A Constructive Proposal to Solve the ‘Dokdo’ Controversy between Korea and Japan

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I. INTRODUCTION
II. HISTORY OF THE “DOKDO” CONTROVERSY
A. Classification of Times
B. Japan’s incorporation of Dokdo
C. SCAPIN 677 and the negotiations for 1951 Peace Treaty
D. the Rhee Line
E. Korea and Japan Diplomatic Normalization
F. A tranquility
G. The Emerging EEZ and the necessity of new maritime demarcation
1. Delimitation of the EEZs
2. The 1998 Agreement on Fisheries
3. The 2006 Japanese Survey Trial near Dokdo by Its Research Vessel

III. THE ARGUMENTS OVER DOKDO
A. The Core Arguments of Japan
B. The Core Arguments of Korea
C. An Analysis under International Law
1. General Ways of Territorial Acquisition under International Law
2. Case Law on Island Territorial Disputes
3. Some Concrete Principles for Resolution
D. Application of International Law Principles to the Dokdo Controversy
1. Korea’s Effectivités and Control over Dokdo
2. 1905 Japanese Incorporation of Dokdo to the Shimane Prefecture
3. The 1943 Cairo Declaration, the 1945 Potsdam Declaration, and SCAPIN 677
4. The 1951 Peace Treaty
5. Argument Based on Historical Facts
“Dokdo” refers to the islets known as the Liancourt Rocks and called “Takeshima” by the Japanese in the East Sea (the Sea of Japan).\(^1\)

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Dokdo, which is composed of two sloping main islets and several smaller rocks, amounts to just less than two square kilometers.² Dokdo is currently under the full control of South Korea.³ From time to time, Japan asserts claims over Dokdo and does not recognize de jure territorial sovereignty of Korea over the islets, even though the islets have effectively been controlled by Korea since 1945, just after World War II.⁴

It is difficult to understand the Dokdo islets controversy without recognizing the troubled history between Korea and Japan, because the controversy represents a colonial legacy in a postcolonial world. Korea was annexed by Japan as part of Japan’s imperialist expansion from August 22, 1910 to the August 15, 1945. In reality, Korea was occupied by Japan at the beginning of the Russo–Japanese War (from February 10, 1904 to September 15, 1905) under the formal or de facto recognition of the British Kingdom and the United

² Dokdo is located 87.4 km southeast of Ulleungdo, Korea and 157.5 km northwest of Oki island, Japan. Dokdo, http://www.dokdo.go.kr/eng/.

³ The Republic of Korea [hereinafter Korea].

Immediately after the Russo-Japanese War, Japan declared that Korea became Japan’s protectorate by the 1905 Eulsa Treaty, a treaty that came about through coercion, which was not consistent with international law. As a result, Japan occupied the Korean peninsula for about 40 years and inflicted suffering on Koreans. Particularly, at the harshest of Japan’s rule over Korea, Japanese imperialists used many young Koreans as human shields on battlefields or as ‘Comfort Women,’ or sex slaves.6

Like Germany, however, Japan justified its past invasion of neighboring countries in order to whitewash misconduct during the occupation and World War II, rather than apologize to them. Japan’s strongest argument concerning Dokdo is based on the fact that Japan expressed its intention to possess the islets by a Cabinet decision in January 1905,

5 For example, this recognition was reflected in the Taft–Katsura Agreement, which was the meeting memorandum containing confidential conversation between United States Secretary of War William Howard Taft and Prime Minister of Japan Katsura Taro in Tokyo on 29 July 1905. See Raymond A. Esthus, The Taft-Katsura Agreement-Reality or Myth?, 31(1) J. OF MODERN HIST. 46, 46-51 (1959), available at http://www.jstor.org/stable/1871772. The agreement addresses four significant issues of the meeting: 1) Katsura's views on peace in East Asia, as the fundamental principle of Japan's foreign policy, was best accomplished by a good understanding between Japan, the United States and Great Britain; 2) the best interest of Japan observed by Taft was that the Philippines would be governed by the United States, a strong and friendly nation to Japan; 3) Katsura confirmed that Japan had no aggressive designs on the Philippines; and 4) Katsura argued that to colonize Korea was a matter of cardinal importance to Japan, as Korea was the direct cause of the just concluded Russo-Japanese War. Id.

followed by a notification by the Shimane Prefecture in February, officially incorporating Dokdo as part of the Shimane Prefecture. However, this was the initial period of Japan’s colonization of Korea. Significantly, Korea was considerably under Japanese control at that time. A hidden meaning of Japan’s argument is that if Japan legally possessed Dokdo, Japan had not illegally occupied or invaded neighboring countries. Therefore, Japan’s claims of sovereignty on Dokdo are closely related to its attempt to justify its early imperialist expansion in 1905.

Thus, Japan’s claiming of Dokdo was a part of its imperial-colonial expansionism design which made Korea the first victim of Japan. In the furtherance of this attitude, the Japanese extreme rightists glamorize the past imperialist appetite and colonial occupation, invasion, and bringing aggressive war and various war crimes. Japanese justification of past aggression and colonization of neighboring countries has impeded the development of relationships with neighboring countries, such as China and Korea.


Along with the Yasukuni Shrine issue and the controversy over Japan’s distortion of historical facts in middle and high school student textbooks, this sovereignty controversy about Dokdo, backed by national sentiment, has been functioning as one of the most serious barriers to better relations between Korea and Japan. Significantly, there is still no regional economic integration among and between Korea, China, and Japan, even though the integration would bring significant economic benefits to the countries.

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The 1982 United Nations Convention on the Law of the Sea (UNCLOS) reignited the Dokdo controversy. With new maritime laws emerging, after unilaterally denouncing the 1965 Korea-Japan Fishery Agreement,\textsuperscript{14} Japan proclaimed new exclusive fishing zones.\textsuperscript{15} In 1998, even though Korea and Japan reached a new fishery agreement, the agreement did not include the demarcation of the EEZ (Exclusive Economic Zone) between the two countries because of the Dokdo controversy.\textsuperscript{16} With the newly recognized economic values of maritime resources, particularly natural gas and Methane clathrate,\textsuperscript{17} the demarcation of the EEZ issue has increased the stakes in the Dokdo controversy.

With the 2002 FIFA World Cup co-hosted by Korea and Japan, both countries have promoted freer cultural and artistic exchange. A few years before, there were noticeable


\textsuperscript{17} Methane clathrate, also called methane hydrate or methane ice, is a form of water ice that contains a large amount of methane within its crystal structure (a clathrate hydrate). Originally thought to occur only in the outer regions of the solar system where temperatures are low and water ice is common, extremely large deposits of methane clathrate have been found under sediments on the ocean floors of Earth. Wikipedia, Methane hydrate, http://en.wikipedia.org/wiki/Methane_hydrate.
signs that the Japanese were rediscovering their regional identity, exemplified economically by Japan’s promotion of the Japan-Korea Free Trade Agreement (JKFTA). Now, however, the negotiation for the conclusion of JKFTA is at a deadlock, partly because of trade issues and the decrease of Japanese gumption for the JKFTA during the negotiation. Despite the great weight of Korea and Japan in the world economy, both countries could not make progress for regional economic integration.

Now, the mood for a favorable atmosphere for rapprochement is building up between the two countries. The new Korean government under Lee Myung-bak inaugurated in February 2008, has continuously and consistently pursued a “pragmatic” foreign policy, in particular a “future-oriented relationship” with Japan, based on strengthening relationships with key regional powers. Yukio Hatoyama, whose Democratic Party of Japan (DPJ) won a landslide election, was elected as the new Japanese Prime Minister in September, 2009. By that election, Japanese experienced the first transfer

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18 In the past, Japan regarded the EU and the United States as its main trade partners and was not very interested in its neighbor countries: Lyou, supra note 13, at 265.


20 See Lyou, supra note 13, at 257-65.

of power away from the Liberal Democratic Party (LDP) which had governed Japan for nearly half a century after World War II. Yukio Hatoyama pledged repeatedly not to visit the Yasukuni shrine before and after the election. This is a meaningful change of Japan’s attitude, but concerning the text book issue and the Dokdo controversy, the new government seems to take the same approach as the past conservative policy of the LDP.

Just after the inauguration of Hatoyama, President Lee Myung-bak and Hatoyama agreed to build a “constructive and future-oriented” relationship between Korea and Japan.

Moreover, President Lee proposed that the Japanese Emperor Akihito visit Seoul.

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With this recent improvement in the relationship between Japan and Korea, now is the most favorable time to calm the Dokdo controversy and to seek a constructive way for a solution. At the least, the leaders of both States should avoid aggravating the controversy. To take a step forward from the standstill, Korea and Japan need to prepare an agenda or action plan to solve the controversy.

The purpose of this article is, based on close analysis of the controversy, to suggest a reasonable approach for the settlement between Korean and Japan in a more constructive way. Following the Introduction, in Chapter II, this Article explains the history of the Dokdo territorial controversy according to a brief timeline to help enhance the understanding of the controversy. In Chapter III, the Article analyzes Korea and Japan’s core arguments under international law, in particular some concrete principles derived from international island territory disputes. In Chapter IV, the Article, based on the above analysis, will explore the possible solutions as well as some disciplines for each State not to escalate the controversy. Based on this discussion, and in consideration of past mutual cooperation between two States, other Post-War peace settlement cases, and economic interdependence and possible benefits which could result from economic integration between both States, the Article proposes a new constructive way for Korea and Japan to
solve the Dokdo controversy.

II. HISTORY OF THE “DOKDO” CONTROVERSY

A. CLASSIFICATION OF TIMES

To understand the causes and evolution of the Dokdo controversy, it is meaningful to classify its history in terms of phases because the attitudes of Korea and Japan concerning the controversy were varied according to the existing circumstances and emerging new interests. At times the tension was mounting, and on other occasions, it was abating. To resolve the controversy, it is necessary to observe which situations escalated the controversy and which appeased the tension.

The history of the Dokdo controversy can roughly be categorized into the following five time frames: (1) Japan’s incorporation of Dokdo into its territory in 1905 and its annexation of Korea in 1910 (1905-1910); (2) The 1951 San Francisco Peace Treaty

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26 See Min Gyo Koo, Economic Dependence and the Dokdo/Takeshima Dispute Between South Korea and Japan, 9(4) HARVARD ASIA Q. 24, 25 (2005).
negotiations between the Allies and Japan (1945-1951); (3) Korea’s unilateral proclamation of the Rhee Line (1952-1960); (5) Negotiation and Conclusion of the basic treaty for Korea and Japan diplomatic normalization (1960-1965); (6) A tranquility: the “economic honeymoon” period (1965-1976); (7) The negotiation and conclusion of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the emerging EEZ and the necessity of new maritime demarcation between Korea and Japan (1977-1998); and (8) The conclusion of Korea and Japan’s new fishery agreement (1999-present).

**B. Japan’s Incorporation of Dokdo**

When the Russo–Japanese War broke out, the Japanese cabinet decided that Korea should be placed under Japan’s rule.\(^{27}\) During the Russo-Japanese War on February 22, 1905, the Shimane Prefecture of Japan declared that the Liancourt Island Takeshima would be become part of the Oki islands.\(^{28}\) The next day Korea and Japan signed the 1904 Protocol which provided that Japan might occupy the territory of Korea if necessary for

\(^{27}\) Kazuo, *supra* note 1, at 124.

\(^{28}\) *Id.* at 132.
strategic reasons.\textsuperscript{29} One year later, Shim Heung-tack, the Ulleungdo County master, surprised at the news of Japan’s unilateral incorporation, submitted a report to the central government on March 29, 1906.\textsuperscript{30} In response, Minster Park Je-sun of the Home Ministry stated that the claim that Dokdo had become Japan’s possession was groundless and ordered officials to investigate the case.\textsuperscript{31} Thus in reality, the Dokdo controversy started in 1906.\textsuperscript{32} At that time, however, Korea lacked the power to protest against Japan. Moreover, Japan had already eliminated diplomatic sovereignty with regard to Korea by the 1905 \textit{Eulsa} Treaty.\textsuperscript{33} Because Korea expressed its opposition immediately upon learning of Japan’s incorporation of Dokdo, the controversy indeed began at the time of the incorporation.\textsuperscript{34} The nominal independent status of Korea was ended by the annexation of Japan in 1910.

\begin{itemize}
\item \textsuperscript{29} The 1904 \textit{Han-Il ëijôngsŏ (韓日議定書: Protocol between Korea and Japan)}, art. 4, Feb. 23, 1904, available at http://ko.wikisource.org/wiki/%ED%95%9C%EC%9D%BC%EC%9D%98%EC%A0%95%EC%84%9C; http://www.geocities.jp/nakanolib/joyaku/jm370223.htm.
\item \textsuperscript{30} Kazuo, \textit{supra} note 1, at 133-36.
\item \textsuperscript{31} \textit{Id.}; Hyun, \textit{supra} note 12, at 75-76.
\item \textsuperscript{32} Kazuo, \textit{supra} note 1, at 137.
\item \textsuperscript{33} The \textit{Eulsa} Treaty, Nov. 17, 1905, available at http://ko.wikisource.org/wiki/%EC%9D%84%EC%82%AC%EC%A1%B0%EC%95%BD.
\item \textsuperscript{34} Kazuo, \textit{supra} note 1, at 137.
\end{itemize}
C. SCAPIN 677 AND THE NEGOTIATIONS FOR 1951 PEACE TREATY

After Japan’s total surrender to the Allied Powers, the Supreme Commander for the Allied Powers issued SCAPIN 677.35 SCAPIN 677, which was entitled “Governmental and Administrative Separation of Certain Outlying Areas from Japan” excluded Dokdo from the territory of Japan.36 According to the occupation boundaries for the United States forces in 1945, namely the MacArthur Line, which drew the postwar boundaries between Korea and Japan, Dokdo belonged to the territory of Korea under the command of the United States XXIV Corps.37 This boundary designation was a neutral initial decision of the United States forces without any influence from the Japanese.

