

Student Note

# The Sovereignty Dispute over the Liancourt Rocks between Korea and Japan: An Analysis under the International Public Legal Principles of Sovereignty Acquisition

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## Abstract

*The purpose of the article is to determine the territorial sovereignty status of the Liancourt Rocks, disputed between Korea and Japan. The islands are currently occupied and controlled by Korea, and Japan protests the Korean occupation as illegal.*

*The paper employs the historical analysis of the state and civilian actions involving the Liancourt Rocks. The relevant actions are examined under the international legal principles of sovereignty acquisition founded by international mediators, arbitrators, the Permanent Court of International Justice, and the International Court of Justice throughout history.*

*The paper finds that Korea has acquired an earlier title than Japan and has maintained the valid and legal sovereignty over the Liancourt Rocks through the operation of various principles under public international law. Thus the current occupation of the Liancourt Rocks by Korea is found to be legal and valid.*

KEY WORDS: Sovereignty dispute, sovereignty, dispute, acquisition, island, Liancourt Rocks, Dokdo, Takeshima, Korea, Japan

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## I. Introduction

This paper concerns the territorial sovereignty status of the Liancourt Rocks. The Liancourt Rocks, also known as Dokdo in Korean and Takeshima in Japanese, is the site of a sovereignty dispute between the Republic of Korea (Korea) and Japan. The islands are currently occupied and controlled by Korea, and Japan protests the Korean occupation as illegal.

The purpose of this paper is to examine the grounds for the assertion of sovereignty from each party under the relevant doctrines and precedents of the public international law. The structure of the paper is designed to replicate the considerations of the previous international arbitrations held under the Permanent Court of International Justice (PCIJ), and the International Court of Justice (ICJ). The rules and the criteria that are normally employed by the ICJ in deciding the sovereignty disputes are discussed throughout the paper, in order to render an analysis that would reflect the current application of international law and generate the likely outcome of a potential arbitration as closely as possible.

It is concluded that Korea has acquired an earlier title than Japan and has maintained the valid and legal sovereignty over the Liancourt Rocks through most of history via the operations of various principles under public international law. The current occupation of the Liancourt Rocks by Korea is found to be legal and valid.

## II. The Subject Matter of the Dispute

The Liancourt Rocks is a set of two islands located 93 kilometres east of the Korean island of Ulleung and 157 kilometres west of the Japanese island of Oki.<sup>1)</sup> The name “Liancourt Rocks” originates from *Le Liancourt*, a French whaling ship which was the first European ship to come in contact with the islands in 1849.

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1) Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PACIFIC RIM LAW & POLICY JOURNAL 63 (Jan. 2002).

The economic interests involving the Liancourt Rocks raise the stakes higher for the claims of sovereignty. The introduction of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 entitled the signatory states to up to 200 nautical miles of an exclusive economic zone (EEZ) around their offshore territories.<sup>2)</sup> This gives the state with formal ownership over an island the exclusive fishing rights and mining access to the seabed of the island, provided that the rocks are able to sustain human habitation or economic life.<sup>3)</sup> If the Liancourt Rocks are considered islands which can sustain human habitation or economic life, then the issue of the mining right and access to the seabed would increase the level of economic potential, particularly in light of the recent report on the potential existence of a large natural gas deposit in the East Sea (Sea of Japan).<sup>4)</sup> Thus the sovereignty dispute over the Liancourt Rocks has practical and economic implications for the two states, going beyond the international legal disputes on the surface.

### III. The Relevant Legal Concepts and Modes of Territorial Acquisition Under the Public International Law

The following legal concepts and the modes of territorial acquisition are relevant to Korea's and Japan's activities in relation to the Liancourt Rocks. The historical activities can form the basis of the claims of sovereignty by satisfying the legal requirements of a mode of acquisition. A failure to satisfy the requirements of any mode of acquisition will render the claim of sovereignty invalid. This section only briefly outlines the concepts, as they are examined more in-depth in subsequent parts of the paper.

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2) Sean Fern, *Tokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute*, 5-1 STANFORD JOURNAL OF EAST ASIAN AFFAIRS 79 (Winter 2005).

3) United Nations Convention on the Law of the Sea, art. 121 para.3, Dec. 10, 1982, 21 ILM 1291.

4) Gyeongsangbuk-Do province, Republic of Korea, *Underground Resources*, GENERAL FACTS ON DOKDO, [http://en.dokdo.go.kr/korean\\_dokdo\\_underground\\_resources.do](http://en.dokdo.go.kr/korean_dokdo_underground_resources.do).

