejung in the early years of the Choson

25 Yonhap News Agency, *South Korea Commissions New Patrol Boat for Disputed Isle Area*, July 13, 2001.

26 *See* Kazuo Hori, *Japan's Incorporation of Takeshima into Its Territory in 1905*, 28 Korea Observer 477, 479 (1997) (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).

27 Shin, *supra* note , at 334.

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

dynasty, was apparently designed to prevent Korean occupants of Ullung-Do from evading taxes and dodging military service, as well as to protect them from Japanese marauders.[30]

The 1667 report of an observational trip to Oki Island in 1667 is the earliest known Japanese governmental reference to Ullung-Do and Tok-Do.[31] This report stated that the two islands are uninhabited and getting a sight of Koryo [Korea] from there is like viewing Oki from Onshu.[32]

1693-99: Japan Recognized Ullung-Do and Tok-Do as Korean Territory. In 1693, a fight erupted between Korean and Japanese fishers over fishing rights off the shores of Tok-Do and Ullung-Do. Referred to by Japanese authors as the Takeshima Incident (because the Japanese then called Ullung-Do Takeshima and referred to Tok-Do as Matsushima or Usando), this dispute was brought before the Japanese government for adjudication.[33]

Eighteenth Century: Japanese Cartographers Draw Tok-Do as Korean Territory. In the eighteenth century, Japanese scholars began producing color-coded maps that pictured Japan and its surrounding countries. 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.[34] Hayashi painted Tok-Do and Ullung-Do in yellow, and wrote next to the depictions of the islands: Korea's possessions or belong to Korea.[35] Two other Japanese maps were produced about this same time using color schemes that acknowledged Ullung-Do and Tok-Do as Korean

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29 *See, e.g.,* Hoon Lee, *supra* note --, at 393; *see also* Shin, *supra* note --, at 334-35, Hori, *supra* note --, at 484-85, and Kajimura, *supra* note --, at 444 (noting that [t]his policy was taken in 1416 and implemented in earnest in 1438 and continued until 1881).

30 *See* Hoon Lee, *supra* note --, at 397-98, (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 Ullung-Do to bring back its inhabitants); Chuong Il Chee, *supra* note , at 6.

31 *See* Shin, *supra* note --, 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)).

32 *Id.*

33 *See* Hoon Lee, *supra* note --, at 400-18.

34 *See* Shin, *supra* note --, at 344.

35 *Id.*; this map is reproduced in Hongju Nah, *supra* note , at 21.

possessions.[36]

The Events of the Late Nineteenth and Early Twentieth Century.

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 hierarchical relationship with China during this period and then it was overwhelmed by the military interventions of Japan at the turn of the century.

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.

By the early 1890s, a revolutionary movement that had been building in Korea for several years evolved into a well-organized uprising.[37] Korea was unable to suppress the strength of the revolutionary army, and requested assistance from China.[38]

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.

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36 *Id.* (referring to another map by Hayashi entitled *Dainihonzu* (A Great Japan's Map), and a 9map called *Soezu* (A Complete Illustrated Map)).

37 *See, e.g.,* Duus, *supra* note , at 66.

38 *Id.* at 67.

Strategic Maneuverings 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.

Japan's Increasing Influence in Korea During the Russo-Japan 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 in February 1904.

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.[39]

1868 - 1904: What Was Happening in and Around Tok-Do/Takeshima? 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 Tok-Do/Takeshima during this period.

During the 1870s, Japanese fishers began submitting applications to exploit the resources found on and around Ullung-Do, including lumber and abalone.[40] The Meiji government denied the applications, however, adhering to the ban of the Takeshima Incident.[41] Toward the end of this decade, Japanese fishers began to confuse the names of Ullung-Do, Takeshima, and Matsushima on their applications.[42]

1905: Japan Incorporates Tok-Do/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

39 *See* Ki Baik-Lee, *supra* note , at 308.
40 *See* Kajimura, *supra* note --, at 453-54.
41† *Id.*
42† *Id.* at 453.

Ullung-Do, with cables extending to the Korean mainland,[43] and then built two more watchtowers on Ullung-Do during the summer of 1905.[44]

Post-War Treaties Solidified Japan's Occupation. The Treaty of Portsmouth, signed on September 5, 1905, officially brought to an end the Russo-Japanese War.[45] 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.[46] Russia also agreed to acknowledge Japan's interests in Korea:

Japan Prepared for Annexation as Korea's Protests Were 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.[47] 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.[48]

International Law Principles Governing the Acquisition of Territory by Discovery of *Terra Nullius*

The basis for the current Japanese claim to Tok-Do/Takeshima traces back to the historical events just described, and rely on the 1905 incorporation of the islets into the Shimane Prefecture. For Japan to prevail on this claim, it would have to convince a decisionmaker that Tok-Do/Takeshima was *terra nullius* as of 1905, that Japan had acted properly in claiming and incorporating the islets, and that nothing has happened

43 *See* Kazuo Hori, *Japan's Incorporation of Takeshima into Its Territory in 1905*, 28 Korea Observer 477, 511-12 (1997), as revised from an earlier publication in Chosenshi Kenkyukai Ronbunshu (A Collection of Articles on Korean History), No. 24 (Tokyo, 1987); Shin, *supra* note , at 351.

44 Hori, *supra* note , at 514.

45 The Treaty of Portsmouth, Sept. 5, 1905, Japan-Russ., *at* http://www.lib.byu.edu/~rdh/wwi/1914m/portsmouth.html.

46 *Id.* art. 3.

47 *See* Sunoo, *supra* note , at 200.

48 *See* Ki Baik-Lee, *supra* note , at 311.

subsequently to question or dislodge Japan's claim to the islets. It may be of substantial significance that Japan's claim is therefore *not* based on any Japanese acts of sovereignty regarding the islets *prior to* 1905.

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,[49] or, in another phrasing, immediately before acquisition, belonged to no state.[50] 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.[51]

1905-1945: 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 Tok-Do/Takeshima.

The Events, Documents, and Decisions Following World War II.

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,[52] the Yalta Agreement,[53] and the Potsdam Proclamation.[54]

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

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

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

51 Levi, *supra* note , at 130.

52 Declaration of the Three Powers-Great Britain, the United States and China regarding Japan, Nov. 27, 1943, *at* http://www.ndl.go.jp/constitution/e/etc/c03.html [hereafter cited as Cairo Declaration].

53 The Yalta Agreement, Feb. 11, 1945, *at* http://www.ndl.go.jp/constitution/e/etc/c04.html.

54 Proclamation Defining Terms for Japanese Surrender, July 26, 1945, *at* http://www.ndl.go.jp/constitution/e/etc/c06.html.

the unconditional surrender of Japan. The declaration addressed the need to punish the aggression of Japan and free an enslaved Korea, but the detailed terms relating to the treatment of the acquired territories of Japan are not specified to an extent that can be relevant in the Tok-Do/Takeshima debate.

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.[55] 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 Tok-Do/Takeshima 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.[56]

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.[57] 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 Tok-Do/Takeshima.

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.[58] Tok-Do/Takeshima was one of the islands that was removed from Japanese control: For the purpose of

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55 Yalta Agreement, *supra* note .

56 Potsdam Proclamation, *supra* note .

57 Instrument of Surrender, Sept. 2, 1945, Japan-US, *at* http://www.ndl.go.jp/constitution/e/etc/c05.html.

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

this directive, Japan is defined to include the four main islands of Japan and excluding Liancourt Rocks.[59]

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.[60] The Instruction placed Tok-Do/Takeshima 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 Tok-Do/Takeshima under Article 7 of the Potsdam Proclamation.[61] SCAPIN No. 677 placed Tok-Do/Takeshima 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.[62]

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,[63] to settle questions still outstanding as a result of the existence of a state of war between them,[64] 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].[65] Tok-Do/Takeshima was not mentioned in the

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59 *Id.*, Article 1.