Article 2 (a) of the 1951 San Francisco Peace Treaty between the Allies and Japan, however, without explicit determination of Dokdo’s sovereignty, stated that “Japan, recognizing the independence of Korea, renounces all right, title, and claim to Korea,


36 Id.

37 Id.
including the islands of Quelpart, Port Hamilton, and Dagelet.\(^{38}\) As a result, the 1951 Peace Treaty, which could be understood to abolish the MacArthur Line, ignited the Dokdo islets controversy. As the partner of the treaty negotiation, Japan’s tenacious lobbying of the United States resulted in the exclusion of Dokdo from the initial draft of the treaty.\(^{39}\) For example, Yoshida Shigeru, the Japanese Prime Minister, recalled that during the negotiation, he did his best so that the Allied Powers would not incorrectly interpret the meaning of the passage “Japan will also be expelled from all other territories which she has taken by violence and greed” of the 1943 Cairo Declaration incorporated into the Potsdam Declaration.\(^{40}\) The territorial clause in the initial draft of the 1951 Peace Treaty recognized that Dokdo belonged to Korea as “Japan hereby renounces all rights and titles to Korea and all minor offshore Korean islands, including Quelpart Island, Port Hamilton, Dagelet Island and Liancourt Rocks [Dokdo].”\(^{41}\) This understanding continued until the end of 1949.\(^{42}\)

\(^{38}\) The Treaty of Peace between the Allies and Japan, art. 2(a), (September 8, 1951) 3 U.S.T. 3169, 136 U.N.T.S. 45. [hereinafter 1951 Peace Treaty]. Quelpart means Jejudo, Port Hamilton means Komundo, and Dagelet means Ulleungdo.

\(^{39}\) As a party of the treaty, Japan could more vigorously lobby the United States. See Jung Byung Joon, William J. Sebald and the Dokdo Territorial Dispute, 13 (4) KOREA FOCUS 55, 66-73 (2005).

\(^{40}\) Id. at 68. See also Chapter III, D, 3 of this article.

\(^{41}\) Memorandum from Dean G. Acheson, U.S. Secretary of State, on Outline and Various Sections of Draft Treaty to General MacArthur, State Dep’t Decimal File No. 740.0011 PW (PEACE)/3-2047, State Dep’t Records, (Mar. 3, 1947) (on file with the U.S. National Archives in College Park, MD); Draft Treaty of Peace With Japan, Wikisource.
However, in the Peace Treaty draft of December 29, 1949, Dokdo was included in the territory of Japan.\textsuperscript{43}

Concerning the change in the draft of the 1951 Peace Treaty, Korea requested the United States to retain the provisions of the initial Article 2(a) so as to include Dokdo.\textsuperscript{44}

However, being considered as a State invited to the conference for the 1951 Peace Treaty,\textsuperscript{45} particularly as a State of the Allies, Korea was generally ignored.\textsuperscript{46} Mr. Dean Rusk, the


\textsuperscript{44} Letter from Mr. Kenneth T. Young, Jr., Director of Office of Northeast Asian Affairs, to U.S. Embassy in Korea, State Dep’t Records, (Nov. 5, 1952), (on file with the U.S. National Archives in College Park, MD); Lee, supra note 7, at 129-43.

\textsuperscript{45} Korea was not invited to the Conference for the 1951 Peace Treaty. Among the invited States, Argentina, Australia, Belgium, Bolivia, Brazil, Cambodia, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Japan, Laos, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, The Philippines, Poland, Saudi Arabia, the Soviet Union, Sri Lanka, South Africa, Syria, Turkey, the United Kingdom, the United States, Uruguay, Venezuela, Vietnam attended the Conference whereas Burma, India, and Yugoslavia did not participate. See Conference for the Conclusion and Signature of the Treaty of Peace with Japan: Record of proceedings (Dep’t of State Publication 4392) 19-20 (1951). Of the 52 participating States, 49 signed the 1951 Peace Treaty but the Soviet Union with Czechoslovakia and Poland refused to sign. See id. at 292, 296, 307.

\textsuperscript{46} For example, with the assumption that the Soviet Union, a State of the Allies, would not sign the 1951 Peace Treaty, a provision of the draft, which seemed to leave Japan with title over South Sakhalin and Kuril Islands, Jean Chauvel, a French Diplomat, argued that the provision be modified in a conversation. See Memorandum of Conversation, June 11, 1951, Files No. 694.001/6-1451(Paris 3607), State Dep’t Records, (June 14, 1951) (on file with the U.S. National Archives in
Assistant Secretary of State, stated that the United States could not agree with the remodification proposed by Korea because according to his information Dokdo islets had never been treated as part of Korea in that they had been under the jurisdiction of the Japanese office of the Shimane Prefecture since 1905. As a result, Article 2(a) of the Treaty made no mention of Dokdo.

The 1951 Peace Treaty and the documentary evidence produced during the negotiation of the treaty are used by Korea and Japan for their arguments on the “Dokdo” islets controversy. For example, Japan argues that the MacArthur Line established under SCAPIN 1033 was abolished by the 1951 Peace Treaty. SCAPIN 1033, with the installment of the MacArthur Line as the sea boundary between Korea and Japan, prohibited Japanese vessels or personnel from approaching closer than twelve miles to

College Park, MD).

Letter from Mr. Kenneth T. Young, Jr., Director of Office of Northeast Asian Affairs, to U.S. Embassy in Korea, State Dep't Records, (Nov. 5, 1952), (on file with the U.S. National Archives in College Park, MD); Lee, supra note 7, at 129-43. Mr. Dean Rusk might not recognize that Korea dropped under the Japanese control in 1905.

Id.


SCAPIN 1033, supra note 49, para. 2.
Dokdo.\textsuperscript{52} Japan claims that with the abolishment of the MacArthur Line, Dokdo is reverted to Japanese territory, as part of Shimane Prefecture.\textsuperscript{53} On the other hand, Korea argues that Dokdo belongs to Korean territory because SCAPIN 677\textsuperscript{54} detached Dokdo from Japan and the 1951 Peace Treaty does not explicitly stipulate it as Japanese territory.\textsuperscript{55}

\section*{D. THE RHEE LINE}

Early 1952, Korea unilaterally proclaimed the Rhee Line,\textsuperscript{56} which was also called “Peace Line,” upon the impending withdrawal of the MacArthur Line according to the 1951 Peace Treaty, which did not mention Dokdo.\textsuperscript{57} The Rhee Line is a maritime defense and

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} para. 3(b).
  \item \textsuperscript{53} Even after the 1951 Peace Treaty, the Supreme Commander for the Allied Powers exclude Dokdo from Japanese jurisdiction and used the islets as a bombing range under control of the U. S. forces. Sean Fern, \textit{Tokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute}, 5(1) STAN. J. EAST ASIAN AFF. 78, 80 (2005).
  \item \textsuperscript{54} SCAPIN 677, supra note 35.
  \item \textsuperscript{55} Park, Kwan-sook, \textit{Legal Status of ‘Dokdo’ Island}, 1 KOREA OBSERVER 78, 78-85 (1969).
  \item \textsuperscript{56} Rhee refers to Syngman Rhee, the first president (1948-60) of Korea. Before attaining the presidency, Rhee was deeply involved in independence movement activities during Japanese colonization. On January 18, 1952, Syngman Rhee issued the Korean Presidential Proclamation over the Adjacent Sea, namely the unilateral declaration of Korean sovereignty over a portion of the East Sea (Sea of Japan) and created the so-called ‘Rhee Line.’ BRIAN BRIDGES, JAPAN AND KOREA IN THE 1990S 65 (1993).
  \item \textsuperscript{57} Alan J. Day, Border and Territorial Disputes: A Keesing’s Reference Publication 337-38 (2nd ed.)
\end{itemize}
fishing demarcation line for Korean jurisdiction over waters within the line running sixty nautical miles on average from the Korean coast and one hundred seventy nautical miles at its farthest point near Dokdo.\textsuperscript{58} During the 1951 Peace Treaty negotiations, with mistrust about Korean political leaders and Japan’s systematic lobbying efforts, Japan was gaining precedence over Korea in the policies of the United States.\textsuperscript{59} In light of this situation, to keep the MacArthur Line, Korea declared the Rhee Line which effectively excluded Japanese fishermen from some of the richest fishing grounds in the East Sea (Sea of Japan). The Rhee Line began the fishery dispute between Korea and Japan. Since its proclamation, Korea seized many Japanese fishing vessels and fishermen found within the Line.\textsuperscript{60}

\textbf{E. KOREA AND JAPAN DIPLOMATIC NORMALIZATION}

Negotiations to normalize Korea and Japan’s diplomatic relations began after Park


\textsuperscript{59} See Jung, \textit{supra} note 39, at 64-73.

Chung Hee’s seizure of power in Korea in 1961. Not surprisingly, the Dokdo issue was one of the most troublesome and difficult obstacles of the negotiation.\textsuperscript{61}

Despite controversy over Dokdo, in June 1965 foreign ministers of Korea and Japan signed the Treaty on Basic Relations,\textsuperscript{62} which normalized their diplomatic relations. Both parties placed priority on the signing of the Treaty on Basic Relations and agreed to leave the Dokdo controversy unresolved.\textsuperscript{63} Specifically, both parties agreed to omit direct mention of Dokdo from the final document.\textsuperscript{64} Given Korea’s occupation of the territory, the fact that the Dokdo controversy was never referred in the Basic Treaty could be considered as a waiver or acquiescence by Japan under the theory of prescription.\textsuperscript{65} Along with the Basic Treaty, both parties agreed on the 1965 Agreement on Fisheries.\textsuperscript{66} At that

\begin{itemize}
\item \textsuperscript{61} See Hyun, \textit{supra} note 12, at 85-89; Lovmo, \textit{supra} note 2.
\item \textsuperscript{63} Hyun, \textit{supra} note 12, at 88-89.
\item \textsuperscript{64} BRIAN BRIDGES, JAPAN AND KOREA IN THE 1990S 65 (1993).
\item \textsuperscript{65} See Dyke, \textit{supra} not 9, at 189-92.
\item \textsuperscript{66} 1965 Agreement on Fisheries, \textit{supra} note 14. In addition to the 1965 Agreement on Fisheries, Korea and Japan negotiated two agreements in 1974 in order to deal with exploration and mining rights to areas of their common continental shelves. \textit{See} Agreement Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries (with Map and Agreed Minutes), Korea-Japan, Jan. 30, 1974, 1225 U.N.T.S. 104, \textit{available at} http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/jap-
time, with the adoption of the four Geneva Conventions on the Law of the Sea in 1958, the interest of the coastal States in the maintenance of resources in the high seas near their coasts, particularly on the continental shelf, was newly recognized. Based on the recognition, the Dokdo controversy between Korea and Japan came to include the nature and extent of a coastal State’s superior right to manage the marine resources adjacent to its coast.\textsuperscript{67} The fishery agreement demarcated the three nautical mile territorial waters, the twelve nautical mile exclusive fishing zone, and the waters jointly controlled by both countries. Korea and Japan both claimed fishing rights over the Dokdo islets area. Even though the territorial controversy of Dokdo was too serious to be solved at the national level, the local fishermen tacitly understood that Japanese fishing vessels could not enter into the three nautical mile territorial waters around the Dokdo. There were several cases involving Japanese fishing vessels entering inside the nautical mile fishing zone near Dokdo.\textsuperscript{68} However, neither side chose to exercise its right to give the one-year notice of abrogation in December 1970 when the five-year mandatory period of the fishery

\textsuperscript{67}Park, Choon-ho, \textit{East Asia and the Law of the Sea} 64-65 (1983).

\textsuperscript{68}Kajimura, Hideki, \textit{The Question of Takeshima/Tokdo}, 28(3) KOREA OBSERVER 423, 466-67 (1997).
agreement was to be expired.69

**F. A TRANQUILITY**

After Korea and Japan’s diplomatic normalization treaty was issued, there was a period of tranquility over Dokdo for about 10 years.70 There were two reasons for the tranquility. One was that Japanese fishing vessels generally respected the three nautical mile waters of Dokdo as Korean territorial sea. Therefore, fishing vessels of both countries operated peacefully. The other reason was flourishing economic interdependence between Korea and Japan. Through more than ten years, the countries experienced an “economic honeymoon era,” as characterized by the increased economic activity between Korea and Japan.71 The economic incentive drove both countries to avoid nationalistic territorial competition, such as the costly controversy over Dokdo, for the time being. Moreover, the interdependence and promotion for more international trade and investment suppressed the

69 1965 Agreement on Fisheries, *supra* note 14, art 10(2).


Dokdo controversy. Conversely, the subsided Dokdo controversy supported the economic interdependence between the two countries.

G. THE EMERGING EEZ AND THE NECESSITY OF NEW MARITIME DEMARCATION

1. Delimitation of the EEZs

At the time of the 1965 fishery agreement between Korea and Japan, there were only a few Korean long distance water fishing vessels. In the early 1970s, however, owing to the rapid development of the ship-building and fishing equipment industry in Korea, Korean fishermen were not only technically able to operate offshore waters of Japan but also were efficient in fishing within the coastal waters of Korea and the common waters of Korea and Japan. This meant that the Japanese fishing industry had to compete with Korean fishermen. Moreover, in 1976 the Soviet Union proclaimed a two hundred nautical mile fishing zone, which made Korean and Japanese distant water fishing vessels lose their fishing ground in the Soviet zone in the Northwest Pacific and swamp the coastal areas of Japan’s Hokkaido.72 As a result, the fishery issue in the context of Dokdo territorial

72 PARK, supra note 67, at 146-47.
controversy between Korea and Japan became more serious.

In 1977, Japanese Prime Minister Fukuda added fuel to the Dokdo controversy by stating that “Takeshima (Dokdo) is Japanese territory beyond all doubt.” Also, the Japanese Foreign Ministry announced that it would take the Dokdo case to the International Court of Justice (ICJ). Undoubtedly, behind such offensive declarations were the fishery competition issues and the emerging global trend towards a two hundred nautical mile EEZ regime. After a general consensus at the Second United Nations Conference on the Law of the Sea in 1960, the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea up to a twelve mile limit from the baselines, was crystallized as customary law in the early 1970s. With vigorous support from many Asian and African States, the concept of the EEZ was proposed and put forward for the first time by Kenya to the Asian-African Legal Consultative Committee in January, 1971 and to the UN Sea Bed Committee in 1972. In 1977, with the new

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73 In response to Fukuda’s statement, the Korean government confirmed that “Dokdo is the essential part of South Korea’s territory, both on historical and legal grounds.”