### 1. *Discovery*

Discovery is bare sighting of or physical access to a territory.<sup>5)</sup> Discovery alone is not likely to amount to a valid title under modern international law without being completed by more direct state activities on the territory. However, there is also an interpretation that mere discovery alone may be sufficient to establish a valid title according to the prevailing international law of the time allowed it.<sup>6)</sup> In the current case, discovery plays a key role in deciding which party has established an earlier title that prevents the other party from assuming its sovereignty unilaterally at a later time.

### 2. *Occupation*

The concept of occupation is the cornerstone of territorial sovereignty. A state must establish that it has fulfilled the requirements of occupation to the extent of being 'effective' under international law in order to acquire the sovereignty over a territory. Thus the goal of a state in a territorial dispute is to be found to have exercised 'effective occupation' at the exclusion of any other state. The initial claim of occupation can be based on the acquisition of a *terra nullius*, a territory that is not under the sovereignty of any other state. However, effective occupation of a territory does not have to involve the first occupation of it. It is sufficient to prove that the prior holder of sovereignty has lost the claim over it and the current occupier has fulfilled the requirements of effective occupation. The modern requirements of effective occupation are: "continuous and peaceful display of territorial sovereignty or the functions of the State (the *Island of Palmas* case); "the intention and will to act as a sovereign" (The *Eastern Greenland* case); and "some actual exercise or display of such authority" (The *Eastern Greenland* case). In the current case, the concept of occupation is relevant in evaluating the validity of the Japanese claims of acquisition in 1618 and incorporation in 1905. The current control of the Liancourt Rocks by Korea

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5) SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 40 (Martinus Nijhoff Publishers, 1997) .

6) *Id.* at 43.

is also examined in this light.

### 3. *Continuity*

The principle of continuity is invoked to justify the conclusion that sovereignty over a certain territory extends to the nearby territories. The validity of the principle is discussed in light of the Korean argument that the Liancourt Rocks should be considered to be part of the Ulleung Island and thus the Korean sovereignty over the Ulleung Island extends to the Liancourt Rocks. Japan cannot rely on the principle of continuity due to the closer proximity of the Liancourt Rocks to Korea than Japan.

### 4. *Prescription*

Prescription is a “process of acquiring a title to territory by a long, continued and uninterrupted possession.”<sup>7)</sup> The difference from occupation is that it operates as a transfer of title from the previous holder of sovereignty to another.<sup>8)</sup> The process of transfer usually involves abandonment, acquiescence, or recognition by the previous holder of sovereignty which allows the subsequent occupier to validate its possession over time. In the current case, the concept of prescription is discussed to determine the validity of the Japanese incorporation of the Liancourt Rocks in 1905.

### 5. *Conquest*

Conquest involves the forcible takeover of the territorial possession, display of the intention to retain the territory, and the ability to maintain the possession of the territory as the sovereignty-holder.<sup>9)</sup> The legality of conquest is disputed under modern international law. In the current case, the validity of the Japanese incorporation of the Liancourt Rocks in 1905 is examined in light of conquest.

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7) *Id.* at 107.

8) *Id.*

9) *Id.* at 143.

## 6. *Intertemporal Law*

The concept of intertemporal law was first introduced in the *Island of Palmas* case. It means that the acquisition of territory should be consistent with the international law in existence at the time of the act.<sup>10)</sup> It also means that the current continuing sovereignty should also be consistent with the development of the international law since the original acquisition which happened under the different norms of the international law than the present.<sup>11)</sup>

## IV. Discovery: The Parties' Claims are Inconclusive or Ineffective in Establishing Sovereignty

Although heavily emphasized by both parties, analysing the claims of discovery does not resolve the dispute. Neither party can rely on the concept of discovery to establish sovereignty over the Liancourt Rocks. While Korea has an earlier claimed date of discovery, the historical evidence on which it relies is subject to criticism. Japan, on the other hand, failed to act in a way to acquire a valid title over the territory. In this section, the concept of discovery is discussed. Then it will be shown why neither Korea nor Japan can rely on discovery to strengthen their cases.

### 1. *Discovery*

Discovery, which can be either bare sighting or physical access, was acknowledged as a mode of acquisition during the fifteenth and sixteenth centuries.<sup>12)</sup> Oppenheim stated that "the fact of discovering a hitherto unknown territory" was sufficient for acquisition.<sup>13)</sup> William Edward Hall also stated that discovery gave not merely an inchoate title but an absolute

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10) *Id.* at 98.

11) *Id.*

12) *Id.* at 40.