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

61 Supreme Commander for the Allied Powers, *Memorandum for Japanese Government: Liancourt Rocks Bombing Range*, SCAPIN No. 1778 (Sep 16, 1947).

62 *Id.* at Article 1.

63 Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (hereinafter San Francisco Peace Treaty) *at* http://www.taiwandocuments.org/sanfrancisco01.htm.

64 *Id.*, Introduction.

65 *Id.* art. 2(a).

Treaty.

Korea's Occupation of Tok-Do Since 1952.

With the announcement of the Syngman Rhee Line in 1952 and the construction of a guarded lighthouse in 1954, Korea has physically possessed Tok-Do for half a century. This activity could either (1) reinforce a longstanding 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.

Japanese Action since 1952 Acquiescence or Effective Protest?

Although the International Court of Justice (ICJ) 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 ICJ has, however, identified several actions that are considered to be effective protests when performed under the proper circumstances.

Standards of Effective Protest in Territorial Disputes. Acquiescence, which is a required element of a prescriptive claim,[66] has been defined as letting another country assume and carry out for many years all the responsibilities and expenses in connection

66 *See, e.g.,* Malcolm Shaw, International Law 344 (4th ed. 1997) (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.).

with the territory concerned, which disqualifies the country concerned from asserting the continued existence of the title.[67] A series of decisions by the ICJ 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 Caselaw on Effective Protest. In *Island of Palmas Case*, *Clipperton Island Case*, *Case Concerning the Temple of Preah Vihear*, and *Case Concerning the Territorial Dispute*, the tribunals ruled that a failure to protest the opposing state's sovereignty claim to disputed territory led to a presumption of acquiescence. In *Chamizal Arbitration*, *Legal Status of Eastern Greenland*, and *Fisheries Case,* the tribunals concluded that protests were sufficient to preserve the state's claim to the territory.

Jurisprudence on Effective Protest. The international decisions discussed above reveal several elements of the acquiesce-protest dichotomy that help shape the framework of a prescriptive claim. First, because peacefulness is a defining element of possession by prescription, a prescriptive title cannot be established in the face of protests from another country. Furthermore, diplomatic protests are sufficient to nullify prescription if a more intense form of protest, such as physical repossession, would result in violence. 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

67 *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 ICJ 6, 45 (separate opinion of Judge Alfaro).

asserting a protest can indicate acquiescence.

Although the decisions discussed 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, argue that diplomatic protests are *per se* sufficien t.[68] Others believe that firmer measures are needed to abrogate a prescriptive claim, such as severing diplomatic relations.[69]

Scholars tend to agree, however, on the importance of attempting to bring the matter before an international tribunal.[70] 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 pursuing a disputed 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.[71] 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. In this

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68 *See* Shaw, *supra* note --, at 345 (noting that diplomatic protests will probably be sufficient). *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.).

69 *See* Johnson, *Acquisitive Prescription in International Law*, 27 Brit. Y.B. Int'l L. 332, 353-354 (1950); *see also* MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 Brit. Y.B. Int'l L. 293, 310 (1953).

70 *See* Shaw, *supra* note --, at 345; Brownlie, *supra* note --, at 157; MacGibbon, *supra* note --, at 310.

71 *See* Charles A. Schiller, *Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland,* 26 Case W. Res. J. Int'l L. 401, 430 (1994).

era of international tribunals, therefore, 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 ICJ 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 perception of inadequacy in the international tribunal, and thus the possessor's unwillingness to accept international adjudication would continue without a change in perception of the adequacy of the tribunal.

Along with diplomatic protest, maps have also been used as evidence in resolving territorial disputes.[72] In the *Temple of Preah Vihear Case*, for example, the ICJ ruled that Thailand had tacitly accepted the disputed territory as belonging to Cambodia because Thai maps depicted the territory within Cambodia.[73] Although the Court thus used a map as evidence of acquiescence, a protesting state may argue that maps should also be used as evidence of effective protest. As is the case with diplomatic protests, topographical protests that are not accompanied by a willingness to seek arbitration in an international tribunal may not be sufficient to overcome a presumption of acquiescence.

72† *See generally Continental Shelf (Tunisia v. Libya)*, 1982 ICJ 18; *see also Temple of Preah Vihear*, *supra* note --; *but see Temple of Preah Vihear*, *supra* note ,at 101, 133-34, and 67, 70 (dissenting opinion of Judges Sir Percy Spender and Moreno Quintana); *but see also Treaty of Versailles*, Article 29 (text prevails over maps).

73 *See Temple of Preah Vihear Case*, *supra* note --.

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 Tok-Do/Takeshima. During the early 1950s, neither country physically possessed the island for a continuous period of time, yet both issued protests to the others' 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, including efforts to bring the matter to the ICJ. Japan's activity provides evidence that Japan has not acquiesced to Korea's possession of the island.

1952-1954: Neither State Possesses, Both Protest. On January 18, 1952, Korean President Syngman Rhee issued a presidential proclamation that created the Syngman Rhee Line, a territorial boundary averaging 60 miles off the coast of Korea that explicitly identified Tok-Do as a Korean territory. Japan protested the Rhee Line and declared that it did not recognize Korea's claim to Tok-Do.[74] Several months later, Japan issued a tacit protest through the U.S.-Japan Security Treaty, which had designated Tokdo as an area for U.S. military training.[75] After receiving a similar protest from the Korean government, the U.S. military announced on Feb. 27, 1953 that Tok-Do would be excluded from its training area.[76] In May 1954, citizens of both Japan and Korea, under the protection of patrol boats from their respective governments, landed on Tok-Do and proceeded to erect signs of their nation's sovereignty while dismantling the signs erected by the other nation.[77]

1954-1965: Korea Physically Possesses and Rejects ICJ Proposals. 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 by proposing the matter be brought before the ICJ. Korea rejected this proposal. The matter was raised again through diplomatic channels during the eight-year negotiations that led to the

74 *See* Seokwoo Lee, *supra* note , at 94 (*citing* The Practice of Japan in International Law 1961-1970, at 67-71 (Shigeru Oda & Hisashi Owada eds. 1982).
75 *See* Security Treaty, Apr. 28, 1952, U.S.-Japan, 3 U.S.T. 3329.
76 *See* Kajimura, *supra* note , at 24.
77 *Id.* at 25.

signing of the 1965 Korea-Japan Treaty.[78] Japan proposed that the Treaty either settle the dispute or designate the ICJ as arbitrator, and again Korea rejected the proposal, leaving the Treaty ultimately silent on the issue.[79] Korea stated that Tok-Do was inherent Korean territory, and thus the island should not become an issue either in the treaty or before the ICJ.[80]_

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 Tok-Do dispute. On February 16, 1996, for example, in reaction to Korean military exercises near Tok-Do, the Japanese Ministry of Foreign Affairs (MOFA) 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.[81] Similar statements were issued in press conferences on February 20, 1996,[82] March 1, 1996,[83] October 15, 1996,[84] and December 10, 1996.[85] 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 ROK that might harm the friendly and cooperative bilateral relations.[86] 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.[87] The 2001,[88] 2002,[89] and 2003[90] issues of the Diplomatic Bluebook reiterated this