74 Hyun, supra note 12, at 77.


international maritime practices such as exclusive fishery jurisdiction\textsuperscript{77} and the emerging EEZ concept, Japan unilaterally declared a twelve nautical mile territorial waters law and a two hundred nautical mile fishing zone law, departing from its agreements with Korea, such as the 1965 Agreement on Fisheries and the 1974 Agreement on the Continental Shelf. The 1977 Japanese proclamation of new exclusive fishing zones near Dokdo brought a new urgency to the Dokdo controversy. In 1982, the conclusion of UNCLOS flared up animus over the controversy. In the end, after asking to amend the 1965 Agreement on Fisheries several times, Japan unilaterally denounced the Agreement in January, 1998.\textsuperscript{78}

2. The 1998 Agreement on Fisheries

With the advent of the UNCLOS regime in 1994, Korea and Japan acutely quarreled again over Dokdo, as both governments took extraordinarily vigorous maritime policies. In 1996 Japan propagated its own EEZ in accordance with the UNCLOS provisions and


\textsuperscript{78} The Chosun Ilbo, (Jan. 23, 1998).
suggested Korea that both countries settle overlapping EEZ terrain in the East Sea (Sea of Japan), where the distance between some EEZ baselines was less than four hundred nautical miles.\textsuperscript{79}

In 1998, even though Korea and Japan reached a new fishery agreement, they neither dealt with the Dokdo controversy nor clarified the EEZ delimitation between them.\textsuperscript{80} Korea and Japan chose to circumvent both issues by setting up two provisional “common water zones:” the sea area near Dokdo and the southeast area to Jeju Island.\textsuperscript{81} The “common water zones,” particularly the zone near Dokdo, was not clearly defined, left open to diverse and ambiguous interpretations.\textsuperscript{82} Thus, with the EEZ demarcation issue unresolved and the newly recognized economic values of maritime resources, such as natural gas and Methane clathrate,\textsuperscript{83} the 1998 Agreement on Fisheries accelerated and

\begin{itemize}
\item \textsuperscript{79} The UNCLOS, art. 74. 1. “The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law….”
\item \textsuperscript{80} See 1998 Agreement on Fisheries, \textit{supra} note 16. The two States agreed to continued negotiation only. \textit{Id.} app. I, para. 1.
\item \textsuperscript{81} See 1998 Agreement on Fisheries, \textit{supra} note 16. art. 9. Also, the agreement includes the coastal State principle concerning illegal fishing within the respective EEZ and thirty five nautical miles from the baseline of territorial waters concerning the width of the EEZ. The Chosun Ilbo, (Sept. 24, 1998).
\item \textsuperscript{83} Methane clathrate, also called methane hydrate, gas hydrate, or methane ice, is a form of water
\end{itemize}
perpetuated the Dokdo controversy.

3. The 2006 Japanese Survey Trial near Dokdo by Its Research Vessel

In 2006, without notice to the Korean government, the Japanese government maritime authorities notified the International Hydrographic Organization (IHO) of plans for a Japanese research vessel to explore and research waterways in Korea’s claimed EEZ near Dokdo between April 14 and June 30. Japan’s trial was considered by Korea as an act of provocation or a deliberate ploy to heighten tensions in the sensitive Dokdo area to be an international dispute. The government of Korea considered Japan’s trial as a territorial sovereignty issue in which there was no negotiation or compromise.

Considering taking physical action including detention or seizure of Japanese research vessel, Korea vowed to stop any Japanese trial to send out the research vessel into Korea’s

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claimed EEZ near Dokdo for a hydrographical survey.\textsuperscript{86} In the face of a plummeting approval rating for the Korean government, President Roh tried to take a firmer stance against Japan’s actions, as doing so would boost the public approval rating of the Korean government. However, the response of the Korean government to the Japanese research waterway trial near Dokdo was excessive in some respects. The first problem was the legality of Korea’s claiming an EEZ near Dokdo. According to article 74 of UNCLOS, the delimitation of the EEZ between States with opposite coasts “shall be effected by agreement on the basis of international law…”\textsuperscript{87} As mentioned before, Dokdo is situated 47 nautical miles to the southeast of Ulleungdo Island of Korea and it is 85 nautical miles to the northwest of Japanese Oki Island. With regard to Dokdo, Korea and Japan are States with opposite coasts because the distance between Ulleung and Oki Islands is less than four hundred nautical miles. Korea and Japan, however, never agreed upon the delimitation of the EEZ around Dokdo. Therefore, it is a difficult case to make the Korea’s claiming an EEZ near Dokdo legally effective, despite the presence of some provisions concerning the


\textsuperscript{87} UNCLOS art. 74. 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law…
delimitation of the EEZ, such as the “central line” between opposite coasts, in Korean
domestic law.\textsuperscript{88} Also, it is doubtful that Dokdo has its own EEZ because Article 121 of
UNCLOS states that “rocks which cannot sustain human habitation or economic life of
their own” shall not have an EEZ.\textsuperscript{89} Considering the fact that Dokdo have been called
“Liancourt Rocks” since 1849, it is not easy to verify its status of islands under the Article
121 of UNCLOS. Therefore, the assertion that Dokdo has its own EEZ even if it has its
territorial water is questionable. Moreover, even if Korea’s claiming an EEZ near the
Dokdo islands would be legally recognized, it would be doubtful that the hydrographical
survey or research waterway action in the EEZ would be prohibited by international law. In
fact, under articles 55 and 86 of the UNCLOS, the EEZ has neither a residual territorial sea
character nor a residual high seas character.\textsuperscript{90} The EEZ “does not follow either the concept
of sovereignty, prevailing in the territorial sea, or the concept of freedom, which
characterizes the high seas.”\textsuperscript{91}

\textsuperscript{88} The Korean EEZ Law art. 3.
\textsuperscript{89} UNCLOS art. 121(3).
\textsuperscript{90} CHURCHILL \& LOWE, supra note 76, at 165.
\textsuperscript{91} Tullio Scovazzi, Coastal State Practice in the Exclusive Economic Zone: The Right of Foreign
States to Use This Zone, in THE LAW OF THE SEA: WHAT LIES AHEAD? 310, 310 (Thomas A.
Nonetheless, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, etc., all States enjoy ‘the freedoms referred to in article 87 of UNCLOS, namely navigation and other internationally lawful uses of the sea related to the freedom compatible with the other provision of the UNCLOS. Moreover, all States enjoy the freedom of over-flight in the EEZ and the freedom of laying submarine cables and pipelines with other internationally

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92 UNCLOS art. 86:
1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;

93 UNCLOS art. 58:
1. In the exclusive economic zone all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms …of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines…

94 Concerning the freedom of over-flight, two limitations could be implied:

"First, the coastal State’s right to construct artificial islands and installations might effectively
lawful uses of the sea related to the freedoms compatible with the provisions of the UNCLOS. Under the rules, if the purpose of Japanese hydrographic research is future safe and efficient navigation, the hydrographic research should be permitted under the freedom of navigation and other internationally lawful uses of the sea.\textsuperscript{95} Under more serious circumstances than the hydrographic research, such as when there are “clear grounds” for believing that a violation of anti-pollution measures has occurred in the territorial sea, the coastal State may undertake physical inspection, including boarding and detaining the ship.\textsuperscript{96} When there are similar suspected situations in the EEZ, however, the coastal State must first seek information from the suspect vessel.\textsuperscript{97} This means that any possible physical measures by Korea including seizure or detaining of Japanese research vessel in

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\textsuperscript{95} Japanese hydrographic research might be considered marine scientific research. In that case, coastal states have the right to regulate, authorize and conduct marine scientific research in their EEZ. UNCLOS art. 246: 1. Marine scientific research shall be conducted with the consent of the coastal state. UNCLOS art. 246: 2. In normal circumstances, however, coastal states shall grant their consent for marine scientific research projects by other states and make such consent will not be unreasonably delayed or denied. UNCLOS art. 246: 3. Action of the coastal State, particularly physical action against hydrographic research project by other State, is seriously limited in the EEZ.

\textsuperscript{96} UNCLOS art. 220: 2.

\textsuperscript{97} UNCLOS art. 220: 3.
the claimed EEZ would not be consistent with international law. Through diplomatic negotiations, Japan refrained from sending the research vessel which might have provoked physical conflict.

Thus, the Dokdo controversy relates to the demarcation of the EEZ near Dokdo. Also, the EEZ closely relates to fishery and newly recognized economic values of maritime resources. The potential and future economic values of maritime resources near Dokdo make the negotiation between Korea and Japan over the delimitation of EEZs increasingly difficult.

With uncertainty of jurisdiction in the EEZ, some coastal countries argued for more extended sovereignty in the EEZ. For example, China adopted the "offshore defense doctrine" to extend its rights over the territorial sea to the full extent of its EEZ. Tai Ming Cheung, Emerging Chinese Perspectives on Naval Arms Control and Confidence-building Measures, in A PEACEFUL OCEAN? MARITIME SECURITY IN THE PACIFIC IN THE POST-COLD WAR ERA 112, 119. (Andrew Mack ed., 1993).

Dong-A Ilbo (Apr. 24, 2006).

The advent of the EEZ regime reallocated maritime resources. CHURCHILL & LOWE, supra note 76, at 176. “The extension of coastal State jurisdiction by means of 200-mile EEZs from what had previously generally been narrow coastal State limits to encompass areas which had formerly been high seas – areas containing the major proportion of the ocean’s resources and being the site of most ocean activities – has represented a major change in the regulation of and access to ocean activities:” Id. Concerning the fishery, the EEZ regime affected negatively on distant-water fishing in the area of former high sea. The reduction in catches has not been spread evenly among distant-water fishing countries. Korean and Japan have to a considerable extent offset their losses by increased fishing in their own EEZs. Id. at 177.
III. THE ARGUMENTS OVER DOKDO

A. THE CORE ARGUMENTS OF JAPAN

Japan argues that Dokdo is an integral part of Japan’s sovereign territory and that the occupation of Dokdo by Korea is illegal. Japan’s core arguments are: 1) by the middle of the Seventeenth century, Japan had established sovereignty of Dokdo based on effective rule; 2) Japan incorporated Dokdo with intention to possess Dokdo, which was a *terra nullius*; and 3) the definition of “Korea” in the 1951 Peace Treaty did not include Dokdo. In September, 1954 Japan proposed to Korea that the issue should be submitted to the International Court of Justice, but this proposal was rejected by Korea.

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102 *Id.*
103 In 1905, Japan expressed its intention to possess Dokdo by a Cabinet decision in January, followed by a notification by Shimane Prefecture in February, officially incorporating Dokdo as part of Shimane Prefecture. *Id.*
104 *Id.*
105 *Id.*
B. THE CORE ARGUMENTS OF KOREA

Korea argues that Dokdo is an integral part of Korean territory. The core arguments of Korea are: 1) Korean title to Dokdo dates back to the Sixth century; 2) in the course of Japan’s imperial aggression, a Japanese local authority adopted a municipal ordinance to incorporate Dokdo into its jurisdiction; 3) some documents adopted by the allied powers have provisions intended to make Japan return the entire pre-colonial Korean territory including Dokdo to Korea; and 4) Korea recovered effective control of Dokdo after World War II.

C. AN ANALYSIS UNDER INTERNATIONAL LAW

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107 Particularly, in 1900, King Kojong of Korea issued Imperial Edict 41 placing Seokdo (Dokdo) under the jurisdiction of Uldo-gun (Ulleungdo), thus reaffirming the fact that the islands belonged to Korea. Id.

108 Id.

109 Id.

110 Id.
1. **General Ways of Territorial Acquisition under International Law**

Concerning territorial acquisition, many international law textbooks introduce the following five stereotypical ways of customary international law – Effective Occupation, Cession, Prescription, Conquest and Annexation, Accretion and Erosion. Effective Occupation as a basis of territorial acquisitions requires an effective and continuous control of a State over such a territory at the time not under the sovereignty of another State, particularly a *terra nullius*, with the intention to establish and maintain the State’s sovereignty over the territory.\(^{112}\)

Cession means the peaceful transfer of territory by a treaty in which the owner State (donor) manifests intent to relinquish and transfer title or sovereignty to another State (donee).\(^{113}\) Because the treaty should be a peaceful agreement, if the donee state coerces the donor State by threat or use of force, cession cannot be established. Such cession is void

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\(^{111}\) IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 127 (7th ed., 2008); JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 275-85 (2nd ed., 2008). Among the five ways of territorial acquisitions, Accretion and Erosion, which means the natural process of adding and decreasing a territory under the certain sovereignty, is not related with Dokdo controversy.

\(^{112}\) *Id.* at 281; OPPENHEIM’S INTERNATIONAL LAW 686-88 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM’S].

\(^{113}\) *Id.* at 679 -80.
under Article 52 of the Vienna Convention on the Law of Treaties.114

Prescription can be defined as the process of acquiring territory by “effective occupation” in which a continuous and effective authority with intent to establish and maintain sovereignty controls the territory.115 To establish prescription, the acquiring state must establish its intention to act as sovereign and some actual exercise or display of such authority must be shown to exist.116 Because “effective occupation” is recognized only of a territory which is not subject to any existing claim of sovereignty, prescription could be applied when a prior sovereignty is being replaced by a constant and continuous act of another State.117

Conquest and Annexation (Subjugation) means acquiring territory by conquest followed by annexation.118 However, with the establishment of the League of Nations, the adoption of the 1928 General Treaty for the Renunciation of War, and eventually the

114 Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter the Vienna Convention] provides that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

115 CURRIE, supra note 111, at 281; OPPENHEIM’S, supra note 111, at 706.


117 CURRIE, supra note 111, at 281.

118 Id. at 279-81.
adoption of the general prohibition on the use of force under the UN Charter, \(^{119}\) annexation following conquest cannot be a valid way of acquiring territory. \(^{120}\)

2. **Case Law on Island Territorial Disputes**

   a) **Terra Nullius**

   *Terra nullius* means a territory not possessed by any social and political organization, or abandoned by the former State. \(^{121}\) As a principle of customary international law, *terra nullius*, or *res nullius*, which may be inhabited but over which no State has ever claimed sovereignty, may be acquired by any state through effective occupation, control, and even symbolic conducts of occupation. \(^{122}\)

   The Island of Palmas Case \(^{123}\) was based on the 19 century customary international

\(^{119}\) Particularly, Article 2 (4) of the UN Charter.