13) *Id.* at 45.

title in the sixteenth century.<sup>14)</sup> However, there is greater weight given to the opinion that discovery alone does not constitute the acquisition of territory.<sup>15)</sup> Various jurists, such as Hugo Grotius, Pufendorf, Marshall, Hans Kelsen, and von der Heydte, stated that discovery would only give rise to an inchoate title.<sup>16)</sup> They argue that an inchoate title must be perfected by possession “within a reasonable time by effective occupation.”<sup>17)</sup> In the words of William Edward Hall:

“An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definite title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effects of acts and the lapse of time must be judged by the light of the circumstances of each case as a whole.”<sup>18)</sup>

However, the most authoritative legal precedent regarding discovery as the basis of an inchoate title only was delivered by Judge Max Huber in the *Island of Palmas* case between the United States and the Netherlands.<sup>19)</sup> The claim by the United States was based on a bare sighting of the island in the sixteenth century. Judge Huber rejected the claim that international law during the sixteenth century recognized title by discovery alone, stating that discovery only created an inchoate title, which must be completed within a reasonable time by effective occupation.<sup>20)</sup> Even if discovery was recognized by international law as a mode of acquiring title to territory, the title had to be supported by an effective display of state authority, failure to

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14) WILLIAM E. HALL, *A TREATIES ON INTERNATIONAL LAW* 126-127(Claredon Press, 1909).

15) *Id.* at 46.

16) SURYA P. SHARMA, *supra* note 5, at 40.

17) *Id.*

18) WILLIAM E. HALL, *supra* note 14, at 126-127.

19) *Island of Palmas(Neth. v. U.S.)*, Hague Ct. Rep. 2d (Scott) 83 (*Perm. Ct. Arb.*1932).

20) *Id.* at 845.

do which would result in the loss of the inchoate title.<sup>21)</sup> In the current case, both parties failed to display state authority after the claimed discovery.

## 2. Korea's Claim of Discovery Requires a Further Verification of the Historical Documents by a Third Party

Korea claims that its sovereignty over the Liancourt Rocks can be traced back to the sixth century.<sup>22)</sup> Korea's Dokdo Museum cited *Samguk Sagi* (三國史記 - *The History of the Three Korean Kingdoms*) written in 1145, which recorded that, in 512 AD, the ancient Korean kingdom conquered the Kingdom of Usan (which is now the Ulleung Island).<sup>23)</sup> However, it is not conclusively mentioned in this text whether the Liancourt Rocks was part of the Kingdom of Usan. Korean scholars argue that, at the time of the conquest, the Kingdom of Usan consisted of multiple islands including the Liancourt Rocks.<sup>24)</sup> This argument is based on other texts that were written a subsequent era, such as *Sejong Sillok Jiriji* (世宗實錄地理志 - *The Geography Section within the History of the Reign under Sejong the King of Korea*), published in 1454. This book was a compilation, along with commentaries, of the provinces and the islands that were under the Korean kingdom at the time of its publication. *The Geography Section* recorded the two islands, called "Usan" and "Ulleung," were part of the Korean territory that they used to form the Kingdom of Usan at the time of the Korean conquest.<sup>25)</sup>

Korean scholars argue that "Usan" and "Ulleung" in *The Geography Section* are the modern day Liancourt Rocks and the Ulleung Island respectively.<sup>26)</sup> *The Geography Section* comments that the two islands are

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21) Farooq Hassan, *The Sovereignty Dispute over Falkland Island*, 23 VA. J INTERNATIONAL LAW 68 (1982).

22) Ministry of Foreign Affairs and Trade, Republic of Korea, *Dokdo, Korean Territory*, <http://dokdo.mofat.go.kr/upload/eng1.pdf>.

23) Dokdo Museum, *Historical Literature*, [http://www.ulleung.go.kr/English/page.htm?mnu\\_uid=579&Translated by the author](http://www.ulleung.go.kr/English/page.htm?mnu_uid=579&Translated%20by%20the%20author). Dokdo Museum has government website, indicating its public status. However its construction was funded by Samsung Foundation of Culture on a lot donated by the County Office of the Ulleung Island.

24) *Id.*

25) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 22.