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78 *See* Treaty on Basic Relations between Korea and Japan, June 22, 1965, 583 U.N.T.S. 33.
79 *Id.*
80 *See* Jessup, *supra* note , at 26.
81 MOFA, Press Conference by the Press Secretary, 16 February 1996, <http://www.mofa.go.jp/announce/press/1996/2/216.html>.
82 MOFA, Press Conference by the Press Secretary, 20 February 1996, <http://www.mofa.go.jp/announce/press/1996/2/220.html>.
83 MOFA, Press Conference by the Press Secretary, 1 March 1996, <http://www.mofa.go.jp/announce/press/1996/3/301.html>.
84 MOFA, Press Conference by the Press Secretary, 15 October 1996, <http://www.mofa.go.jp/announce/press/1996/10/1015.html>.
85 MOFA, Press Conference by the Press Secretary, 10 December 1996, <http://www.mofa.go.jp/announce/press/1996/12/1210.html>.
86 MOFA, 1997 Diplomatic Bluebook, <http://www.mofa.go.jp/policy/other/bluebook/1997/I-b.html>.
87 MOFA, 2000 Diplomatic Bluebook, <http://www.mofa.go.jp/policy/other/bluebook/2000/I-c.html>.
88 MOFA, 2001 Diplomatic Bluebook, <http://www.mofa.go.jp/policy/other/bluebook/2001/chap1-d.html>.
89 MOFA, 2002 Diplomatic Bluebook, <http://www.mofa.go.jp/policy/other/bluebook/2002/chap1-e.pdf>.
90 MOFA, 2003 Diplomatic Bluebook, <http://www.mofa.go.jp/policy/other/bluebook/2003/chap2-a.pdf>.

statement. When Korea issued a postage stamp bearing the image of Tok-Do 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.[91] In March of 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 Tok-Do/Takeshima:

Japanese Topographical Protests. Japanese cartographers have published a series of maps depicting Tok-Do/Takeshima 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.[92]

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 Tok-Do/Takeshima in the color scheme.[93] 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 Tok-Do/Takeshima as Japanese territory.[94] 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.[95] This atlas contains more than 200 maps depicting Tok-Do/Takeshima 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 many other islands and minor territories were not named. The National Atlas also lists Tok-Do/Takeshima under the administrative area of Goku-mura, Simane-ken.[96]

Summary of This Section. Japan's protests appear to have been sufficient to

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91 MOFA, Press Conference, 16 January 2004, <http://www.mofa.go.jp/announce/press/2004/1/0116.html#4>.
92 *See supra* notes -- and accompanying text.
93 Teikoku's Complete Atlas of Japan 11-12 (Editorial Department of Teikoku-Shoin Co., 1964).
94 Japan Atlas 10-11, 14-15 (Heibousha Cartographic Publishing Co. 1991).
95 The National Atlas of Japan (Geographical Survey Institute, Japanese Ministry of Construction, 1977).
96 *Id.* at 210.

overcome a presumption of acquiescence, and thus if Korea's claim were based solely on its occupation of the islets since World War II, these protests could be seen as adequate to block a claim based on prescription. The combination of a willingness to proceed to the ICJ and continued diplomatic and topographical protests adequately demonstrates that Japan has not given up on its claim to the island. If Korea's claim is based on its earlier historical exercises of sovereignty over the islet, however, Japan's persistent protests would be less significant. Korea has been unreceptive to Japan's initiatives to submit the dispute to the ICJ, saying that there is no dispute to resolve. This position may be viewed later by a tribunal as inconsistent with the obligation of every state to resolve disputes peaceably, and Korea may be asked to explain whether the ICJ was in some way an inadequate or unfair forum.

Tok-Do and the 1999 Fisheries Agreement Between Korea and Japan.

In 1998, Japan and Korea entered into a new fisheries agreement[97] designed to accommodate their continuing dispute over the area around Tok-Do/Takeshima, 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 Tok-Do 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 exclusive economic zone, allowing each country, after the first three 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 Tok-Do/Takeshima islets, and carefully regulated how much fish of each species could be caught within the zone, and in the adjacent national-jurisdiction zones. The

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

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 Law of the Sea Convention pending final determination of the maritime boundary, and it should not have any effect one or the other on claims of sovereignty over Tok-Do/Takeshima or the final delimitation of the boundary between the two countries in the East Sea/Sea of Japan.[98]

Contiguity

The geographical location of a disputed territory and its proximity to other territory of the nations claiming it will never be decisive in resolving a dispute, but it is certainly not irrelevant. Arbitrator Max Huber rejected contiguity as a basis for a claim of title in the Island of Palmas Case,[99] and a number of countries include land areas quite distant from other parts of the country. Nonetheless a land and 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. The recent development of the regimes of the continental shelf and the exclusive economic zone, as well as the extension of the territorial sea from three 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.[100] Even Arbitrator Huber acknowledged that as 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.[101] The fact

98 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).

99 *Island of Palmas Case*, *supra* note .

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

101 *Id.*, 22 Am. J. Int'l L. at 894 [check page cite].

that Tok-Do can be seen from Ullung-Do on a clear day[102] reinforces the linkage between the two islands and supports the view that it was understood that these islets were linked and were historically both subject to Korean sovereignty. Tok-Do/Takeshima can never be seen from Japan's Oki Islands, and the 40 additional miles from these islets to Tok-Do/Takeshima, as compared to the distance from Ullung-Do would have been significant in the days before motorized transport.[103]

Conclusions Regarding the Sovereignty of Tok-Do/Takeshima.

Japan's claim to sovereignty over Tok-Do/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. The *terra nullius* assertion in 1905 means that Japan acknowledges that it had no effective claim to the islets prior to that time, and hence Japan would appear to be estopped from now basing a claim on prior acts of sovereignty that may have been made by previous Japanese governments.

The historical material, in any event, appears to favor Korea more than Japan, even though Korea had no physical presence on the islets for many centuries because of its vacant island policy. Because the islets were remote, access was difficult, and, above all, [they] were uninhabitable,[104] constant physical occupation was not required,[105] and the occasional visits by Korean fishers served as adequate evidence of occupation. Perhaps the most significant historical material is found in the maps issued by Japanese cartographers in the late eighteenth century, which place Tok-Do/Takeshima as part of Korea's territory and make no claim on behalf of Japan. Korea protested as best it could after it found out about the 1905 incorporation of Tok-Do/Takeshima into Shimane Prefecture, which was not widely publicized at the time, but the Korean peninsula was occupied by Japanese military forces during this period and the Korean government was

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102 *See* citations in note 5 *supra*.

103 Chuong Il Chee, *supra* note , at 29.

104 Choung Il Chee, Korean Perspectives on Ocean Law Issues for the 21st Century 4 (The Hague: Kluwer, 1999).

105 *See Island of Palmas Arbitration*, discussed *supra* in text accompanying notes .

effectively being run by Japanese advisors.

The Instructions issued by the U.S. occupation forces in the years immediately following World War II treat Tok-Do/Takeshima as separate from the territory of Japan, 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. 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.

The final factor that supports Korea's claim is geography. Tok-Do/Takeshima is physically closer to Korea's Ullung-Do (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 Ullung-Do and the Oki Islands.

Korea's claim to sovereignty over the islets is thus substantially stronger than that of Japan, based on historical evidence of Korea's exercise of sovereignty and recognition of Korea's claim by Japanese cartographers, based on the dubious actions of Japan to incorporate the islets as *terra nullius* in 1904 and 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 TOK-DO/TAKESHIMA HAVE ON THE MARITIME BOUNDARY BETWEEN KOREA AND JAPAN IN THE EAST SEA/SEA OF JAPAN?