\(^{120}\) **CURRIE**, *supra* note 111, at 279-80.

\(^{121}\) Ian Brownlie, *Principles of Public International Law* 133-34 (7th ed., 2008).

\(^{122}\) Concerning *terra nullius*, see Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Judgment of Apr. 5), at 45-75.

\(^{123}\) Island of Palmas Case (Neth. v. U.S.), 2 UN Rep. Int’l Arb. Awards 829, (Decided on 4 Apr. 1928), available at http://untreaty.un.org/cod/riaa/vol_II.htm. Island of Palmas (or Miangas) located off the Philippine coast was two miles long by three fourths of a mile wide island with a hundred inhabitants. *Id.* at 831, 860. According to the 1925 Agreement between the United States and the Netherlands, Max Huber, as the arbitrator for the Permanent Court of Arbitration (PCA), was
law principle of *terra nullius* which meant that territorial sovereignty could be acquired through occupation.¹²⁴ In the case, however, the PCA held that discovery of *terra nullius* accompanied by symbolic acts of Spain, gave no more than an inchoate title, and that the inchoate title over land could not prevail over the sovereignty of the Netherlands which obtained the land by continuous and peaceful display of its authority over it.¹²⁵ Peaceful displays of sovereignty, such as taxation of the habitants, completed title of the territory.¹²⁶ Also, the PCA recognized that the manifestations of sovereignty over a small and distant island cannot be expected to be frequent and that the display of sovereignty should be traced to the very distant past.¹²⁷

In the Clipperton Case,¹²⁸ the arbiter applied the same principles set forth in the charged to determine whether the Island of Palmas formed a part of the territory of the United States or of Netherlands. Id. at 831-34. The United States based its title to Palmas, on the original discovery by Spain and Spain’s subsequent cession of the Philippines to the United States pursuant to the Treaty of Paris in 1898. Id. at 837. The Netherlands based its claim on the colonization of Palmas by the Dutch East India Company and on its subsequent uninterrupted and peaceful exercise of sovereignty over Palmas. Id. at 837-38.

¹²⁴ Id. at 845-46.
¹²⁵ Id.
¹²⁶ Id. at 839-40, 846, 865.
¹²⁷ Id. at 866-67.
¹²⁸ Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France / Mexico), 26 AM. J. INT’L L. 390 (1932), available at http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ajil26&men_hide=false&men_tab=citnav&collection=fijournals&page=391#396 [hereinafter Clipperton Case]. In the Clipperton
Island of Palmas Case. The arbiter concluded that even if the discovery of Clipperton by Spain was admitted, to establish Mexico’s claims, Mexico, as the successor of Spain, needed to prove that Spain not only had the right to possess the island, but also had effectively exercised the right. Mexico’s claims, however, were based on only the historical fact of discovery without manifestations of sovereignty afterwards.\textsuperscript{129} Mere long-standing historic conviction that Clipperton was Mexican territory could not be dispositive.\textsuperscript{130}

In short, rather than the nominal taking of possession, affirmative and actual behaviors relevant to the territory are needed for obtaining title.

\textit{b) The More Convincing Evidence of Sovereignty}

In the Minquiers and Ecrehos Case,\textsuperscript{131} setting aside burden of proof\textsuperscript{132} and

\textsuperscript{129} \textit{Id.} at 392-93.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17) [hereinafter Minquiers and Ecrehos]. The Minquiers and Ecrehos are the small islet and rock groups in the English Channel between Island of Jersey and the coast of France. The United Kingdom and France, which argued sovereignty claims over the Minquiers and Ecrehos, submitted the dispute to the ICJ by virtue of a
application of the *terra nullius* principle,\textsuperscript{133} the definitive issue was which of the two States produced the more convincing evidence regarding sovereignty over the Minquiers and Ecrehos.\textsuperscript{134} According to the court, the crucial issue was not the indirect presumptions based on matters dating back to the Middle Ages, particularly the medieval treaties, but the evidence directly relating to the possession of the Minquiers and the Ecrehos.\textsuperscript{135} Even though the dismemberment of the Duchy of Normandy, when Normandy was occupied by the French in 1204, could be considered as an act of sovereignty, it had been superseded by subsequent actions constituting State functions. Thus, leaving behind historical controversies,\textsuperscript{136} the ICJ focused on the importance of affirmative conducts of sovereignty, which were considered State functions.\textsuperscript{137} Any alleged original title could be superseded by

\begin{flushleft}
\textsuperscript{132} The Special Agreement Article II. See *id.* at 49.
\textsuperscript{133} Because both States competed that they had the original title it was not the issue of *terra nullius* principle. *Id.* at 53.
\textsuperscript{134} *Id.* at 54.
\textsuperscript{135} *Id.* at 57.
\textsuperscript{136} “For the purpose of deciding the present case it is, in the opinion of the Court, not necessary to solve these historical controversies.” *Id.* at 56.
\textsuperscript{137} *Id.* at 57, 65.
\end{flushleft}
subsequent affirmative conduct.\textsuperscript{138}

In relation to the Ecrehos, the Court gave probative value to various Jersey jurisdiction exercises and local administrative conducts.\textsuperscript{139} For example, the Court found that conduct such as inquests on corpses found at the Minquiers, building houses for taxpayers, and registration of real estate contracts, were exercised in respect of the Minquiers.\textsuperscript{140}

Therefore, the Court unanimously decided that sovereignty over the islets and rocks of the Ecrehos and the Minquiers belonged to the United Kingdom.\textsuperscript{141} In the case, Judge Alvarez, even though he agreed with the decision expressed regret that both States had not sufficiently considered international law or its present tendencies in regard to territorial sovereignty but relied too much on medieval evidence.\textsuperscript{142}

\begin{footnotes}
\item[138] Id.
\item[139] Id. at 64-67.
\item[140] Id. at 67-70.
\item[141] Id. at 67, 72.
\item[142] Id. at 73.
\end{footnotes}
c)  *Uti Possidetis*

The principle of *uti possidetis* means that colonial administrative boundaries will become international borders when the political subdivision or colony forms as an independent sovereign State.\(^\text{143}\) In the Land, Island and Maritime Frontier Case,\(^\text{144}\) concerning the issue which State owned the islands of El Tigre, Meanguera and Meanguerita in the Gulf of Fonseca,\(^\text{145}\) the Chamber of ICJ decided that the principle of *uti possidetis* was to consider relevant manifestations of sovereignty.\(^\text{146}\)

“*[U]ti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of

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\(^{143}\) *Black's Law Dictionary* 1686 (9th ed. 2009).

\(^{144}\) *Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. intervening)*, 1992 I.C.J. 351 (Sept. 11) [hereinafter Land, Island and Maritime Frontier]. In 1839, the Federal Republic of Central America, which proclaimed independence from Spain in 1821, disintegrated into its component states, such as El Salvador and Honduras. *Id.* at 380-89, paras. 27-45. The dispute regarding sovereignty over the islands in the Gulf of Fonseca emerged in 1854 when Honduras proposed to sell the island of El Tigre to the United States. *Id.* at 381, para. 30. El Salvador objected by a diplomatic Note of October 12, 1854, in which it also claimed sovereignty over the islands of Meanguera and Meanguerita. *Id.*

\(^{145}\) *Id.* at 553-57, paras. 323-30.

\(^{146}\) *Id.* at 386-88 paras. 42-43.
decolonization wherever it occurs.”

The application of the principle results in the administrative boundaries established by a colonial power, “in the full sense of the terms,” being transformed into the international borders. By application of the principle of *uti possidetis juris*, “the territorial boundaries at the moment when independence is achieved” could be secured as very probative standards for resolution. The originally intent of the colonial power to draw administrative boundaries was not important. Also, the possibility of *terra nullius* should be denied because the application of the principle of *uti possidetis* relates only to the location of boundaries upon the alleged title.

The specific boundary would be determined according to the principle of *uti possidetis* by reference to Spanish Royal Decrees of Title in effect at the time of independence in 1821. The Spanish documents proved the will of the Spanish Crown,

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148 *Id.*

149 *Id.*

150 Land, Island and Maritime Frontier, *supra* note 144, at 387-88, para. 43.

151 *Id.* at 386-87 para. 42, at 566, para. 347.

152 *Id.*
which adjusted certain territories of its colony to respect each administrative unit. The document, which served only an administrative purpose, is different from ordinary titles, which were grants by colonial administrative authorities to individuals or Indian communities.\footnote{Id.}

Concerning El Tigre, the ICJ Chamber concluded that, according to the principle of \textit{uti possidetis juris}, Honduras achieved sovereignty on El Tigre by succession from Spain, or such succession, in the least, was not contradicted by any other Spanish colonial title.\footnote{Id. at 569-70, para. 355.} In particular, the Chamber found that El Salvador recognized Honduras’ presence on El Tigre, namely \textit{de facto} occupation, since 1833\footnote{Id. at 566, para. 348.} and El Salvador did not question Honduras’ sovereignty of El Tigre when Honduras proposed to sell the island to the United States, even though El Salvador objected to the transaction itself and argued sovereignty over the islands of Meanguera and Meanguerita.\footnote{Id. at 568, para. 352.} Additionally, the ICJ chamber emphasized that Honduras effectively occupied and controlled El Tigre for more than a hundred

\begin{footnotes}
\item[153] \textit{Id.}
\item[154] \textit{Id.} at 569-70, para. 355.
\item[155] \textit{Id.} at 566, para. 348.
\item[156] \textit{Id.} at 568, para. 352.
\end{footnotes}
Concerning the islands of Meanguera and Meanguerita,\textsuperscript{158} the ICJ Chamber had to support the argument of El Salvador, which was based on its \textit{effectivités} – effective exercise of its sovereignty over the islands in dispute – since 1854, because the Chamber could not produce probative standards from the Spanish Royal Decrees of Title in effect at the time of independence in 1821 by application of the principle of \textit{uti possidetis}.\textsuperscript{159}

d) \textit{Effectivités}

If the court, where application of the principle of \textit{uti possidetis}, failed to yield sufficiently decisive information to reach a conclusion, the court would rely on \textit{effectivités}, namely the conduct of the State as proof of the effective exercise of

\textsuperscript{157} \textit{Id.} at 569-70, para. 355.

\textsuperscript{158} The ICJ treated Meanguera, an inhabited island situated above El Tigre, and Meanguerita, which is an uninhabited small island to the south-east of Meanguera, as a singular unit because neither Honduras nor El Salvador argued otherwise. See \textit{id.} at 570, para. 356, at 579, para. 367.

\textsuperscript{159} \textit{Id.} at 579, para 367.
Sovereignty over the islands in dispute.\textsuperscript{160} Recently the ICJ has relied more on *effectivité* to resolve international island disputes.

In the Nicaragua and Honduras Territorial and Maritime Dispute case,\textsuperscript{161} the ICJ reached a conclusion based on *effectivité* as it did in the Land, Island and Maritime Frontier case. In this case, Nicaragua and Honduras both claimed sovereignty over four islands: Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay located north of the parallel 14° 59.8 North latitude.\textsuperscript{162}

\textsuperscript{160} Id.


\textsuperscript{162} Id. para. 72. The dispute dates back to 1821, when both States recovered sovereignty over their respective territories, including the adjacent islands along their coasts, namely independence from Spain. Id. paras. 33-71. In 1894, the two States concluded a general boundary treaty (the Gámez-Bonilla Treaty) of which article II provided that “each Republic is owner of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua,” according to the principle of *uti possidetis juris*. Id. para. 37. Also, article I of the treaty provided for the establishment of a Mixed Boundary “to demarcate on the spot the dividing line.” Id. The Commission, however, demarcated the boundary only with respect to one-third of the land territory. Id. para. 38. Pursuant to the terms of article III of the treaty, the remaining portion of the land boundary was demarcated by the King of Spain, the sole arbitrator, in 1906. Id. Following a challenge by Nicaragua, in 1960, the ICJ confirmed the validity of the 1906 Spanish King’s arbitration award. Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), Judgment, 1960 I.C.J. 192 (Nov. 18). Honduras concluded a maritime boundary treaty with Colombia on August 2, 1986. Territorial and Maritime Dispute between Nicaragua and Honduras, supra note 161, para. 59. Regardless of Nicaragua’s complaints, Honduras decided to ratify the treaty with Colombia. Id. para. 67. Upon Nicaragua’s request, in 1999, the Central American Court of Justice ordered Honduras to suspend the procedure of ratification of the 1986 treaty with Colombia pending the determination of the merits in the case: Despite the order of the Central American Court of Justice, however, Honduras proceeded to ratify the 1986 treaty with Colombia. Id. para. 70. On December 8, 1999, Nicaragua brought the Territorial and Maritime Dispute to the
Both States agreed that the islands in dispute were not terra nullius at the time of their independence from Spain in 1821.\textsuperscript{163} With the belief that the disputed islands were not terra nullius, Honduras’s primary argument was that it had original title over the disputed islands derived from the principle of uti possidetis.\textsuperscript{164} Also, Honduras argued that its title had been confirmed by its many effectivités, namely its conduct as proof of the effective exercise of sovereignty over the islands.\textsuperscript{165}

Conversely, Nicaragua argued that the uti possidetis doctrine could not be applied because the islands were not assigned to either State at the time of independence.\textsuperscript{166} Nicaragua argued in favor of an alternative way to resolve the dispute, such as the geographical proximity of the islands. Under the principle of adjacency referred to in treaties between the two States and Spain, respectively, Nicaragua argued its original title over the islands.\textsuperscript{167}

The ICJ rejected Nicaragua’s argument based on the principle of adjacency

\begin{itemize}
\item \textit{Id.} para. 1.
\item \textit{Id.} paras. 75, 79.
\item \textit{Id.} para. 79.
\item \textit{Id.} para. 80.
\item \textit{Id.} para. 75.
\item \textit{Id.}
\end{itemize}
because the principle is not necessarily determinative of legal title. Also, the principle referred in treaties between the two states and Spain, respectively, applied to the mainland coasts rather than to offshore islands. Moreover, the islands in dispute were closer to the coast of Honduras than the coast of Nicaragua.