26) *Id.*



visible from each other under a fair weather, and the fact that the Liancourt Rocks is the only island that is visible from the modern day Ulleung Island only under on a fair weather supports the Korean argument.<sup>27)</sup>

Japan however argues that Korea has misinterpreted the lines in *The Geography Section*.<sup>28)</sup> A Japanese paper cited by the Japanese Ministry of Foreign Affairs argues that the proper interpretation should mean that the two islands are visible from the Korean peninsula, not from each other, and that “Usan” in *The Geography Section* is the modern-day Juk Island, a small island immediately east of the Ulleung Island, not the Liancourt Rocks.<sup>29)</sup>

To counter the Japanese assertion, Korea cites more texts that were written in later periods.<sup>30)</sup> Some of these texts conclusively leads to the interpretation that “Usan” was indeed the old name for the Liancourt Rocks by recording that “Usan” island was what the Japanese called “Matsushima” (another Japanese name for the Liancourt Rocks).<sup>31)</sup> The earliest of these texts, was *Dongguk Munhun Bigo* (東國文獻備考 - *Remarks on Korean Documents*) written in 1770.<sup>32)</sup> The specific mention of “Matsushima” in this text makes it conclusive that “Usan” was not the Juk Island but indeed the Liancourt Rocks, because it is an uncontested fact that “Matsushima” referred to the Liancourt Rocks.

Against this evidence, Japan questions the accuracy of the documents listed by Korea.<sup>33)</sup> A Japanese researcher argues that the descriptions regarding the Liancourt Rocks within all of the ancient Korean texts were the products of the misquotation of an earlier Korean text, *Dongguk Yeojiji* (東國輿地志 - *The Topography of Korea*), published in 1656.<sup>34)</sup> The Japanese researcher argues that the original lines found in *The Topography of Korea* should be interpreted to mean that “Usan” is just an alternate name for the

27) *Id.*

28) Ministry of Foreign Affairs, Japan, *The Issue of Takeshima*, <http://www.mofa.go.jp/region/asia-paci/takeshima>.

29) *Id.*

30) Ministry of Foreign Affairs and Trade, Republic of Korea, *Q&A Regarding Dokdo*, <http://dokdo.mofat.go.kr/page.do?page=0020101>.

31) *Id.*

32) *Id.*

33) Ministry of Foreign Affairs, Japan, *supra* note 28.

34) *Id.*

Ulleung Island.<sup>35)</sup> Japan thus argues that the factual accuracy of the Korean texts must be discredited as the assertions made are based on the misinterpretation of the earlier text.

As evidenced by the exchange of arguments, the central issue on the Korean discovery is how the historical texts are to be interpreted. All of these texts were written in classical Chinese, which was the official instrument of writing in East Asia at the time. At a potential arbitration, the verdict on discovery will depend on the study, translation, and interpretation of the texts by an impartial third party. Therefore, Korea's claim of discovery remains unverified.

### *3. Korea Failed to Display State Sovereignty after the Claimed Discovery*

Even if the arbitrator finds the Korean interpretation of the texts to be accurate and persuasive, Korea still has to prove effective occupation. Korea has no evidence to support that any state activity was conducted on the Liancourt Rocks. Between 512 and 1145, there is no textual evidence to support any claim of state activity. The earliest record in existence to prove Korean involvement with the Liancourt Rocks was published in 1145. The second earliest text was published in 1454. Korea has no textual record to prove state activity on the island until 1454. Therefore, even if Korea had a valid claim of discovery in 512, it does not have a basis to claim sovereignty until 1454 without any proof of displaying state authority after the discovery. The only legal instrument that can remedy the lack of direct involvement is the concept of continuity, which is discussed in a later part of this paper.

### *4. In the Event of Non-Discovery by Korea, Japan's Claim of Discovery is Likely to Stand*

Japan's claim of discovery depends on the strength of the Korean case, since Korea's claim of discovery predates that of Japan. In the event that the arbitrator does not find Korea's case persuasive, Japan may have a chance

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35) *Id.*

to establish its claim of discovery.

Japan bases its argument for discovery on the acts of two Japanese merchants in 1618, who received permission from the Shogunate (the highest level of the Japanese governing body at the time: a form of a federal government regulating the regional aristocratic lords) for passage to the Ulleung Island.<sup>36)</sup> Japan argues that the two merchants' families used the Liancourt Rocks as a stop-over en route to the Ulleung Island.<sup>37)</sup> If the facts claimed by Japan are backed up by evidence, Japan's claim of discovery is likely to stand. Nonetheless, as in the case of Korea, Japan still needs to prove that it displayed state authority on the Liancourt Rocks to complete the acquisition of sovereignty.