The effect that Tok-Do/Takeshima should have on the delimitation of the exclusive economic zones 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 exclusive economic zone or continental shelf. After this topic is addressed, the principles that govern the delimitation of maritime boundaries can be applied to Tok-Do/Takeshima.

Is Tok-Do/Takeshima Entitled to Generate an Exclusive Economic Zone or Continental Shelf Under International Law?

Article 121 of the 1982 United Nations Law of the Sea Convention[106] says that every island is entitled to generate an exclusive economic zones 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.[107] Judge Budislav Vukas has recently explained that the latter interpretation is the correct one, because of the underlying purposes of establishing the exclusive economic zone regime.[108] The reason for giving exclusive rights to the coastal states was to protect the economic interests of the coastal communities that depended on

106 United Nations Convention on the Law of the Sea, December 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).

107 *See, e.g.,* Van Dyke and Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, *supra* note ; Valencia, Van Dyke, and Ludwig, *supra* note --, 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 L. Rev. 425 (1988); 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).

108 *Volga (Russian Federation v. Australia)*, *Prompt Release, Judgment*, Declaration of Judge Vukas, ITLOS Reports 2002, [ITLOS website].

the resources of the sea, and thus to promote their economic development and enable them to feed themselves.[109] This rationale does not apply to uninhabited islands, because they have coastal fishing communities that need such assistance.[110] The EEZ regime may also be useful for the more effective preservation of the marine resources,[111] 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 Resources[112] can serve to protect fragile resources.[113]

Whatever emerges as the ultimate definition of rock in Article 121(3) of the 1982 Convention, it would appear to be clear that Tok-Do/Takeshima will be covered by this term. The two tiny rocky islets that make up Tok-Do/Takeshima consist of barren and wind-swept 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.[114]

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, and one family tends to stay during the summer, but no one has ever taken up permanent year-round residence on these remote rocky structures. Two distinguished commentators have stated directly 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.[115] A

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109 *Id.*, paras. 3-5.
110 *Id.,* para. 6.
111 *Id.*, para. 7.
112 Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980.
113 Vukas Declaration, *supra* note , para. 8.

114 Hydrographer of the Navy, 1 Japan Pilot 200 (HMSO, London, 1966).
115 Douglas M. Johnston and Mark J. Valencia, Pacific Ocean Boundary Problems Status and Solutions 113 (1991).

prominent Korean scholar has acknowledged that Tok-Do is a rocky island and unsuitable for human inhabitation.[116] One of the early Korean names given to the islets was Sok-Do, which is significant because sok means rock in Korean.[117]

An important example of state practice relevant to the meaning of Article 121(3) occurred recently 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. Rockall is a single outcrop of granite measuring approximately 200 feet (61 meters) in circumference and reaching about seventy feet (21 meters) high.[118]

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 the islets. 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.[119] Japan has apparently argued that Tok-do/Takeshima qualify as an island and should not be disregarded in a continental shelf delimitation, without indicating the weight to be attributed to [them] in a delimitation.[120] Some other countries, including the United States,[121] have also been expansive in claiming extended maritime space around features that are clearly rocks, and the legitimacy of such claims remains in dispute.

The Republic of Korea has tended to argue that small uninhabited islets should

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116 Choung Il Chee, *supra* note , at 15.

117 Choung Il Chee, *supra* note , at 8-9.

118 Van Dyke, Morgan, and Gurish, *supra* note , at 452; *see generally* O'Donnell, *Rockall The Smallest British Isle*, 23 Sea Frontiers 342 (1977).

119 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 AsiaPacific Issues 43 (April 2000).

120 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)).

121 *See generally* Van Dyke, Morgan, and Gurish, *supra* note , at 429-33.

not be able to generate exclusive economic zones 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.[122] This would appear to be the better approach. If the maritime boundary eventually becomes the equidistance line between Korea's Ullong-do and Japan's Oki Gunto, as explained below, then Tok-Do would be on the Korean side and should not affect the boundary delimitation. If some other approach is used, and Tok-Do 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 Tok-Do/Takeshima, and hydrocarbon resources may exist in the area. These isletes have served as a fishing station for harvesting abalone and seaweed and hunting seals.[123] 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 Tok-Do/Takeshima and also because they disagree on the ability of tiny islands to generate zones. Should Tok-Do be given full effect, half effect, or no effect? Korea argues that neither the tiny Japanese islet of Danjo Gunto nor Tok-Do 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. As the materials below demonstrate, even if Tok-Do/Takeshima 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.

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122 *See* Johnston and Valencia, *supra* note --, at 113; Daniel J. Dzurek, *Deciphering the North Korean-Soviet (Russian) Maritime Boundary Agreements*, 23 Ocean Development & Int'l L. 31, 42 (1992)

123 Choung Il Chee, *Korean Perspectives on Ocean Law Issues for the 21st Century* 1-2 (The Hague: Kluwer Law International 1999).

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 exclusive economic zone) 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.† [124] 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:[125]

** ***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 *Libya/Malta* case,[126] the *Gulf of Maine* case,[127] and the *Jan Mayen* case,[128] among others, the International Court of Justice (ICJ) examined the equidistance or median line[129] as an aid to its preliminary

124 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).

125 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); from 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, 150-53 (2003); and from Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18 Int'l J. Marine & Coastal L.509-16 (2003).

126 *Continental Shelf (Libya v. Malta),* 1985 I.C.J. 13.

127 *Case Concerning Delimitation of the Maritime Boundary in Gulf of Maine Area (US v. Canada),* 1984 I.C.J. 246.

128 *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway),* 1993 I.C.J. 38.

analysis, but then adjusted the line in light of the differences in the length of the coastlines of the contending parties.[130] 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 the tribunal will generally make an adjustment to bring the ratios into line with each other.[131] In the *Libya/Malta Case,* for instance, the ICJ started with the median lines between the countries, but then adjusted the line northward through 18′ of latitude to take account of the "very marked difference in coastal lengths"[132] between the two countries. The Court then confirmed the appropriateness of this solution by examining the "proportionality" of the length of the coastlines of the two countries[133] and the "equitableness of the result. "[134] In the *Jan Mayen Case,* the ICJ 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).[135]

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

130 Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law,* 88 Am. J. Int'l L. 230, 244-45 (1994).

131 This approach has been used in the *Gulf of Maine Case, supra* note --, the *Libya/Malta Case, supra* note --, the *Jan Mayen Case*, *supra* note--, 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 --, at 241-43.

132 *Libya/Malta Case, supra* note , 1985 I.C.J. at 49 para. 66.

133 *Id.* at 53 para. 74.

134 *Id.* para. 75. In the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, 25 I.L.M. 252 (1986), 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.

135 *See also* the *Eritrea-Yemen Arbitration*, <http://www.pca-cpa.org> (1998-99), where the

** ***Geographical considerations will govern maritime boundary delimitations and nongeographic considerations will only rarely have any relevance.***[136] 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 Case*[137] 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,*[138] the *Libya/Malta Case,*[139] and *Gulf of Maine Case.*[140] In the *St. Pierre and Miquelon Case,*[141] 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 recent 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.[142] To some extent, the Principle of Non-Encroachment, discussed

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tribunal relied upon 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, paras. 20, 39-43, 117, and 165-68.

136 *See* Charney, *supra* note --, at 236 (discussing the *Libya/Malta* and the *St. Pierre and Miquelon Cases*, *supra* notes -- and --).

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

138 *Continental Shelf (Tunisia v. Libya)*, 1982 I.C.J. 18.

139 *Libya/Malta Case, supra* note --.

140 *Gulf of Maine Case, supra* note --.

141 *St Pierre and Miquelon Case, supra* note --.