Given that the parties agreed that the islands were not terra nullius, the ICJ confirmed that the principle of uti possidetis required the Court to determine to whom the Spanish Crown had allocated the islands. Having examined all the other evidence submitted, however, the Court found that information concerning the conduct of the colonial administrative authorities was deficient and that neither State had produced documentary evidence from the pre-independence era that explicitly referred to the islands by virtue of the principle of uti possidetis.

Therefore, the ICJ then examined the effectivités, conducts of the administrative authorities, during the colonial period and post-colonial period since

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168 Id. paras. 34-35
169 Id. para. 164.
170 Id.
171 Id. para. 158.
172 Id. para. 167.
1821 to determine whether such conduct amounted to proof of effective exercise of sovereignty over the Islands.\textsuperscript{173} Concerning the post-colonial effectivités, the ICJ considered legislative and administrative control exercised by both States; application and enforcement of criminal and civil law; regulation of immigration; regulation of fisheries activities; naval patrols; granting of oil concessions; etc.\textsuperscript{174}

The ICJ concluded that Honduras had shown its “intention and will to act as sovereign” over the islands through sufficient overall pattern of conduct in spite of the scarcity of acts of sovereignty.\textsuperscript{175} In particular, the ICJ gave weight to the following acts of Honduras as evidencing sovereignty: 1) During the 1993 drug enforcement operation, Honduras granted the United States permission to fly over the islands;\textsuperscript{176} 2) Honduran immigration officers visited the islands in 1999 and Honduras issued work permits to Jamaican and Nicaraguan nationals living on the islands;\textsuperscript{177} 3) Honduran authorities issued fishing permits with the belief that they

\textsuperscript{173} \textit{Id}. paras. 159-207.
\textsuperscript{174} \textit{Id}. paras.176-207.
\textsuperscript{175} \textit{Id}. para. 208.
\textsuperscript{176} \textit{Id}. para. 185.
\textsuperscript{177} \textit{Id}. para. 187.
had a legal entitlement to the maritime areas around the islands; and 4) Honduras conducted public works, such as authorization of an antenna on Bobel Cay in 1975. Therefore, in 2007, the ICJ decided unanimously that Honduras, not Nicaragua, had sovereignty over four disputed islands in the Caribbean Sea.

In the Pulau Dispute between Indonesia and Malaysia case, the ICJ did not apply the principle of uti possidetis because both States argued that their titles could be established as a matter of succession from the original title-holder. Indonesia asserted that the dividing line between the respective possessions of Great Britain, which was the predecessor State to successor Malaysia, and the Netherlands, which was the predecessor State to successor Indonesia, in the area of the disputed

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178 Id. para. 195.
179 Id. paras. 227, 321.
180 Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I. C. J. 625 (Dec. 17), available at http://www.icj-cij.org/docket/files/102/7714.pdf [hereinafter Pulau Dispute between Indonesia and Malaysia]. Pulau Ligitan and Pulau Sipadan are very small islands in the Celebes Sea off the northeast coast of the island of Borneo along the coast of the Celebes Sea, which is divided between Indonesia and Malaysia. Id. at 634, para. 14. On March 13, 2001, the Philippines sought to intervene in the case, based on the argument that this was necessary to preserve and safeguard the historical and legal rights of the Philippines concerning the territory of North Borneo. Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Application by the Philippines for Permission to Intervene, International Court of Justice, (Judgment of 23 Oct. 2001), at 580 para. 7 available at http://www.icj-cij.org/docket/files/102/7698.pdf. By a judgment of October 23, 2001, the Court denied the application. Id. at 607, para. 95.
181 See Pulau Dispute between Indonesia and Malaysia, supra note 180, at 644-45, paras. 35-36.
islands,182 was established by the 1891 Convention between the two predecessor States.183 Article IV of 1891 Convention provides “From 4° 10' North latitude on the east Coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands.”184 Thus, Indonesia argued that, according to the 1891 Convention, those islands in dispute belonged to the Netherlands, and then Indonesia got the tiles as successor.185 The ICJ, however, rejected the Indonesian treaty-based title argument because the court noted that Sipadan and Ligitan were not in dispute in 1891, and that they were not shown on the map which attached to a Dutch memorandum accompanying a draft law submitted to the States-General of the Netherlands in the aftermath of the negotiation of the 1891

182 Id. at 644, para. 36.


184 See Pulau Dispute between Indonesia and Malaysia, supra note 180, at 645, para. 36.

185 Id.
Convention and in connection with its ratification by the Netherlands.\textsuperscript{186} This meant “that the Members of the Dutch Parliament were almost certainly unaware that two tiny islands lay to the south of the parallel and that the red line might be taken for an allocation line.”\textsuperscript{187} Then, the ICJ examined Malaysia’s chain-of-title argument, which asserted that Malaysia was the successor in a series of transfers of title from the Sultan of Sulu to Spain, the United States, Great Britain and finally to Malaysia.\textsuperscript{188} The ICJ found that, in the chain-of-title, the United States was unclear as to which islands it had inherited by virtue of the 1900 treaty.\textsuperscript{189} Thus the ICJ concluded that neither Indonesia nor Malaysia put forth convincing cases.\textsuperscript{190} The ICJ, rather than \textit{de jure} ruling on treaty-based title succession, examined the dispute based

\textsuperscript{186} \textit{Id.} at 648-51, paras. 44-48.

\textsuperscript{187} \textit{Id.} at 650, para. 47.

\textsuperscript{188} \textit{Id.} at 669, para. 97. Indonesia also made a successor-to-title argument asserting a chain of title from the Sultan of Bulungan to the Netherlands to Indonesia. The ICJ did not accept this argument either, because there was no evidence that the Sultan of Bulungan ever exercised or claimed sovereignty over the disputed islands. \textit{Id.}

\textsuperscript{189} \textit{Id.} at 676, para. 117. The 1907 and 1930 agreements between the United States and Great Britain did not purport to transfer the United States’ title to Great Britain even though the United States had no claim to the disputed islands. \textit{Id.} at 676-77, paras. 118-20.

\textsuperscript{190} However, the ICJ noted that there was evidence that the colonial authorities of the British North Borneo Company had taken certain measures to control the taking of turtles and turtle eggs, which was an “important economic activity” on the disputed islands before 1930. \textit{Id.} at 681, para. 132. Turtle eggs for many years were a valuable harvestable commodity of the disputed islands, and the right to take the eggs was therefore an asset. \textit{Id.}
on effectivités.\textsuperscript{191}

For the \textit{effectivités} argument, Indonesia presented affidavits from fishermen and evidence of activities of the Indonesian Navy in the area before the dispute in 1969, patrols in the area by vessels of the Dutch Royal Navy, particularly the \textit{Lynx} in November and December 1921.\textsuperscript{192}

Malaysia presented the following three \textit{effectivités}: 1) from the early 1900’s, British colonial authorities had taken steps to control the taking of turtles and the collection of turtle eggs on the disputed islands, and to settle related disputes;\textsuperscript{193} 2) in 1933, British colonial authorities named Sipadan as a bird sanctuary pursuant to a local land ordinance and published this decision in the local official gazette;\textsuperscript{194} and 3) in 1962 and 1963, after Indonesia was independent, British colonial authorities in Malaysia established light towers on both Sipadan and Ligitan, which remain and are maintained by Malaysia.\textsuperscript{195}

\textsuperscript{191} \textit{Id.} at 678, paras. 126-27. The ICJ defined \textit{effectivités} as relevant displays of State conduct in, or in relation to the specific islands in dispute.

\textsuperscript{192} \textit{Id.} at 679-80, para. 130.

\textsuperscript{193} \textit{Id.} at 681, para. 132.

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} \textit{Id.}
Concerning the *effectivités*, the ICJ observed that the court should consider only those acts prior to the dispute,\(^{196}\) constituting a relevant display of authority specifically related to the disputed islands, while recognizing the scarcity of *effectivités* over very small islands which are uninhabited or not permanently inhabited and which have been of little economic importance.\(^{197}\) In that context, concerning the activities of Indonesian fishermen, the ICJ concluded that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.\(^{198}\) Also, as to the specificity requirement for *effectivités*, the ICJ declined to recognize that the Dutch naval authority, which was involved in joint anti-piracy patrols with the *Lynx* or the Indonesian navy, considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia.\(^{199}\) Thus, the ICJ rejected

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\(^{196}\) Exception was made for “acts [that]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.” *Id.* at 682, para. 135. In this regard, the ICJ essentially agreed with the argument of Indonesia that 1969 was a critical date and gave weight only to pre-1969 activities. *Id.* The ICJ precluded any consideration of Malaysian activities on the islands, particularly in relation to a tourist facility for scuba divers. *Id.* at 679, para. 129.

\(^{197}\) *Id.* at 682-83, paras. 134-36.

\(^{198}\) *Id.* at 683, para. 140.

\(^{199}\) *Id.* paras. 138-39.
Indonesia’s *effectivité* argument.\(^{200}\)

As for Malaysia’s *effectivité* argument, the ICJ concluded that the measures taken to regulate and control the taking of turtle eggs, as well as the designation of Sipadan as a bird sanctuary in 1933 under the laws of North Borneo, were regulatory and administrative assertions of authority over the territory specified by name. However, the court did not recognize the construction and operation of the light towers as *effectivités* because those acts were not normally considered manifestations of State authority.\(^{201}\)

Thus, the ICJ ruled that the sovereignty over Pulau Ligitan and Pulau Sipadan off the northeast coast of Borneo belonged to Malaysia.\(^{202}\)

3. *Some Concrete Principles for Resolution*

\(^{200}\) *Id.* para. 141.

\(^{201}\) *Id.* at 684, para. 145.

\(^{202}\) *Id.* at 686, para. 150.
To date, there is no fixed international law of territorial acquisition.\textsuperscript{203} The reality is that territorial disputes are complex and require application of various international law principles.\textsuperscript{204} As such, it is difficult to categorize territorial disputes under stereotyped manners of territorial acquisition. In most territorial dispute cases, the decisions rely on the relative merits of competing States’ claims and conduct with regard to the territory, rather than any absolute determinations of sovereign title.\textsuperscript{205} The court must balance those relative merits with the specific merits of each State’s case.\textsuperscript{206} Moreover, in many cases, the court, rather than \textit{de jure} ruling, relies on consideration of the factual aspects.\textsuperscript{207} In the context of the Dokdo case, analysis of a similar, more recent case, could suggest more concrete disciplines for resolution. In order to explore more practical and concrete standards for the resolution of the Dokdo controversy, it is necessary to closely analyze international cases concerning island territory disputes, particularly the recent significant developments.

\textsuperscript{203} Ian Brownlie, Principles of Public International Law 127 (7th ed., 2008).

\textsuperscript{204} \textit{Id}.


\textsuperscript{206} \textit{See} Pulau Dispute between Indonesia and Malaysia, \textit{supra} note 180, at 682-83, paras. 134-40.

\textsuperscript{207} \textit{See}, \textit{e.g.}, \textit{id}. at 678, paras. 125-26.
The above cases involving international disputes over island territories show the following approach in those resolution proceedings. At first, according to whether the disputed territory could be considered as *terra nullius*, different principles with respect to the case are applied. If the territory does not belong to any State, which is *terra nullius*, it may be acquired by any State through effective occupation, control, and even symbolic conduct of occupation after discovery under the principles of customary international law.\textsuperscript{208} Where the disputed territory is not considered *terra nullius*, three possible situations may ensue. The first is a case that, as the case of Minquiers and Ecrehos, each disputing State has been claiming the original title to the disputed island since more than a few hundred years ago. In that case, the court resolved it by determining which of the disputed States could provide evidence regarding its alleged title in a more convincing way.\textsuperscript{209} The second situation is that, like the Land, Island and Maritime Frontier Case, the disputed parties are newly independent States from the same colony or colonial power. In that case, the principle of *uti possidetis* would be applied. Logically, the principle of *uti possidetis*, which relates only to the location of boundaries upon the alleged title, denies the possibility

\textsuperscript{208} Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Judgment of Apr. 5) at 45-46.

\textsuperscript{209} Minquiers and Ecrehos, supra note 131, at 56-57, 65.
of *terra nullius*.\(^{210}\) However, if a court could not recognize a party State’s title by virtue of *uti possidetis*, namely *de jure* ruling, then the court examined the dispute based on *effectivités*, which means effective occupation with relevant display of state conduct in, or in relation to, the specific islands in dispute.\(^{211}\) The third situation is that, like the Pulau Dispute between Indonesia and Malaysia case, the disputed parties’ arguments are based on a treaty-based derivative title, namely cession, or chain-of-title which was passed from the original title holder States.\(^{212}\) Like the second situation, however, if the court could not find a party State’s derivative title by virtue of the alleged cession treaty, namely *de jure* ruling, then the court had to rely on relatively stronger *effectivités*.\(^{213}\)

In reality, many international island territory disputes, even in which the *uti possidetis* principle applied or treaty-based derivative title or chain-of-title was argued by disputing party States, are resolved by virtue of the relatively stronger *effectivités*. In the Island of Palmas Case, the PCA held that an inchoate title obtained by discovery of *terra nullius* accompanied by symbolic acts cannot prevail over the sovereignty obtained by

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\(^{210}\) Land, Island and Maritime Frontier, *supra* note 144, at 386-87 para. 42.

\(^{211}\) *Id.* at 579, para 367.

\(^{212}\) *See* Pulau Dispute between Indonesia and Malaysia, *supra* note 180, at 644-45, paras. 35-36.