#### *5. Japan Failed to Display State Sovereignty after the Claimed Discovery*

Discovery only creates an inchoate title which expires if not subsequently completed by effective occupation on the part of the discoverer. The only Japanese activity displayed on the Liancourt Rocks after the discovery was the private usage of the islands as a stop-over by the two merchants. The issue then is whether the private usage of a territory can amount to effective occupation. Occupation is the "act of appropriation by a state through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state."<sup>38)</sup> There are two conditions for acquiring a title through occupation: an announced intention to acquire by the state (*animus occupandi*) and the actual display and exercise of state functions over the territory (*corpus occupandi*).<sup>39)</sup>

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36) *Id.*

37) Ministry of Foreign Affairs, Japan, *10 Issues of Takeshima*, <http://www.mofa.go.jp/region/asia-paci/takeshima>.

38) NORMAN HILL, *CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS* 146 (Greenwood Press Publishers, 1945).

39) *Id.*; SURYA P. SHARMA, *supra* note 5 at 62. This principle was first outlined by King Bittore Emanuele III of Italy in his arbitral award regarding a dispute between Brazil and British Guyana in 1904.

### 1) *Japan Did Not Have Animus Occupandi*

Japan has no evidence to prove the Shogunate's intention to occupy the Liancourt Rocks. Even the letter of permission given to the two merchants which allow them the passage to the Ulleung Island does not mention the Liancourt Rocks. In fact, the sole expressed subject of the Shogunate permission was the Ulleung Island.<sup>40)</sup> It leaves a door open for the Korean argument that the usage of the Liancourt Rocks was in fact entirely at the discretion of the two merchants, unbeknownst to the Shogunate. A collateral rule branching out of *animus occupandi* is that a private person cannot acquire territorial sovereignty by occupation without explicit authorization or subsequent confirmation by the state, as he/she alone cannot embody state intention:

“The independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a license or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.”<sup>41)</sup>

Therefore, the Japanese merchants' act of using the Liancourt Rocks did not fulfill the requirement of having *animus occupandi*.

#### (1) The Korea-Japan Negotiation in 1692: the Showcase of Japan's Lack of Animus Occupandi

In 1693, a Korean fisherman made a trip to the Ulleung Island despite the Korean government's policy of an empty island. The Japanese merchant, under the false assumption that the Ulleung Island was a Japanese territory, kidnapped him to Japan and alerted the authorities. The incident brought to the attention of the Shogunate the issue of conflicting sovereignty claims over the Ulleung Islands by the two countries. As the Japanese merchants petitioned the Shogunate to prohibit Koreans' passage to the Ulleung Island, the Shogunate repatriated the fisherman and

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40) Ministry of Foreign Affairs, Japan, *supra* note 28 at 5.

41) DANIEL PATRICK O'CONNELL, *INTERNATIONAL LAW* 482(Stevens, 1970); SURYA P. SHARMA, *supra* note 5, at 70. This principle was first laid out in the *Fisheries case*. 1951 ICJ at 184.

engaged in negotiations with the Korean royal court. The negotiations were not successful as the Korean royal court asserted its sovereignty over the island. At the demise of the negotiations, the Shogunate inquired a local lord from the Tottori clan about the issues regarding the island. The letter of inquiry from the Shogunate contained seven questions regarding the Ulleung Island and its jurisdictional history. The principal question of the letter was whether the Ulleung Island was within the Tottori jurisdiction.<sup>42)</sup> Another question that the Shogunate asked in the letter to Tottori was whether any islands other than the Ulleung Island were considered within the Tottori jurisdiction.<sup>43)</sup> The lord of Tottori responded that the Ulleung Island did not belong to his jurisdiction.<sup>44)</sup> In response to the second question, he said that neither the Ulleung Island nor the Liancourt Rocks belonged to the Tottori clan, nor are there any other island belonging to their clan.<sup>45)</sup> Subsequently, the Shogunate recognized Korean sovereignty over the Ulleung Island and, in January, 1696, prohibited the Japanese from accessing it.

The above incident illustrated the Shogunate's lack of sufficient commitment to both the Ulleung Island and the Liancourt Rocks. The written correspondence between the Shogunate and the local lord exhibited the former's ignorance and uncertainty about the islands. It demonstrated that Japan's position on the Ulleung Island and the Liancourt Rocks was subject to sway by foreign assertions, without a firm official policy which regarded the islands as Japanese territories. The indecisive nature of the Shogunate treatment of the island can be construed as the absence of *animus occupandi*.

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42) Steven J. Barber, *Historical Facts about Korea's Dokdo Island*, <http://www.dokdo-takeshima.com/japans-1695-tottori-bafuku-records.html>.