142 [Discuss China's claims in East China Sea & and the Korea-Japan boundary in the south.]

next, has taken the place of the natural-prolongation idea, but it leads to some different results.

** ***The Principle of Non-Encroachment.*** 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 exclusive economic zone (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 feature s.[143] The unusual 16-nautical-mile-wide and 200-nautical-mile-long corridor drawn in the *St. Pierre and Miquelon Case*[144] 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 Case,*[145] *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."*[146] *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,[147] and in the *St. Pierre and Miquelon Case*, France was given a narrow corridor connecting its territorial sea with the outlying high seas.[148] The geographical

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143 1993 I.C.J. 38, 69 para. 70, 79-81 para. 92.
144 *St. Pierre and Miquelon Case, supra* note --.
145 *North Sea Continental Shelf Case, supra* note --, 1969 I.C.J. at 45 para. 81.
146 Charney, *supra* note --, at 247.
147 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, 1992 I.C.J. 351, 606-09 paras. 415-20 [hereafter cited as *Gulf of Fonseca Case*].
148 *St. Pierre and Miquelon Case, supra* note --, 31 I.L.M. at 1169-71, paras. 66-74.

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,"[149] 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."[150]

** ***Each Competing Country Is Allocated Some Maritime Area.*** This principle is similar to the Non-Encroachment 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.[151] 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*.[152] 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 exclusive economic zones and continental shelves, but the I.C.J. and arbitral tribunals have not, in fact, given

149 Charney, *supra* note --, at 248.

150 *Id.* at 249.

151 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 (Seyfi Tashan ed., Foreign Policy Institute, Ankara, Turkey, 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.

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

islands equal ability to generate zones when they are opposite continental land areas or substantially larger islands.[153] Islands have been given a diminished role in generating maritime zones in the *North Sea Continental Shelf Case,*[154] the *Anglo-French Arbitration,*[155] the *Libya/Tunisia Case,*[156] the *Libya/Malta Case,*[157] the *Gulf of Maine Case,*[158] the *Guinea/Guinea-Bissau Case,*[159] the *Jan Mayen Case,*[160] and the *St. Pierre and Miquelon*

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153 *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 (Foreign Policy Institute (Ankara) ed. 1989); also published in *Ocean Yearbook 8* at 44, 54-64 (Elisabeth Mann Borgese, Norton Ginsburg, and Joseph R. Morgan eds. 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 United Nations Reports of International Arbitral Awards (RIAA) 74 (1977), *reprinted in* 18 I.L.M. 397 (1979)[hereafter cited as *Anglo-French Arbitration*]; *Libya/Tunisia Case, supra* note --; *Gulf of Maine Case, supra* note --; and *Libya/Malta Case, supra* note --).

154 *North Sea Continental Shelf Case, supra* note --, 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).

155 *Anglo-French Arbitration, supra*, note --. 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.

156 *Libya/Tunisia Case*, *supra* note -- para. 129. The Court gave only half-effect to Tunisia's Kerkennah Islands, even though the main island is 180 square kilometers and then 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.* paras. 120 and 79.

157 *Libya/Malta Case, supra* note --, at 48 para. 64. The Court ruled that equitable principles required that the uninhabited tiny island of Filfla (belonging to Malta, five 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, D.C., 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.

158 *Gulf of Maine Case, supra* note --, at para. 222. The Chamber gave half effect to Seal and Mud Islands. Seal Island is 2 miles long and is inhabited year round.

159 In the *Guinea/Guinea-Bissau Case, supra* note --, the arbitral tribunal gave no role to Guinea's small islet of Alcatraz in affecting the maritime boundary.

160 In the *Jan Mayen Case, supra* note --, 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

Arbitration.[161]

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.[162]

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.[163] The Court

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the opposite land mass -- Greenland.

161 In the *St. Pierre and Miquelon Case, supra* note --, the tribunal gave the small French islands only an enclave and a corridor to the high seas because of their limited size in comparison to Newfoundland.

162 *Eritrea-Yemen* arbitration, *supra* note --, 1999 Award, paras.147-48. 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 land masses. *Id.* paras. 160-61.

163 *Qatar-Bahrain Maritime Delimitation and Territorial Questions,* Decision of March 13, 2001, *http://www.icjcij.org/icjwww/idocket/iq...ment_20010316/iqb_ijudgment_20010316.htm*, paras. 219 (citing *North Sea Continental Shelf*, *supra* note --, para. 57, and *Libya/Malta, supra* note --, 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 paragraph 185, that Article 121(2) of the Law of the Sea Convention, *supra* note

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.[164] 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, exclusive economic zone, and continental shelf could be measured.[165] But using the feature as such a baseline would distort the boundary and have disproportionate effects,[166] 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,[167] 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 ICJ Chamber in the *El Salvador-Honduras Maritime Frontier Dispute,* concluding that El Salvador, Honduras, and Nicaragua hold undivided interests in the maritime zones seaward of the closing line across the Gulf of Fonseca,[168] 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.[169]

--, 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.

164 *Id.* paras. 245-48.
165 *Id.* para. 245.
166 *Id.* para. 247 (quoting from the *Anglo-French Arbitration, supra* note --, at para. 244).
167 *Jan Mayen Case, supra* note --, at para. 81.
168 *See* Charney, *supra* note --, at 230 and 235 (discussing *Gulf of Fonseca Case, supra* note --, 1992 I.C.J. at 606-09 paras. 415-20).
169 *See generally The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (Mark Valencia ed. 1981); Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, Sharing the Resources of the South China Sea 183-87 (1997).

** ***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 land mass 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) decisionmakers 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 exclusive economic zone 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. The Republic of Korea should reaffirm its position that very small islets should have little or no effect on maritime boundary delimitations. This position will allow the boundary with Japan in the East Sea to be resolved without having to address sovereignty over Tok-Do[170] (which can be given a 12-nautical-mile territorial sea enclave). It will 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

170 *See, e.g.,* Johnston and Valencia, *supra* note 88, at 114 (By treating [Tok-do] 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.).

not have the permanent effect of limiting North Korea's access to the sea in that area.

Japan's position on the ability of Tok-Do/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. [Expand]

Applying These Principles to the Maritime Boundary in the East Sea/Sea of Japan. Tok-Do/Takeshima 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 exclusive economic zone or continental shelf. It should, therefore, be ignored in the maritime delimitation, and the boundary between Korea and Japan in the East Sea/Sea of Japan should probably be the equidistance line drawn between Korea's Ullung-Do and Japan's Oki Islands. This line would put Tok-Do/Takeshima on the Korean side of the boundary, and would reinforce the logic of Korea's claim to the islets under the contiguity approach. [Expand]

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 Tok-Do is particularly challenging because Korea does not recognize this as a disputed issue and contends that the Korean sovereignty over Tok-Do cannot be questioned. [Expand]

Both Japan and Korea, however, have an interest in bringing closure to their differences regarding Tok-Do/Takeshima, and in delimiting the maritime boundary in the East Sea/Sea of Japan. Articles 74 and 83 of the 1982 Law of the Sea Convention say that countries that 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.[171] The 1998 fisheries agreement described above[172] is

171 Law of the Sea Convention, *supra* note , arts. 74(3) and 83(3). [Cite to Rainer Lagoni's

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.[173] Part XV of the Convention spells out the procedures for the Settlement of Disputes.[174] This language would appear to obligatory shall resort to the procedures....

International law has long stressed the duty to cooperate[175] and in recent years has emphasized the duty to settle disputes peaceably.[176] 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 seed third-party dispute resolution, through nonbinding mechanisms such as conciliation or mediation or binding devices through arbitration or an international tribunal.[177]

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.[178]

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article]

172 *See supra* text accompanying notes .