\(^{213}\) *Id.* at 678, paras. 126-27.
continuous and peaceful ‘display of its authority’ over the same land.\textsuperscript{214} In the Minquiers and Ecrehos Case, in which each disputing State had been claiming the original title, the ICJ focused on the importance of ‘affirmative conduct of sovereignty,’ or ‘State functions,’ such as Jersey jurisdiction exercises and local administrative conduct, and to legislation regarding criminal proceedings and inquests on corpses, taxation, and the registration of fishing boats and real estate contracts, and found that any alleged original title could be superseded by the following affirmative conduct.\textsuperscript{215} What is the difference among ‘display of a State’s authority,’ ‘affirmative conduct of sovereignty,’ and \textit{effectivités}? They are all conduct of State as proof of the effective exercise of Sovereignty, namely \textit{effectivités}. In short, almost all international island territorial disputes were resolved by virtue of the relatively stronger \textit{effectivités}.

In relation to the Dokdo controversy, this article notes that the following disciplines formed through international island territorial dispute cases: 1) \textit{Effectivités} or the relatively stronger \textit{effectivités} are the utmost standard to resolve the island territorial controversy. Particularly, instead of historical and evidentiary differences, the exercise of jurisdiction,

\textsuperscript{214} Island of Palmas, \textit{supra} note 123, at 845-46.

\textsuperscript{215} \textit{See} Minquiers and Ecrehos, \textit{supra} note 131, at 57-70.
local administration, and legislation are much highly valued for territorial acquisitions.  

2) *Uti possidetis* is a principle related to decolonization which upgrades former administrative delimitations established during the colonial period to international frontiers.\(^{216}\) In the application of *Uti possidetis* principle, the original purpose of colonial authority is not important.\(^{217}\) 3) In relation to ‘cession,’ namely treaty-based title claim,\(^{218}\) the court requires that the treaty should manifestly refer to the disputed island in the situation of title dispute.\(^{219}\) Such a narrow and strict interpretation of the words in the treaty is reasonable because cession means that the owner State had manifest intent to relinquish and pass the disputed island to another State.\(^{220}\)


\(^{217}\) Land, Island and Maritime Frontier, *supra* note 144, at 387-88, para. 43.

\(^{218}\) If the island is not considered as *terra nullius* and the party States claim their original title, the court resolved it based on which of the disputed States could provide evidence of its alleged sovereignty.

\(^{219}\) Pulau Dispute between Indonesia and Malaysia, *supra* note 180, at 648-51, paras. 44-48.

\(^{220}\) CURRIE, *supra* note 111, at 281.
D. APPLICATION OF INTERNATIONAL LAW PRINCIPLES TO THE DOKDO CONTROVERSY

1. Korea’s Effectivités and Control over Dokdo

Korea effectively has been possessing Dokdo as its part of territory since World War II. Even though Japan argues that Korea illegally occupied Dokdo and it may be uncertain whether Korea exercises its full sovereign right of Dokdo, Korea does effectively control it. Korea manages Dokdo as an administrative part of Ulleung Island [county], North Kyongsang province.221 The Korean coastguard, a unit of the Korean national police, defends Dokdo.222 Facing impending withdrawal of the MacArthur Line according to the 1951 Peace Treaty, Korea’s proclamation of the Rhee Line in 1952 to defend Dokdo was an effective exercise of sovereignty.223 The Korean government began a Dokdo tour program in 2006 by building permanent coast guard stations, constructing a landing stage, and

222 Id.
renovating a lighthouse.\textsuperscript{224}

Japan also argues that there are historical reasons for its ownership of Dokdo. Even if Japanese historical evidence might be considered to have the same value as that of Korea, Korea established the stronger claims due to its effective control of Dokdo through various affirmative acts.\textsuperscript{225} As the Island of Palmas Case decision affirmed, effective occupation completes title of the territory and mere discovery of land cannot compete against the continuous and peaceful display of sovereignty by another State. The decision of the Clipperton case emphasized that actual possession, rather than the nominal taking of possession, is needed for obtaining title. Above all, as stated before, the conduct of a State as proof of the effective exercise of sovereignty over the islands in dispute, namely effectivités, or the relatively stronger effectivités become the utmost standard in resolving the recent island territorial disputes.

Thus, Korea has established the stronger claim because, by actual possession, it has effectivités or manifested the affirmative conduct of sovereignty over Dokdo, even though

\begin{itemize}
\item\textsuperscript{224} See Benjamin K. Sibbett, \textit{Tokdo or Takeshima? The Territorial Dispute between Japan and the Republic of Korea}, 21 FORDHAM INT'L L.J. 1606, 1639 (1998); Historical Facts about Korea’s Dokdo Island, \textit{supra} note 221.
\item\textsuperscript{225} Benjamin K. Sibbett, \textit{Tokdo or Takeshima? The Territorial Dispute between Japan and the Republic of Korea}, 21 FORDHAM INT'L L.J. 1606, 1640-46 (1998); Fern, \textit{supra} note 53, at 86-88; Dyke, \textit{supra} note 9, at 194-95.
\end{itemize}
occasional Japanese protests could be considered to obstruct the establishment of Korea’s prescription. It is doubtful that groundless protests could be effective under international law. Under the theory of prescription, Japan’s protest might overcome a presumption of acquiescence if Korea’s claim were based only on its occupation of Dokdo since the World War II. However, there are many historical bases to support Korea’s claim whereas Japan, based on an unconvincing premise that Dokdo was terra nullius, argues its incorporation during its imperial expansionist period.

2. 1905 Japanese Incorporation of Dokdo to the Shimane Prefecture

The Sino-Japanese War in 1894 and the Russo–Japanese War from February 1904 to September 1905 showed Japanese intention to get control over Korea. In 1905, under the plot of imperialistic expansion, Japan beat off its two rivals, namely China and Russia, and forced Korea to become a Japanese protectorate in 1905 then finally annexed it to Japan in 1910. In the course of this imperial aggression, on February 22, 1905, the Shimane

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226 Id. at 192.

227 Id.
Prefecture, a Japanese local authority, adopted a municipal ordinance to incorporate Dokdo into its jurisdiction of Oki Islands, without legal foundation and notification to Korea.\textsuperscript{228}

Could the 1905 Japanese incorporation of Dokdo to the Shimane Prefecture be explained as one of the ways of new territory acquisition, such as effective occupation, cession, prescription, or conquest and annexation (subjugation)? The position of Japan is that Korea had not exercised effective occupation over Dokdo and that, therefore, it was \textit{terra nullius} eligible for incorporation of Japan in 1905 under the concept of ‘intertemporal law,’ namely international law at that time.\textsuperscript{229} So to prevail in its claim, Japan has to prove that Dokdo was \textit{terra nullius} at the time of incorporation in 1905.\textsuperscript{230} However, in addition to the fact that international courts have seldom recognized the arguments of \textit{terra nullius}, there is much historical evidence of acts of sovereignty by Korea over Dokdo.\textsuperscript{231} Moreover, the doctrine of estoppel prevents Japan from arguing its sovereignty activities before

\textsuperscript{228} Kazuo, \textit{supra} note 1, at 132.


\textsuperscript{230} Dyke, \textit{supra} note 9, at 180.

\textsuperscript{231} \textit{Id.} Japan may argue that Shimane Prefecture’s incorporation of Dokdo was an administrative act based on prior sovereignty activities over Dokdo.
The 1905 Japanese incorporation of Dokdo to the Shimane Prefecture took place in the process of colonization. When Korea learned of Japan’s incorporation of Dokdo, the Korean government (the *Daehan* Empire) immediately rejected the “totally groundless” Japanese claim. Even though Japan, based on a series of annexation treaties from 1905 to 1910, argues that all Korean territory became Japanese, Korea did not intend to give up its title or pass sovereignty to the Japanese, which is required for a ‘cession.’ ‘Cession’ means that the owner State has manifest intent to relinquish and pass the disputed island to another State.

On the contrary, Korea continuously resisted annexation during Japanese rule. In the Pulau Dispute between Indonesia and Malaysia case, regarding ‘cession’ or treaty-based title argument, the ICJ required that the treaty should manifestly refer to the island in the title dispute. However, in 1905, there was neither a title dispute over Dokdo between Korea and Japan nor consent of Korea specifically to transfer Dokdo to Japan. Also,

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232 *Id.*

233 *See id.* at 133-36; Hyun, *supra* note 12, at 75-77.

234 CURRIE, *supra* note 111, at 281.

Japan’s argument based on ‘cession,’ which is ‘derivative acquisition,’ is inconsistent with its claim of original title based on historical evidence or of *terra nullius*. Moreover, Article 52 of the Vienna Convention provides that a treaty brought about by the threat or use of force contrary to the UN Charter is void.

Based on the concept of ‘intertemporal law,’ which was applied in the Island of Palmas case, Japan argues that a series of annexation treaties from 1905 to 1910 were valid at that time. The concept of intertemporal rule means that the legal significance of past transactions is to be evaluated according to the law that was applicable at the time. In the same context, the intertemporal rule regarding territory acquisition could be interpreted to mean that past acts of a State regarding a certain territory should be judged by the international law prevailing at the time rather than present law. However, such a doctrine requires careful application because it could be used to legitimize past invasion or unlawful territorial acquisitions. So, rather than legal standards at the time of the act

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236 Island of Palmas, *supra* note 123, at 845.


239 CURRIE, *supra* note 111, at 274-75.
related with territorial acquisition, the prevailing standards at the time of dispute arising
with consideration of continual evolution of international law.\textsuperscript{240} should be the basis of
dispute resolution. A change of situation should also be considered. Moreover, Japan
agreed that a series of annexation treaties “before August 22, 1910,” namely from the 1905
Protocol to the 1910 Annexation, were “already null and void” by the ‘Treaty on Basic
Relations between Japan and the Republic of Korea’ in 1965.\textsuperscript{241}

Japan also argues its claim of Dokdo by conquest and annexation because Japan
established sovereignty over the peninsula by issuing a formal annexation order following
its conquest of Korea. In 1905, however, there was no armed conflict or international
negotiation for cession between Korea and Japan. Rather Japan unduly incorporated Dokdo
to the Shimane Prefecture. In actuality, Japan forced Korea to concede Dokdo to Japan,
which might be characterized as ‘cession’ rather than conquest and annexation. As
mentioned above, however, Japanese claims based on cession are groundless because
Korea did not intentionally give up the title to Japan.

Korea recovered control of Dokdo from Japan after World War II even though Japan

\textsuperscript{240} For example, Article 52 of the Vienna Convention provides that agreements imposed by force
are void.

\textsuperscript{241} Treaty on Basic Relations, \textit{supra} note 62, art. II.
incorporated Dokdo to the Shimane Prefecture in the course of this imperial aggression.\textsuperscript{242}

Therefore, Japan cannot argue effective occupation or prescription which requires continuous and undisturbed exercise of control lasting long enough to create a widely held conviction in the international community. To establish ‘occupation’ as a way of acquisition, territory should be treated by the international community as *terra nullius*, and the occupying State must continuously show exercise or display of its sovereignty acts with the intention to act as a sovereign.\textsuperscript{243}

Therefore, the 1905 Japanese incorporation Dokdo is groundless and not a legitimate acquisition of new territory.

\textsuperscript{242} However, Japan’s occasional protests against Korea’s control of Dokdo may undermine the requirement for a prescription of a continuous and undisturbed exercise of sovereignty with a general conviction of the international community. Thus, we face the question of whether any protest, such as an argument without grounds, impedes the establishment of prescription.

\textsuperscript{243} Based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involve two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

3. The 1943 Cairo Declaration, the 1945 Potsdam Declaration, and SCAPIN 677

After World War II, Korea, being liberated from Japan, recovered its territory, including Dokdo. During and after the War, the Allied Powers adopted a series of documents, such as the 1943 Cairo Declaration and Potsdam Declaration, which contained provisions intended to make Japan return the entire pre-colonial Korean territory including Dokdo to Korea. In furtherance of this objective, SCAPIN 677 was issued by the Supreme Commander for the Allied Powers in Japan.

The 1943 Cairo Declaration states that “Japan will also be expelled from all other territories which she has taken by violence and greed.” Also, Article 8 of the Potsdam

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Declaration provides that “the terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.” The Potsdam Declaration, ‘Terms for Japanese Surrender,’ required Japan to accept the Cairo Declaration and surrender under its terms on the 15th of August, 1945. Concerning the Cairo Declaration, Japan argues that the reference to “territories which she has taken by violence and greed” in no way applies to Dokdo because Dokdo was already a part of Japanese territory. However, the 1905 incorporation of Dokdo to the Shimane Prefecture occurred in the course of Japanese imperialistic expansion with greed. Moreover, the incorporation is hard to justify by the concept of ‘intertemporal law.’

Paragraph 3 of SCAPIN 677 specifically excludes Dokdo from Japan's territory as follows: “for the purpose of this directive, Japan is defined to include the four main islands of Japan... excluding Utsuryo Island, the Liancourt Rocks [(Dokdo)] and Quelpart Island.” However, Japan argues that SCAPIN 677, as one of the series of measures taken before the conclusion of the 1951 Peace Treaty, did not represent the final decisions

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248 Ulleungdo Island.
concerning the attribution of Japanese sovereign territory. Japan points to Paragraph 6 of SCAPIN 677 which provides that “[n]othing in this directive shall be construed as an indication of Allied policy related to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.” However, Paragraph 6 should be considered an exception to Paragraph 3. Thus, if there is no fundamental change of circumstances relative to Paragraph 3, then it should be respected.\textsuperscript{249} Also, Japan argues that SCAPIN 677 was made for administrative functions rather than sovereignty. Nevertheless, SCAPIN 677, the first document concerning Dokdo made after World War II, neutrally demarcated the boundary between Korea and Japan.