The site features the pictures of the original correspondence between the Shogunate and the lord of Tottori and the computerized Japanese textual contents of the documents and the English translation of them. Managed by Steven J. Barber (Webmaster) citing credits to the contributions of other researchers: Ryan Saley, Hosaka Yuji, Jon M. Van Dyke, Yu Mi Rim, Mark Lovmo, Hideki Kajimura, Kazuo Hori, and Shojin Sato. Contact: maemi30@yahoo.co.kr

43) *Id.*

44) *Id.*

45) SURYA P. SHARMA, *supra* note 5 at 17.

## 2) *Japan Did Not Have Corpus Occupandi*

Japanese activities on the Liancourt Rocks did not amount to *corpus occupandi*. *Corpus occupandi* means physical occupation involving the actual display and exercise of state functions over the territory. There is no evidence to prove the Shogunate activities. Therefore there is no basis to argue that Japan had *corpus occupandi*.

The presence of Japanese merchants around the Liancourt Rocks in 1618 may have amounted to discovery and acquired an inchoate title, but there is no evidence to support that the Japanese presence on the Liancourt Rocks ever involved *animus occupandi* or *corpus occupandi* of the Shogunate at the time. Therefore, the Japanese inchoate title expired without converting into effective occupation, thus having no legal effect of establishing Japanese sovereignty over it. In conclusion, the events that happened around 1618, such as the Shogunate granting access to the Ulleung Island and the usage of the Liancourt Rocks by Japanese merchants, did not have the effect of establishing Japanese sovereignty over either of the islands.

## 6. *Concluding Remark on the Claims of Discovery*

As it stands now, the Korean claim of discovery is on inconclusive grounds. The first official, government-sanctioned Korean document (*The Remarks on Korean Documents*) that recorded the Liancourt Rocks as a Korean territory in a definitive manner, without leaving room for doubt that it could refer to the Juk Island, was published only in 1770. Japan's claim of discovery in 1619, even in the event the arbitrator finds it to be the first discovery, had no legal effect of establishing sovereignty over the Liancourt Rocks. Therefore it is concluded that the examination of the claims of discovery does not resolve the dispute in either party's favour.

## **V. The Doctrine of Continuity: The Korean Sovereignty Over the Liancourt Rocks was Preserved Even in the Absence of Direct Control**

Until the establishment of the current occupation of the Liancourt

Rocks, the Korean claim for the sovereignty had been based on the “package” treatment of the Liancourt Rocks and the Ulleung Island. Korea has consistently treated the Liancourt Rocks as an attachment to the Ulleung Island which form a single territorial unit along with the other smaller islands around it. In this regard, the earlier Korean claim of the Liancourt Rocks is an extension of the Korean sovereignty over the Ulleung Island, particularly in the absence of *corpus occupandi* over the former until 1454. In this section, it is concluded that the lack of direct involvement over the Liancourt Rocks by Korea did not result in the loss of sovereignty. It is because the maintenance of sovereignty over the Ulleung Island was extended to all the nearby islands, including the Liancourt Rocks, through the operation of continuity.

*1. The “Packaging” of the Liancourt Rocks and the Ulleung Island by Korea May Be Effective in the Absence of Japanese competition*

The Korean connection between the Liancourt Rocks and the Ulleung Island is based on the principle of “continuity,” even though Korea has never explicitly invoked it. The principle raises a presumption that sovereignty over a certain territory also extends to nearby territories.<sup>46)</sup> This presumption however is rebutted if the status quo continues without any evidence of state authority exercised over the nearby territories or if a competing state has a superior case of displaying sovereignty.<sup>47)</sup> The ICJ echoed this reasoning by ruling that such a legal “packaging” of territories was invalid in the face of effective occupation by a competing state.<sup>48)</sup> In the *Island of Palmas* case, Judge Huber stated:

“It cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty: what is essential in such a case is the continuous and peaceful display of actual power

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46) JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 273(Irwin Law, 2008).

47) *Id.*

48) *Island of Palmas (Neth. v. U.S.)*, Hague Ct. Rep. 2d (Scott) 857 (*Perm. Ct. Arb.*1932).

in the contested region.”<sup>49)</sup>

Thus the principle of continuity is not entirely ineffective in establishing a title. It is only ineffective in the face of a stronger display of state authority by another state.

In the case of the Korean claim, the Liancourt Rocks has been treated as an appendage to the Ulleung Island. Until the first display of the more direct state authority over the Liancourt Rocks by Korea in the post-WWII era, Korea had relied on the principle of continuity to maintain sovereignty over the islands. Korea has been publishing official documents that listed the Liancourt Rocks as its territory, but there is no evidence of physical occupation. However, Japan also has not displayed a stronger form of state authority to overpower the Korean publication of the official documents as a superior claim. Therefore, Korea was able to maintain its title by exhibiting *animus occupandi* as reflected through the official documents.