173 *Id.*, arts 74(2) and 83(2).

174 *Id.,* arts. 279-99. *See generally,* Jon M. Van Dyke, *Louis B. Sohn and the Settlement of Ocean Disputes,* 33 George Washington International Law Review 31-47 (2000).

175 *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...); Levi, *supra* note , at 237-43.

176 *See, e.g.,* United Nations Charter, art. 33.

177 *See* Jon M. Van Dyke, *Sharing Ocean Resources in a Time of Scarcity and Selfishness*, in The Law of the Sea (The Hague: Kluwer, Harry N. Scheiber ed. 2000).

The dispute over the sovereignty of Tok-Do/Takeshima involves different versions of the historical record, and, more importantly, some uncertainty over the governing law leading to a certain unpredictability in the outcome. This controversy is made more awkward by Korea's refusal to acknowledge that a dispute exists, while Japan has offered to submit the matter to the International Court of Justice. Some Korean officials appear to take the position that time is on their side, because they physically occupy the islets, and the longer they maintain that occupation the stronger their position becomes.

Japan's willingness to submit the matter to the ICJ for resolution constitutes a necessary component of its effort to protest effectively against Korea's occupation of the islets.[179] Scholars have noted that the bringing of a matter before the UN or ICJ will be conclusive as to the existence of the dispute and thus of the reality of the protests,[180] 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.[181] It thus appears to be important for Japan to continue to express its willingness to submit the sovereignty matter to third-party adjudication. Whether Korea's reluctance to accept this offer hurts its claim is a more complicated question.

The Republic of Korea should therefore give some consideration to submitting the sovereignty dispute over Tok-do/Takeshima to the International Court of Justice or some other appropriate tribunal, such as the International Tribunal for the Law of the Sea, just as the island disputes between Malaysia and Indonesia and between Malaysia and Singapore have recently been submitted to the ICJ. As explained in the first section above, Korea's legal claim to sovereignty over Tok-Do is strong, and a resolution of this matter would allow other issues to be addressed and resolved in an orderly fashion.

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178 Akehurst, *supra* note , at 235.
179 *See supra* text accompanying notes .
180 Shaw, *supra* note , at 345.
181 Brownlie, *supra* note , at 157.

A Study on the Legal issues related to sovereignty over Dok-Do

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A Study on the Legal issues related to sovereignty over Dok-Do

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Ⅰ. Introduction

Dok-Do islands are two tiny rocky islets, the East Island(Tongdo) and the West Island (Sodo), and numerous small reefs. Dok-Do lies 88km east of Korea's Ullung Island, its geographical location is 37°14′22"N, 131°51′57"[1]. Korea has designated Dok-Do 'Natural Monument No.336.[2]

Dok-Do, deep-rooted historical bitterness between Japan and the other disputants impedes the resolution of these territorial disputes. Since Japan's relinquishment of control over Korea after its defeat in World War II, Korea and Japan have contested the ownership of Dok-Do, which are currently occupied by Korea.

Korean scholars contend that Tok-Do was always thought of as a part of or an appendage of Ullung-Do during the early phases of Korean history. Based on Korea's point of view, Dok-Do was at one time part of Korea. Additionally, Korea asserts that various maps verify its title to

* Senior Researcher, *Korea Maritime Institute*.
1 Ministry of Maritime Affairs & Fishries, *Dok-Do*(MOMAF, Seoul, 2002), p.5.
2 *Ibid.*, p.19.

both Dok-Do and Ullung Island.[3]

On the other hand, Japan's historical claims are based on records documenting Japanese ownership of Dok-Do and on evidences of Japanese fishermen's use of Dok-Do during the 17th and 19th centuries, and Japanese hunting of sealions on Dok-Do during the early-20th century.[4] And resently Japan claim to Dok-Do traces back to the 1905 incorporation of it into the Shimane Prefecture.

Because both Japan and Korea claim to Dok-Do, it has become difficult to address and delimit the exclusive economic zone and continental shelf boundaries between these two countries in the East Sea.

This paper examines the issues related to sovereignty over Dok-Do, and the options available to the two countries regarding the peaceful resolution of disputes over Dok-Do.

Ⅱ. Historical Materials

1. Claims of Korea

Claims of Korea are based on numerous Korea historical records, including some written in the 8th century, indicating that Dok-Do became part of Korea in 512 A.D. Namely, Dok-Do appeared as Usan Guk in *Samguk Sagi*(historical records of three kingdoms) which provided that Usan Guk was subjugated by Silla, one of the Three Kingdom, in 512 A.D..[5]

Later, Dok-Do was called Usando in the Chosun Dynasty, and was placed under its municipal administrative jurisdiction, together with Ullung Island. The *Annals of King Sejong* described the locations of and the relationship of Dok-Do and Ullung Island in these terms: "The distance between the two islands is not far off from each other so one is visible from the other on a fine day."

*Sinjung Tongguk Yoji Sungnam(*Augmented Survey of the Geography of Korea) mentioned Usando and Ullung Island as islands attached to Ulchin Country, one of the municipal administrative.[6]

In the 18th century, Japanese scholars began producing color-coded maps that pictured Japan and its surrounding countries. In 1785, the prominent scholar Hayashi Shihei finished *Sangoku setsujozu* "A Map of Three Adjoining Countries," which displayed Korean territory in yellow and

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3 Yong-Hwa, Shin "A Historical Study of Korea's Title to Tokdo", 28 *Korea Observe*(1997), pp.333-348.

4 Hori, K "Japan's Incorporation of Takeshima into Its Territory in 1905", 28 *Korea Observer*(1997), pp. 477~488; Kajimura, H, "The Question of Takeshima/Tokdo", 28 *Korea Observer*(1997), pp.423~435.

5 Yong Hwa, Shin, "Dok-Do, Korea's Valuable Territoty", Intelligence Industrial Company(1997), p.26.

6 *Ibid.*, pp.27~29.

Japanese territory in red. Hayashi painted Dok-Do and Ullung-Do in yellow, and wrote next to the depictions of the islands: "Korea's possessions" or "belong to Korea."

In May 1881, the Korea Government began seriously to take the issue of Japanese activities over Ullung Island, and went to protest against the Japanese Foreign Minister. Further, the Ullung Island began to settle again from 1881; a superintendent of the Ullung Islands was made in 1895; An Imperial Ordinance No.41 was proclaimed on October 25, 1900.

2. Claims of Japan

Based on points of Japan, knew of the existence of the Dok-Do from ancient times.[7]

Japan maintains that Dok-Do has been a part of the territory of Japan since the beginning of history, this fact having been established by authentic historical document such as *Takeshima Zusetsu*(An Illustated Map of Takeshima), including the fact that for a long time Japanese fisherman migrated there during certain seasons of the year. In 1905, the Japanese Government formally reaffirmed its claims to Dok-Do as an integral part of Japan, apparently without protest from Korea, and placed it under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture.

3. Appraisal

Both the Korean and Japanese Governments have produced historical evidence supporting their respective claims to Dok-Do. Despite the fact that there exists certain doubts on the authenticity of the documents relied upon by Korea, and so it is doubtful what probative value can be attached to them, the historical evidence supporting the claimants' respective claims to Dok-Do would indicate that Korean has probably made out a better case, in particular within the context of prior discovery and occupation.[8] And the early records are confused and difficult to interpret, in part, because the names of these islands appear to have changed during the years.

The emergence of such maps in Japan seems to indicate that Japanese had come to recognize Dok-Do as a part of Korea, but the maps do not provide conclusive evidence because the topographers were working independently and their maps were not officially sanctioned and approved by the Japanese government.