Applying the principle of \textit{uti possidetis} to the Dokdo controversy, it should be respected as “the territorial boundaries at ‘the moment’ when independence is achieved.” Two events may establish this ‘moment’: 1) when the Korean government was established after the three year period of the United States Army Military Government in Korea (USAMGIK) (from September 8, 1945 to August 15, 1948), and 2) when Japan recovered

\textsuperscript{249} SCAPIN 1033, which defined the MacArthur Line and prohibited Japanese vessels from entering the twelve mile parameter of Dokdo, has a similar exceptive provision, Paragraph 5: “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.”
self rule from the Allied Powers’ occupation. At the end of the Second World War, Japan was occupied by the United States led Allied Powers under the 1951 Peace Treaty.\(^{250}\) In summary, while the USAMGIK temporarily ruled Korea after liberation from Japan, Dokdo was excluded from the territory of Japan in accordance with SCAPIN 677 issued by the Allied Powers led by the United States, which controlled and administered Japan. Also, during the period of the USAMGIK ruling in Korea, Korea and Japan both were under the influence of the United States, namely the MacArthur regime.\(^{251}\) By the 1951 Peace Treaty, Japan recovered self rule from the Allied Powers’ occupation. In actuality, Japan’s argument concerning Dokdo largely relies on the 1951 Peace Treaty. At the time of the 1951 Peace Treaty completion, however, independent Korea controlled Dokdo even though it was during the Korean War and Dokdo was once used as a bombing range for bombers of the UN forces.\(^{252}\) Therefore, the principle of \textit{uti possidetis} could be applied at the moment when Korea established its government after the USAMGIK ruling on the 15\(^{th}\) of August,

\(^{250}\) The principle of \textit{uti possidetis} could not be applied at the time (August 15, 1945) when Korea liberated from Japan because it was not the case that both States got independence from the same colonial power. Also, Korea and Japan did not document the territorial boundaries when Korea liberated from Japan.


\(^{252}\) See Lovmo, \textit{supra} note 2.
1948. Thus, like the Spanish Royal Decrees in the Land, Island and Maritime Frontier Case, SCAPIN 677 which was issued on January 29, 1946, is a forensic document for *uti possidetis*. According to SCAPIN 677, Dokdo is the territory of Korea.

Even though Japan argues that SCAPIN 677 was made for administrative functions rather than sovereignty, Spanish Royal Decrees in the Land, Island and Maritime Frontier Case was also made for administrative purpose.\(^{253}\) In order words, for application of *Uti possidetis* principle, the original purpose of colonial authority is not important.\(^{254}\) Furthermore, a Japanese administrative regulation, Japanese Ministry of Finance Notice no. 654, which was issued immediately after Korea’s independence from Japanese rule, excluded Dokdo from the territory of Japan.\(^{255}\)

4. *The 1951 Peace Treaty*

The 1951 Peace Treaty stipulates in Article 2(a) that “Japan recognizing the

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\(^{253}\) Land, Island and Maritime Frontier, *supra* note 144, at 387-88, para. 43.

\(^{254}\) *Id.*

independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.” Based on this clause, Japan argues that the definition of ‘Korea’ in the 1951 Peace Treaty did not include Dokdo. Besides Japanese lobbying to include such a clause, however, Article 2(a) mentions only three major islands among about 3,000 Korean islands.256 Also, before the 1951 Peace Treaty, Korea already occupied Dokdo, and then effectively controlled it.

5. Argument Based on Historical Facts

As the above cases show, for territorial acquisitions historical evidence is progressively less important than effective possession demonstrated by the exercise of jurisdiction, local administration, and legislation. Historical facts provide subsidiary and

256 For example, article 4 of the draft of Japanese Peace Treaty on September 11, 1950, provides that, without any mention about islands, “Japan recognizes the independence of Korea” and Japan’s relation with Korea would be based on the resolutions of the U. N. See the Letter on Attached Treaty Draft from Mr. Dulles to Secretary Acheson, DC/R Central Files No. 694.001/9-1150, State Dep’t Records, (Sep. 11, 1950) (on file with the U.S. National Archives in College Park, MD). Also, article 3 of the draft of Japanese Peace Treaty on March 12, 1951, provides that, without any mention about islands, “Japan renounces all rights, titles and claims to Korea…” Memorandum on Attached Treaty Draft, State Dep’t Decimal File No. 694.001/3-1251, State Dep’t Records, (Mar. 12, 1951) (on file with the U.S. National Archives in College Park, MD). Even though those drafts did not specify any islands, such as Dokdo, they could not be interpreted to mean that the Korean islands should belong to Japan as Japan argued.
supplementary bases of territorial acquisitions. Historical evidence for the Korean arguments is supported by many facts since the sixth century. Some historical facts supporting Japanese arguments took place around the 17th and 18th century when the Korean government (the Kingdom of Chosun) instituted a vacant remote island policy (1416-1881) for Dokdo. The purpose of the Korean policy was to reduce the number of Korean fishermen sacrificed by pirates, especially Japanese marauders or buccaneers. However, Japanese fishermen visited Dokdo irregularly during the vacant island policy of Korea, thus this cannot be considered *effectivités*. Concerning such activities of fishermen, the ICJ concluded that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority. Moreover, some Japanese arguments are irrational. For example, according to Japanese argument, after 1696 Korea and Japan’s negotiations over the fishing waters surrounding Ulleung Island, the Japanese government (the Edo Shogunate Government) prohibited Japanese fishermen from visiting Ulleung. According to Japanese argument, however,

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257 Dyke, *supra* not 9, at 165.
258 *Id.*
259 Pulau Dispute between Indonesia and Malaysia, *supra* note 180, at 683, para. 140.
visits to Dokdo were not prohibited. However, the decision of the Council of State (Daiokan) of Japan on March 20, 1877 clarified that “Takeshima [Ulleungdo] and Matsushima [Dokdo] have nothing to do with our country.”

By the Russo–Japanese War, several Japanese maps showed that Japan seemed to consider Dokdo as part of Korean territory. In particular, a century-old map of Northeast Asia, published by the Japanese imperial government in 1903, clearly shows that Dokdo belonged to Korea. On the map (Picture 1), the border between Korea and Japan in the East Sea is drawn between Dokdo and the Oki island of Japan. Also, the map marked Taiwan as part of Japanese territory after Japan’s victory in the Sino-Japanese War in 1894-95.

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261 *Id.* However, a wooden warning sign of Japanese Edo Government not only prohibited its people from visiting Ulleungdo, but also from visiting the other island to the east of Ulleungdo. Kim Dongsub, Japan desperately tried to keep the wooden warning sign (Korean language), CHOSUN ILBO, Mar. 5, 2010, available at http://news.chosun.com/site/data/html_dir/2010/03/05/2010030501274.html. The other island to the east of Ulleungdo is presumed to be Dokdo.


265 *Id.*
6. Geographical Consideration

Dokdo is situated 87.4 km (47 nautical miles) to the southeast of Ulleungdo Island of Korea\textsuperscript{267} whereas it is 157.5 km (85 nautical miles) to the northwest of Oki Island of Japan.\textsuperscript{268} Dokdo is visible from Ulleungdo Island on a clear day while it cannot be seen from Oki Island of Japan.\textsuperscript{269} In Ulleungdo Island, there are about 15 thousands Korean inhabitants who largely belong to the fishing industry in the area including Dokdo.

With regard to Dokdo, it is not easy to apply the principles of “geographical adjacency,” or “proximity,” which presumes sovereignty over certain territory extends also to attached, contiguous, or nearby territory,\textsuperscript{270} because Dokdo is remote from Ulleungdo (87.4 km) and both islands are divided by relative deep sea water. In the Territorial and Maritime Dispute between Nicaragua and Honduras Case, the ICJ rejected Nicaragua’s argument based on the principle of geographical proximity or adjacency because the

\textsuperscript{267} See Ulleung Gun (county), http://www.ulleung.go.kr; Encyber, http://www.encyber.com


\textsuperscript{269} Id.

\textsuperscript{270} Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984 I. C.J. 246, 296, paras.102-03 (Judgment on 12 Oct.).
principle is not necessarily determinative of legal title of the island in dispute and the
principle referred to treaties between the two states and Spain, respectively.\(^{271}\) The
principle is applied to the mainland coasts rather than to offshore islands.\(^{272}\) Also, in the
Island of Palmas case, the PCA found that contiguity alone was not sufficient to prove the
title of the island in dispute.\(^{273}\)

In the Territorial and Maritime Dispute between Nicaragua and Honduras Case, the
ICJ rejected Nicaragua’s geographical proximity argument. However, the court indicated
specifically that the islands in dispute were closer to the coast of Honduras than the coast of
Nicaragua.\(^{274}\) In the Minquiers and Ecrehos case, the ICJ seemed to consider the
geographical factor that the Ecrehos was 3.9 sea miles from Jersey and 6.6 sea miles from
the coast of France and the Minquiers group was 9.8 sea miles from Jersey and 16.2 sea
miles from the coast of France.\(^{275}\) Moreover, in Land, Island and Maritime Frontier case,
the ICJ, based on the consideration of Meanguerita’s small size, its contiguity to Meanguera,

\(^{271}\) Territorial and Maritime Dispute between Nicaragua and Honduras, \textit{supra} note 161. paras. 34-35

\(^{272}\) \textit{Id.} para. 164.

\(^{273}\) Island of Palmas, \textit{supra} note 123, at 854.

\(^{274}\) \textit{Id.}

\(^{275}\) Minquiers and Ecrehos, \textit{supra} note 131, at 53.
and its lack of inhabitants, regarded the uninhabited island of Meanguerita and the inhabited island of Meanguera as a single unit.\(^{276}\)

In short, Korea is superior to Japan in geographical consideration even though proximity alone cannot be the basis of title over Dokdo.

**E. SUMMARY AND JAPAN’S HIDDEN INTENTIONS BEHIND THE CONTROVERSY**

As discussed above, Korea has established the stronger claim because it has manifested greater affirmative acts of sovereignty over Dokdo while Japan has not established any persuasive ground for its claim.\(^{277}\) Given the fact that Korea has effectively possessed Dokdo, there is no possibility that Dokdo became Japan’s territory. In sum, Japan stands little chance of winning the controversy, which should be recognized by the Japanese leaders.

However, Japan has tenaciously stuck to its argument on Dokdo. As mentioned

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\(^{276}\) Land, Island and Maritime Frontier, *supra* note 144, at 563-64.

\(^{277}\) See Fern, *supra* note 53, at 79, 86; Dyke, *supra* not 9, at 163.
before, Japan’s claims over Dokdo seem related to its justification of the past. Before the new Japanese government, Japanese rightist politicians raised the domestic public support by such a justification of past, in a populist manner.

Japan may consider the Dokdo controversy in relation to its other territorial disputes with Russia and China. If Japan withdraws its claim over Dokdo, it could be considered a part of the collapse of Japanese “fortress” in argument. Also, Japan used the Dokdo issue as leverage over Korea in various negotiations. For example, in the negotiation of the 1998 fishery agreement between Korea and Japan, the Korean government gave up broader waters\textsuperscript{278} in the area south of Jeju isle in East China Sea, which has more economic value, in order to get a bit more area near Dokdo islets. The reason was that almost all Koreans are sensitive to and interested in the territorial contest on Dokdo between Korea and Japan. In one respect, Japan made the best use of the Dokdo controversy in the negotiation.


As Korea, Japan and China have proclaimed their Exclusive Economic Zones (EEZs) under the new maritime order created by the United Nations Convention on the Law of the Sea of 1982, which entered into force in 1994, the EEZ claims of the three States to the East China Sea, the East Sea and the Yellow Sea, where the distance between these coastal States is less than 400 nautical miles, now overlap. Due to the complexity of the overlapping claims to the sea area, Korea concluded a fisheries agreement with Japan in January 1999 and with China in August 2000. \textit{See} The Ministry of Maritime Affairs and Fisheries of Korea, Korea-Japan and Korea-China Fisheries Agreement, \textit{available at} http://www.apec-vc.or.kr/?p_name=database&sort2=EG7&gotopage=9&query=view&unique_num=ED2004060399; Zou Keyuan, Disrupting or Maintaining the Marine Legal Order in East Asia? 1(2) Chinese J. Int’l L. 449, 451, 497 (2002).
IV. POSSIBLE WAYS TO SOLVE THE CONTROVERSY

A. SHORT TERM STAND STILL POLICY: AVOID DETERIORATION OF THE CONTROVERSY

For a few years after the Korea-Japan joint declaration of 1998, both countries promoted a deeper diplomatic and economic partnership. The successful co-hosting of the World Cup 2002 showed the possibility of deeper economic integration, in furthering a new spirit of partnership. In 2003, Korea lifted the embargo on Japanese cultural products and Korea and Japan began to negotiate a free trade agreement, namely JKFTA. In a friendly gesture, Japan allowed Korean tourists to visit Japan without visas beginning in the fall of 2005. Mutual tourism of both countries is flourishing. The comfortable interaction


280 For example, nowadays, most tourists who visit Tsushima island of Japan are Korean. In 2008, 72,349 South Koreans visited the island. See Maya Kaneko, Tsushima’s S. Koreans: guests or guerrillas?, JAPAN TIMES, Mar. 5, 2010, available at http://search.japantimes.co.jp/cgi-
between the two States is really what both governments should be focusing on to make a better relationship. This would be a reasonable direction for the two countries. Such favorable relations, however, may deteriorate at any time. In reality, there have been some domestic populist approaches of Korean and Japanese politicians to use Dokdo for political purposes.

Japan should bear responsibility for the stagnant relationship between both States because Japanese politicians worshiped the Yasukuni war shrine and argued territorial claims over Dokdo. Those Japanese behaviors have offended the Korean nation, which experienced Japanese invasion and harsh rule. Especially, nostomaniac expression of Japanese politicians about their military imperialism period made Koreans’ feelings toward Japanese grow worse. The Northeast Asia region’s history of wars, Japanese colonization, and ideological conflict has left a legacy of mistrust and nationalistic sentiment among the peoples. In this regard, the Japanese politicians have occasionally made the Koreans and the Chinese angry over the years and deepened their chagrin through the worship of World

bin/nn20100305f1.html. Since Korea and Japan don’t require visa tourist from each other country, many Koreans can experience Tsushima Island (which might also be called “little piece of Japan”) as their own home land at almost the same cost as a domestic tour.
War II criminals,\textsuperscript{281} the justification of past invasions and colonization of neighboring countries, and the authorization of textbooks containing a distorted history.\textsuperscript{282} Such conduct by Japanese politicians provokes the apprehension of neighboring countries concerning the revival of past Japanese saber-rattling regimes. By this type of justification of past war crimes, however, the degree of domestic public support for such Japanese politicians is raised. In other words, more Japanese favor the justification than oppose it. Also, as above mentioned, the Japanese government might get some small benefits from its provocations. The regional community, however, cannot accept such a justification.