*2. The Policy of an Empty Island by Korea Did Not Amount to the Loss of Korean Sovereignty over the Ulleung Island and, by Extension, the Liancourt Rocks*

An argument based on the principle of continuity operating between the Ulleung Island and Liancourt Rocks leads to an inference that the loss of sovereignty over the former has an effect of losing the former as well. Such reasoning is relevant in the case due to the adoption of the “empty island” policy by Korea in 1403. The policy of an “empty island” made it illegal for Koreans to live in the Ulleung Island. The issue here is whether the policy led to the loss of sovereignty over the Liancourt Rocks along with the Ulleung Island along with and allowed Japan to acquire them unilaterally in 1618. It is argued that the policy of an “empty island” by Korea did not amount to the loss of sovereignty over the Ulleung Island, and by extension the Liancourt Rocks.

The policy of ‘an empty island’ called for the relocation of all the residents of the Ulleung Island to the Korean peninsula.<sup>50)</sup> It was adopted to

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49) *Id.*

50) Dokdo Centre, *111 Questions and 111 Answers*, <http://www.dokdocenter.org/new/>



protect the residents from the murderous raids by the Japanese pirates who frequently looted the island.<sup>51)</sup> Japan can argue that such a policy constituted the abandonment of the Ulleung Island by Korea, and therefore made the island available for Japanese acquisition later in 1618. The argument however is likely to fail, because abandonment requires “the animus of abandoning the island.”<sup>52)</sup> The requirement of the animus (intention) of abandoning the island is based on a precedent set in the *Clipperton Island* case, between France and Mexico.<sup>53)</sup> It is stated in the case:

“There is no reason to suppose that France has subsequently lost her right by derelictio, since she never had the animus of abandoning the island, and that the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.”<sup>54)</sup>

Abandonment requires the *animus* of abandonment. Even the lack of a positive exercise of authority does not constitute abandonment without the intention to abandon. Within the policy of an empty island, Korea exhibited an intention to maintain sovereignty over the Ulleung Island. Korea cites an incident in 1416, in which a Japanese official from the Tsushima Prefecture asked the Korean court to allow Japanese migration to the Ulleung Island and appoint the head of the Tsushima Prefecture to govern the island.<sup>55)</sup> Korea refused to grant permission, for the reason that allowing foreigners to settle in a Korean island, even if it is uninhabited, can cause disputes in the future.<sup>56)</sup> The incident of 1416 highlighted the Japanese recognition of the Korean sovereignty of the Ulleung Island even in a state of depopulation. The incident is also a demonstration of the Korean intention

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studypds/another\_main.htm?curDir=studypds&idx=49&mode=r&page=1&searchfield=&searchword=&tb=openb\_another\_main.

51) *Id.*

52) *Clipperton Island case, Judicial Decision Involving Questions of International Law: Fr. v. Mex.* (1931), 2 R. I. A. A. 1105. \*Second last paragraph.

53) *Id.*

54) *Id.*

55) JOHN H. CURRIE, *supra* note 47.

56) *Id.*

to maintain its sovereignty over the Ulleung Island by denying foreigners from creating a settlement there. In addition, Korea carried out the policy of patrolling the island by armed officers once every three years in 1697, while still maintaining the policy of an empty island.<sup>57)</sup> The official records produced during the time of the policy, such as *The Topography of Korea* (1656), also lists the Ulleung Island as a Korean territory. Therefore, the policy of an empty island did not amount to abandonment, as the Korean court demonstrated the intention to maintain its sovereignty over the Ulleung Island by its actions.

### *3. Japan's Issue of Permit to Access the Ulleung Island was Illegal and Ineffective in Acquiring the Island.*

Given the lack of abandonment, the holder of the sovereignty over the Liancourt Rocks was Korea in 1618 when Japan granted permission to the merchants. Thus Japan's action should be analyzed as a claim of acquiring the title from a previous holder. If a territory is subject to take-over by a newcomer, the transfer of transfer cannot be done unilaterally. It must also involve recognition or acquiescence by the previous holder of the new territorial assertion. The facts of the case show that Japan did not have Korea's recognition or acquiescence.

Recognition requires a "form of express consent to the rival claim."<sup>58)</sup> There is no evidence of any express consent from the Korean state. Thus the argument for recognition fails.