Although the records regarding activity connected with these islands during this early period are very limited as far as Ullungdo is concerned, there is evidence that Koreans lived there and the government attempted to control it politically.

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7 「竹島は,…我が國固有の領土である」 in *http:/www.mofa.go.jp/mofaj/area/takeshima.*

8 Seok Woo. Lee, *International law and the resolution of territorial disputes over islands in East Asia*(A Thesis of Ph.D, Uni. of Oxford, 2001), pp.239～240.

Ⅲ. Pre-Occupation

The classical technique of categorising the various modes of acquisition of territory is based on Roman law and modes of acquisition are usually detailed; occupation of *terra nullius*, prescription, cession, accretion and subjugation(or conquest).[9] Occupation is the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State.[10]

Japanese main claim to Dok-Do rely on pre-occupation(the 1905 Shimane Prefecture).

1. Claims of Japan

The basis for the current Japanese claim to Dok-Do traces back to the historical events just described, and rely on the 1905 incorporation of it into the Shimane Prefecture. A Japanese Cabinet Decision on 28 January 1905 and Shimane Prefecture Notice 40 on 22 February 1905 declared that the island 85 miles northwest of Oki Islands should be designated as "Takeshima" and be placed under the jurisdiction of the head of Oki Islands, himself under Japanese sovereignty.

Japan insists that Dok-Do Islands were *terra nullius* in 1905 and, therefore, subject to occupation, while Korea asserts that historical documentation proves that Dok-Do belonged to Korea prior to Japan's alleged 1905 incorporation, thereby refuting Japan's contentions that Dok-Do Islands were *terra nullius*.[11]

For Japan to prevail on this claim, it would have to convince a decision maker that Dok-Do was "*terra nullius*" as of 1905, that Japan had acted properly in claiming and incorporating the islands, and that nothing has happened subsequently to question or dislodge his claim to the islands.[12]

2. Claims of Korea

In Korea's position, by asserting that Dok-Do were *terra nullius* in 1905, Japan appears to acknowledge that it had no legally recognizable claim to the islands prior to that time, and it is probably estopped from now making any claim based on any prior acts of sovereignty regarding

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9 Malcom N. Shaw, *International Law*(Grotius Publications Ltd., 3rd ed., 1991), p.284.

10 R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester Uni. Press, 1961), p.20.

11 Seok-Woo. Lee, *supra* note 8, pp.231～232.

12 「1905(明治38) 年の、閣議決定及び島根縣告示による竹島の島根縣への編入措置は、日本政府が近代國家として竹島を領有する意志を再確認したものであり、それ以前に、日本が竹島を領有していなかったこと、ましてや他國が竹島を領有していたことを示すものではなく、また、当時、新聞にも掲載され、秘密裡に行われたものではないなど、有効に實施されたものである。」 in *http:/www.mofa.go.jp/mofaj/area/takeshima.*

Dok-Do.

Moreover, during 1905 and 1945, Japan controlled the Korean, 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 Dok-Do. 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 this period regarding which country now has proper sovereignty over the disputed islands.

And because of the remote and barren nature of the Dok-Do, little activity would appear to be required to establish an "occupation" in relation to these islands during the past millennium through its presence and administrative activities on Ullung-Do and the fishing activities of Koreans around Dok-Do and their occasional visits to the islands.

Korea also stresses that Dok-Do can be seen from Ullung-Do, 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 Dok-Do.

For this reason, it may be of substantial significance that Japan's claim is therefore *not* based on any Japanese acts of sovereignty regarding the Dok-Do *prior to* 1905.

3. Appraisal

Generally, 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"[13], or in another phrasing, "immediately before acquisition, belonged to no state."[14]

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."[15]

And the legal theory of prior discovery and occupation has been further developed and firmly established through notable decisions and awards by international judicial and arbitral bodies, in particular, *Islands of Palmas Arbitration, Clipperton Island Arbitration, Eastern Greenland Case, Minquiers and Ecrehos Case, Western Sahara, The Salvador v. Honduras Case,* and the very recent decision in *Qatar v. Bahrain*.

Occupation is a method of acquiring territory which belongs to no one (*terra nullius)* and which may be acquired by a state in certain situations. The occupation must be by a state and not by private individuals, it must be effective and it must be intended as a claim of sovereignty over the area.[16]

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

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

15 Werner Levi, *supra* note, p.130.

Before a claim based on the traditional concept of occupation is admitted, certain conditions must be fulfilled, the main being that the occupied territory in question must have been *terra nullius*, not under the occupation of any other state.[17]

So, it may be of substantial significance that Japan's claim is therefore *not* based on any Japanese acts of sovereignty regarding Dok-Do *prior to* 1905.

Ⅳ. Interpretations of SCAPINs

1. SCAPIN No.677(1946)

(1) Claims of Korea

Korean commentators have contended that this statement excluding Dok-Do from defined Japanese territory should be seen as a recognition that Japanese sovereignty did not extend to the islets. This instruction has been considered as one of the significant legal instruments that decided the destiny of Dok-Do, especially in favour of Korea. Korea continuously maintains that Supreme Commander of Allied Powers' Instruction(hereinafter 'SCAPIN) No.677 decreed the cessation of Japanese administration over various non-adjacent territory, including the Dok-Do Islands, and this is strong indication of what the Allied Powers dispose of.

(2) Claims of Japan

In response to these claims of Korea, Japan argues that SCAPIN No.677 suspended only Japanese administration of various island areas, including Dok-Do Islands, and it did not preclude Japan from exercising sovereignty over this area permanently.[18] And the United States recognized that the question of international sovereignty was outside Supreme Commander of Allied Powers'(hereinafter SCAP) authority.

Moreover, SCAPIN No.677 was an operational directive to the Japanese Government tentative in character and specifically stated further in paragraph 6[19] that it was not Allied policy

16 M. N. Shaw, *supra* note 9, p.289.

17 Surya P. Sharma, *Territorial Acquisition, Disputes and International Law*(Martinus Nijhoff Publishers, 1997), p.61.

18 「…1946年1月29日付連合軍總司令部覺書第677号が、日本が竹島に對して政治上又は行政上の權力を行使すること及び行使しようと企てることを暫定的に停止したこと、及び、1946年6月22日付連合軍總司令部覺書第1033号が、日本漁船の操業區域を規定したマッカーサーラインの設置にあたり、竹島をその線の外においたこと）に關する文書は、いずれもその文書の中で日本國領土歸屬の最終的決定に關するものではないことを明記しており、竹島を日本の領土から除外したものではないことは明白である。」in *http:/www.mofa.go.jp/ mofaj/area/takeshima.*

19 「Nothing in this directive shall be construed as an indication of allied policy relating th the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration」

determination of Japanese territory.[20]

2. SCAPIN No.1033(1946)[21]

(1) Claims of Korea

The Allied Powers issued SCAPIN No.1033 on 22 June 1946, which established the MacArthur Line to delineate authorized areas for Japanese fishing and whaling. The Instruction placed Dok-Do 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.

Korean commentators also have contended tha this instruction has been considered as one of the significant legal instruments that decided the destiny of Dok-Do, especially in favour of Korea. Korea continuously maintains that SCAPIN No.1033 decreed the cessation of Japanese administration over the Dok-Do Islands.

(2) Claims of Japan

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."

Moreover, SCAPIN No.1033 was an operational directive to the Japanese Government tentative in character and specifically stated further in paragraph 6 that it was not Allied policy determination of Japanese territory.