Korean leaders also are partly responsible for Korea and Japan’s stagnant relationship because they have used pending issues between both countries for domestic purposes for short term gain. For example, the Korean leaders should have taken a more reasonable attitude about Japan’s trial to send its research vessel near Dokdo area in 2006.


\textsuperscript{282} Japan’s firm stance on not revising its history textbooks, which justifies imperialism, and whitewashes and denies Japan’s history of aggression, continues to annoy Chinese and South Koreans, who maintain that the facts on wartime atrocities should be known. \textit{Japan stands firm over history textbook}, CNN, May 17, 2001, available at http://archives.cnn.com/2001/WORLD/asiapcf/east/05/17/japan.textbook.firm/index.html.
Generally, the firmer the attitude of the Korean government against Japan, the higher the approval rating of the Korean government. Korea’s strong warning against Japan’s hydrographic research trial was supported by many Koreans. It is the same mechanism that Japanese politicians’ justifications of past war crimes were preferred by many Japanese. Such a domestic populist approach to the Dokdo controversy is aggravating the territorial controversy between the two States. Besides the Dokdo controversy, even the delimitation of EEZs between the two States is not expected to be solved.

Now, it is necessary to recall the about 10 year period (1965-1976) of tranquility over Dokdo which derived from the “economic honeymoon” relationship between Korean and Japan. Fortunately, compared to past governments, the present governments of both States are improving the general relationship between two countries. With this improvement, it is the most favorable time to resolve the Dokdo controversy and to seek a constructive solution. At the least, the leaders of both States should avoid a deterioration of the Dokdo controversy. To that end, Korea and Japan need to prepare an agenda or action plan to solve the controversy. In particular, Japanese leaders should focus on the larger benefits that could be obtained from a closer relationship with Korea or regional economic integration, rather than its hopeless claim over Dokdo, and the possible small advantage
obtained by continuing the dispute.

B. **Submit the dispute to the ICJ or the International Tribunal for the Law of the Sea**

In September 1954 Japan proposed to Korea that the Dokdo controversy should be submitted to the ICJ, but this proposal was rejected by the Korea.\(^\text{283}\) In reality, Japan also refuses to submit to the ICJ the issue concerning the South Kuril (Northern Territories) and the Senkaku Islands where Japan may be expected to lose and cannot expect a lot of benefits even if it wins. Concerning the South Kuril and the Senkaku Islands, Japan is in the same position of Korea concerning Dokdo. In the case of Dokdo, Japan has nothing to lose even if it loses the case because Korea currently has effective occupation over it. Thus the resolution through the ICJ is not likely to be accepted by Korea.

For the same reason, resolution through the International Tribunal for the Law of the Sea is being blocked by Korea. With the strong warning against Japan’s hydrographic

research trial near Dokdo in 2006, Korea lodged a declaration under article 298(1)(a) of UNCLOS that Korea does not accept any of the dispute settlement procedures provided in Section 2 of Part XV of UNCLOS with respect to disputes relating to sea boundary delimitations or titles.\(^{284}\)

C. A NEW PROPOSAL FOR A CONSTRUCTIVE SOLUTION

As a short-term and practicable policy, it is necessary that Korea strengthen its international legal superiority over the Dokdo controversy with Japan. Generally, compared to the other party of a conflict, if one party achieves marked superiority in legal and factual position, the conflict might be solved easily. As to superiority, Korea has an enormous advantage over Japan because it has *de facto* possession of Dokdo and can increase control on the islets through a variety of infrastructure projects and improvements, such as the newly constructed landing stage, desalinization plants, and most types of

\(^{284}\) CHOSUN ILBO, Apr. 21, 2006, *available at* http://www.chosun.com/national/news/200604/200604210034.html. Such a declaration is used by some countries. For example, on 18 June 2002, Australia declared not to accept any of the dispute settlement procedures provided for in the UNCLOS.
telecommunication facilities.\textsuperscript{285}

Thus, Dokdo is substantially possessed by Korea, which is the decisive requirement of prescription. Based on the \textit{de facto} possession of Dokdo, Korea can strengthen its international legal superiority. For the substantial sovereignty on Dokdo, particularly the islets’ own EEZ, Korea needs to make the islets “sustain human habitation or economic life of their own.”\textsuperscript{286} The way to achieve this would be promotion of civil Korean inhabitation,\textsuperscript{287} development of sufficient freshwater resources, and construction of commercial facilities for economic life on Dokdo. Considering the developing relationship between Korea and Japan, however, it is hard to say that the policy would be the best or constructive way.

Relevant here is the creation of the European Coal and Steel Community (ECSC) which is the initial form of the European Union (EU) integration. Just after World War II, due to a long period of gruesome fighting and repetition of occupying each other, the relationship between Germany and France and the national sentiment against the other


\textsuperscript{286} UNCLOS art. 121: 3.

\textsuperscript{287} In reality, Dokdo, which is composed of very sloping rocks and located in distant waters, is not favorable for human residence. See A Brief Background About Dokdo Island, http://www.dokdo-takeshima.com/.
became the worst. The first example of a territorial dispute between the two states is Alsace-Lorraine. On May 9, 1950, France proposed by the Schuman Plan that the entire Franco-German production of coal and steel be placed under a joint High Authority. The Schuman Plan provided that “…for the maintenance of peaceful relations…Because Europe was not united, we have had war...The uniting of the European nations requires that the age-old opposition between France and Germany be overcome.” Thus, the leaders of France and Germany tried not to stir up national feeling toward each other and tried to find a way to live peacefully together in the future. The answer to the Schuman Plan was the establishment of the ECSC. France was above all seeking effective guarantees against a revival of German military power while the United States and United Kingdom had thought that a rearmed Germany could be an important defense against Soviet expansionism.

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288 Alsace-Lorraine was a territory disputed between the nation states of France and Germany through a long history. Alsace-Lorraine originally belonged to the Holy Roman Empire of the German Nation since the year 921, but was gradually annexed by France since the Peace of Westphalia in 1648. After the Franco-Prussian War in 1871, the Treaty of Frankfurt confirmed the return of the territory to the newly-founded German Empire. With the end of World War I, after eleven days of independence, Alsace-Lorraine was occupied by and incorporated into France. Alsace-Lorraine was annexed by Germany after France was defeated in 1940, and, with the end of World War II, again reverted to French control in 1945. See Wikipedia, Alsace Lorraine, http://en.wikipedia.org/wiki/Alsace-Lorraine.

289 Documents on International Affairs, 315-17 (1949-50).

290 Id.

291 George A. Bermann et al., Case and Materials on European Community Law 5-6 (1993).
Coal and steel were the key materials for making “tank,” namely arms and weapons. If Germany or France were going to war at that time, coal and steel would be essential. If the industry of coal and steel were controlled not by either Germany or France but by a supra-national and self-reliance authority, it could prevent war and keep peace in the region. Based on the thought, Germany and France, especially France, wanted to regulate the Franco-German production of coal and steel, two important factors for military power and economic development. In short, the “Schuman plan,” based on the idea of Jean Monnet who was the original promoter of European integration, meant peaceful and efficient use of coal and steel resources. On account of German’s acceptance of the Schuman Plan, a supra-national High Authority, composed of independent persons nominated by the each member government, was established. Thus the ESCS was established and the High Authority began to control the Franco-German production of coal and to promote trade liberalization within the co-member countries. Even though the ECSC focus was on regional economic integration, strong will for peace was an important purpose of ECSC. Wisely, Germany and France earned not just peace but remarkable benefits derived from the economic integration.

\[292 \text{ Id.}\]
The creation of ECSC is a valuable empirical discipline to Korea and Japan which could not solve the Dokdo controversy for sixty years. The attitude of Korean and Japanese leaders is totally different than that of French and German leaders just after World War II. For example, immediately after the temporary diplomatic tension derived from Japan’s hydrographic research trial in 2006, the president of Korea, Roh Moo-hyun, issued a special public statement:293

“…For Koreans, Dokdo is a symbol of the complete recovery of sovereignty. Along with visits by Japanese leaders to the Yaskuni Shrine and Japanese history textbooks, Dokdo is a touchstone of the extent to which Japan recognizes its past history as well as of its commitment to the future of Korea-Japan relations and peace in East Asia…The government will revisit the entirety of our response with regard to the matter of Dokdo. Together with the distortion of Japanese history textbooks and visits to the Yasukuni shrine, the matter of Dokdo will be dealt with head on. It will be reviewed in the context of rectifying the historical record between Korea and Japan and historical awareness building, our history of self-reliance and independence, and the safeguarding of our sovereignty. Physical provocations will be met with strong and firm responses…”

What are Japan’s “physical provocations”? Is it Japan’s action regarding the hydrographic research in the waters near Dokdo area? What is the meaning of “strong and firm responses” against Japan’s “physical provocations”? Is it a war? Does this mean that Korea is going to have a war with Japan if necessary? This kind of statement is indeed supported many Koreans, as the Japanese leaders’ worship of the Yasukuni shrine is supported by many Japanese. The statement, however, without any vision, also is provocative rather than problem solving.

It’s time to think about a more fundamental and constructive solution for the Dokdo controversy between Korea and Japan. With promotion for freer trade and investment, the growing economic interdependence between Korea and Japan suppressed the Dokdo controversy for about ten years from 1965. The present mutual interdependence of Korea and Japan, especially in the area of people, trade, investment, and culture, is continuously increasing. Also, based on the empirical discipline of the ECSC,

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294 Id.

295 “Given the need for a close bilateral relationship between Japan and South Korea, the two sides will likely resolve any remaining disputes related to [D]okdo by compromise and agreement;” Fern, supra note 53, at 89.

296 Koo, supra note 26, at 28-29.

297 Number of Koreans in Japan: 636,000 persons (as of December 1, 1999; includes North Koreans in Japan); Number of Japanese in the Republic of Korea: 15,217 persons (as of October 1 1999;
Korea and Japan could establish an ‘Authority,’ a kind of supra-national and self-reliant system, to control Korea and Japan’s facing areas in the East Sea (the Sea of Japan). The Dokdo, in addition to some other islands, such as Ulleungdo, Oki, and Tsushima island, in the East Sea would be directly managed by the Authority. The Ministerial Meetings of the Authority, as a supreme decision making organization, would be composed of same number of ministers from Korea and Japan. The Authority could deal with JKFTA or regional economic systems between Korea and Japan as well as fishery and developing resources issues in the area. Recently, Japan wants to construct Korea-Japan Chunnel, namely submarine tunnel between Korea and Japan, which could connect Japan and the Eurasia

14,648 long-term residents, 569 permanent residents): Direct investment from Japan to Korea: $175 million (1999). Ministry of Foreign Affairs of Japan, Japan-Republic of Korea Relations, http://www.mofa.go.jp/region/asia-paci/korea/index.html. Trade between the two States has been remarkably growing in magnitude in the world economy. See the Table 1.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Year & Korea’s Export to Japan & Korea’s Import from Japan & Balance \\
\hline
1965 & 44,646 & 174,980 & -130,334 \\
2008 & 28,252,471 & 60,956,391 & -32,703,921 \\
2009 & 21,770,839 & 49,427,515 & -27,656,676 \\
\hline
\end{tabular}
\caption{Trade between Korea and Japan}
\end{table}

continent. The Authority could also deal with the promotion, construction, and afterward management of the Korea-Japan Chunnel.

Conflict and controversy concerning the issues under the Authority, such as trade, fishery, developing resources, and other maritime issues, would be settled by the Dispute Settlement System of the Authority. For the establishment of the Authority, Korea would ask Japan to admit that Dokdo belongs to Korea as a pre-condition. The establishment of the Authority would be a remarkable work for peace and prosperity in Northeast Asia.

V. CONCLUSION

For over sixty years since World War II until the present, Japan has not recognized dem jure territorial sovereignty of Korea over Dokdo, even though the islets are de facto controlled by Korea. Without a doubt, the territorial sovereignty controversy on the Dokdo between Korea and Japan, which was manifested by the 1951 Peace Treaty, is one of the strongest barriers to better relations between the two countries. Moreover, the delimitation

of EEZs and newly recognized economic values of maritime resources imply acceleration and continuation of the Dokdo territorial controversy. Korea has established the stronger claim because it has manifested the affirmative conduct of sovereignty over Dokdo. Indeed, Korea has the stronger claims over Japan’s because it has *de facto* possession of Dokdo.

As a short-term and practicable policy, it is necessary that Korea strengthen its international legal superiority over the Dokdo controversy between Korea and Japan. Generally, if one party in a conflict gets remarkable superiority in legal and factual terms, the conflict might be solved more easily. For this purpose, Korea can increase control on the islets through variety of infrastructure projects and improvements.

From the empirical discipline of the ECSC, Korea and Japan could establish an Authority, a kind of supra-national and self-reliance system, which would be composed of same number of ministers from both countries, to control Korea and Japan’s facing areas in the East Sea. The Authority with its dispute settlement system could deal with regional economic systems between Korea and Japan as well as fishery and developing resources issues in the area. It would be a pre-condition of the establishment that Japan admits Korean sovereignty on the Dokdo. The establishment would be a substantial step for the Northeast Asian Community.
Under the situation that the magnitude of international trade related to Korea and Japan in the world economy is tremendous, the mutual interdependence of both countries, especially in the area of people, trade, investment, and culture is continuously increasing. Korea and Japan had a special experience and memory of co-hosting the 2002 FIFA. Moreover, the meaning of national boundaries between countries is getting weaker and weaker under globalization, namely the global integration process through the increase of universality and homogeneity. In these circumstances of being part of a global village, it’s very shameful and unfortunate that Korea and Japan are fighting each other over Dokdo, some small islets, for over sixty years. To escape from the shackles of this troubled history and with future oriented thought, it’s time to establish the joint Authority between Korea and Japan.