3. Appraisal

The General Headquarters of SCAP gave instruction No.677 entitled "Governmental and Administrative Separation of Certain Outlying Areas from Japan" on January 29, 1946.[22] 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."

> Article 3 of SCAPIN No. 677[23]
> 「For the purpose if this directive, Japan is defined to …Ullung Island, Liancourt Island…」
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> Article 6 of SCAPIN No. 677[24]

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20 Seok-Woo. Lee, *supra* note, pp.148～149.
21 *"Area Authorized for Japanese Fishing and Whaling"*, SCAPIN No.1033 (June 22, 1946).
22 *"Governmental and Administrative Separation of Certain Outlying Areas from Japan"*, in *http://www.geocities.com/mlovmo/temp10.html*.
23 SCAPIN No.677(29 Jan. 1946), in *http://www.geocities.com/mlovmo/ temp10.html*, p.3.
24 *Ibid.*, p.4.

「Nothing in this directive shall be construed as an indication of allied policy relating th the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration」

The directive was not an ultimate decision of jurisdiction but rather a suspension of Japanese administration, SCAPIN were an operational directive to the Japanese Government tentative in character and specifically stated further in paragraph 6 that it were not Allied policy determination of Japanese territory. And the United States also pointed out that in all SCAPINs to the Japanese Government regarding authorization of areas for Japanese fishing and whaling which were established under SCAP.[25]

Some instructions stated, however, that such its territorial definition would be "for the purpose of this directive,"and that "nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of sovereignty over several islands.

Ⅴ. The 1951 San Francisco Peace Treaty

1. Claims of Japan

After the conclusion of World War II, the clause on territorial disposition regarding Korea, Article 2(a) of the San Francisco Peace Treaty, did not specifically mention disposition of Dok-Do, it simply provided that "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamiton and Dagelet." As for Dok-Do, the Allied Powers did not specifically mention Dok-Do in Article 2(a) of the San Francisco Peace Treaty, and it is not the result of "violence and greed".[26]

2. Claims of Korea

As to Korea, Article 2(a) of the San Francisco Peace treaty provided that Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including Dok-Do. Accordingly, the first five and the seventh draft of the Treaty provided that Dok-Do to be returned to Korea by including the islets in the Article 2(a) list. Analysis of the drafting history of the Peace Treaty reveals that the Allied Power considered Dok-Do in its deliberations, and therefore the Treaty's silence was not a result of failure to consider the island's status.

As to Korea, the territorial clause of the San Francisco Peace Treaty alone were not necessarily the final determinant of the sovereignty issue, they should be evaluated within the broad

25 Seok Woo. Lee, *supra* note, p.149.

26 1943年のカイロ宣言にある「日本は、暴力及び貪欲により略取したる他の一切の地域より驅逐せらるべし」の「暴力及び貪欲により略取した」地域には当たらない。at *http ://www.mofa.go.jp/mofaj/area/ takeshima.*

framework of international documentations on territorial acquisition and loss after World War Ⅱ.

During World War II, the terms of the territorial disposition regarding Korea were decided principally by the 1943 Cairo Declaration[27] and 1945 Potsdam Proclamation.[28]

Korean scholars insist that San Francisco Peace Treaty appears to be an implementation of the precise terms of the Potsdam Proclamation, Cairo Declaration, the Yalta Agreement[29] which regarding Japanese territorial determination taken by violence and greed, in particular over Dok-Do.

Korean commentators would view Japan's incorporation of Dok-Do in 1905 as being the result of "violence and greed," since Japan was engaged in a major imperialistic expansion during that period.

3. Appraisal

The Treaty has provided a thorough examination from the Treaty's initial draft to the final text, and has established that the Allied Power changed its mind several times as to territorial disposition of Dok-Do.[30]

The uncertainty arising therefrom largely accounts for the dispute over the ownership of Dok-Do. Accordingly the issue relates to the need for a careful interpretation and clarification of how a series of drafts defined the terms of the San Francisco Peace Treaty and various wartime resolutions regarding Dok-Do.

The territory clause on Dok-Do in the 1951 San Francisco Peace Treaty can not be construed in an unambiguous manner due to the sharply contradictory descriptions in its drafts, despite the fact that the drafters viewed that the treaty left Dok-Do to Japan at the later stage.[31]

For this reason, the territorial clause of the San Francisco Peace Treaty on Dok-Do to can be interpreted as follows:

First, due to the significantly contradictory nature of the various drafts of the treaty, and other relevant instrument, the question what exactly constituted Dok-Do remains unclear.

Second, various wartime resolutions, in particular the Yalta Agreement, have significant legal weight in respect of territorial dispositions of Dok-Do.

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27 The Cairo Declaration referred to "the territories Japan has stolen from…, Japan will also be expelled from all other territories which she has taken by violence and greed." *in* http://www.ndl.go.jp/constitution/e/etc/c03.html.

28 The Potsdam Proclamation, in particular, in stating that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu and Shikoku, and such minor islands as we determine". *in* http://www.ndl.go.jp/constitution/e/etc/c03.html.

29 Made by the leaders of the Soviet Union, Great Britain, and the United States.

30 Seok Woo. Lee, *supra* note, p.146.

31 *Ibid.*, pp.274～275.

Ⅵ. Conclusion

State territory is that subjected to the sovereignty of a state, that it is the space within which the state exercises its supreme, and normally exclusive, authority.[32] There are several conditions that are particularly productive of territorial dispute. First is the fact that provisions for the disposition of territory in the past have so often been unwise, confusing, or even ambiguous.

It is very difficult to reach a peaceful solution as to the competing claims to Dok-Do between Korea and Japan, because problems relating to territory are very serious to their countries.

As mentioned above, the official stance on the disputed Dok-Do stated by the Korea is that Dok-Do cannot be subject to any diplomatic negotiations or review by the International Court of Justice, Dok-Do is an integral part of Korean territory historically, and international law supports it.

So, the legal issues related to sovereignty over Dok-Do are as belows;

First, Korea seems to lay their claim to Dok-Do based on earlier and more numerous precedents and the historical material, in any event, appears to favor Korea more than Japan, even though Korea had no physical presence on Dok-Do for many centuries because of its "vacant island policy."

Second, The Japanese still consider their 1905 incorporation of Dok-Do into the Japanese territorial sphere as legally binding. But the "*terra nullius*" assertion in 1905 means that Japan acknowledges that it had no effective claim to the islets prior to that time, and hence Japan would appear to be estopped from now basing a claim on prior acts of sovereignty that may have been made by previous Japanese governments.

Third, the Instructions issued by the U.S. occupation forces in the years immediately following World War II treat Dok-Do as separate from the territory of Japan.

Forth, but the 1951 San Francisco Peace Treaty is silent on the status of Dok-Do, and the drafting history of this treaty provides conflicting and ambiguous guidance regarding this issue.

To conclude, a quote is quite appropriate:[33]

> 「…*if rational decision making is in play, this issue will be solved when one of the two ‥ probably Japan‥ finally decides to throw in the towel.* …」

32 Oppenheim, *International Law*, Volume I(Longman, 9th ed., 1992), pp.563～564.
33 "The Territorial Disputes over Dok-Do", in http://www.geocities.com/ mlovmo/*temp4.html*, p.13.

In short, it can be accepted that Korea's claim to sovereignty over Dok-Do is substantially stronger than that of Japan, based on historical evidence of Korea's exercise of sovereignty, and based on Korea's actual physical control of the islets during the past half century.

However, Korea should further strengthen its evidence and prepare for the maximizing the legal implications of Korea's position and minimizing the legal implications of Korea's virtual inaction over Dok-Do, and to prepare the legal approach and study the extensive analysis in relation to Dok-Do.