Acquiescence can be construed by "silence or passivity in the face of a clear assertion by another state of sovereignty over territory."<sup>59)</sup> It requires the intention to remain silent or passive despite the knowledge of a competing assertion. There is no evidence of the Shogunate communicating its assertion to Korea, and nor is there any evidence of the Korean court intending to remain silent or passive about it. On this account, Japan can argue that the ships of the Japanese merchants bore the crest of the

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57) *Id.*

58) *Id.*

59) *Id.*

Shogunate, and thus it was ostensible and observable to Korea.<sup>60)</sup> However, the bearing of a state symbol alone cannot help establish acquiescence if such display was never noticed by the other state.

In summary, the Japanese arguments for its acquisition of the Ulleung Island fail. With the absence of recognition, and acquiescence, the Korean sovereignty over the Ulleung Island was maintained at the time after the Shogunate granted permission for passage to the island. Thus the Shogunate's act did not have the effect of acquiring sovereignty, and, as a result, the permission was ineffective under the international law, rendering the presence of the Japanese merchants in the Ulleung Island illegal.

#### *4. Concluding Remarks on the Doctrine of Continuity as Applied to the Liancourt Rocks*

It may be concluded that the principle of continuity allowed the treatment of the Liancourt Rocks as an attachment to the Ulleung Island. It is also found that Korea's policy of an "empty island" and Japan's issue of permit to access did not result in the loss of Korean sovereignty over the Ulleung Island and the Liancourt Rocks. Finally, it is inferred that the Korean sovereignty over the Ulleung Island extended to the Liancourt Rocks as an attachment.

## **VI. Korea Maintained a Stronger Case During the Period between 1696 and 1900**

The analysis of the period between 1696 and 1900 is relevant to the case because the sovereignty status established during this period would determine the legality of Japanese actions in 1905.

Since the conclusion of the negotiations in 1696, there is no evidence of further direct interactions between Korea and Japan regarding the Liancourt Rocks until 1900. In fact, the Japanese Ministry of Foreign Affairs

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60) Ministry of Foreign Affairs, Japan, *supra* note 28, at 5.

does not discuss this time period at all, while the Korean counterpart produces textual evidences written during the time to argue that its *animus occupandi* existed. Korea cites two texts: *Remarks on Korean Documents, 1770*, and *Mangi Yoram* (萬機要覽 – *Manual of State Affairs for the Monarch*), 1808.<sup>61)</sup> As previously discussed, Japan claims that the passages in these texts regarding the Liancourt Island are based on the misquotation of an earlier Korean text. However, such challenge is only relevant in the discussion of the first discovery. Regardless of the accuracy, these texts show the intention of the Korean royal court to include the Liancourt Rocks as part of Korean territory in the years they were published.

In 1868, Japan entered the Meiji period as a result of the self-abolishment of the samurai class and the overthrow of the Shogunate to restore the emperor back into political power and westernize the nation. The new Meiji government conducted the Land Registry Project in 1877 under the Ministry of Home Affairs.<sup>62)</sup> The Ministry of Home Affairs sent an inquiry to the *Daijokan* (*Grand Council of State*), the highest decision-making body of the Meiji government, regarding whether the Ulleung Island and ‘the other island’ were to be included in the Land Registry.<sup>63)</sup> The *Daijokan* concluded that the two islands belonged to Korea and issued a directive accordingly. Korea claims that this is an acknowledgement of Korean sovereignty over the Liancourt Rocks. Japan claims that ‘the other island’ refers to the Juk Island, a tiny island closer to the Ulleung Island. Each party has evidence to defend their position. Regardless of whether the Meiji government indeed expressed its non-involvement with the Liancourt Rocks, it did not display any positive state authority over it either during the time period. Again, there is no evidence that the *Daijokan* was aware of the existence of the Liancourt Rocks as there is no mention of it in the official records of Japan during this time.

The overall trend between 1696 and 1900 was that the Korean court produced official records which listed the Liancourt Rocks as its territory, while Japan did not produce of any signs of *animus occupandi* or *corpus occupandi* over the Liancourt Rocks. Although Korea did not produce any

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61) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 26, at 13.

62) *Id.* at 20.

63) *Id.*

evidence of *corpus occupandi*, its *animus occupandi* was shown via the production of the official publication. Although the *animus occupandi* of a state does not fulfill the requirements to constitute an effective occupation of a territory, Judge Max Huber establishes in the *Island of Palmas* case that there is no minimum amount of sovereign authority mandated by international law “as long as the circumstances warrant the drawing of conclusions on such a basis.”<sup>64)</sup> In other words, the arbitrator will look at “relative merits of competing claims of sovereignty, rather than any established, objective threshold for the establishment of sovereignty in the abstract.”<sup>65)</sup> Therefore the display of *animus occupandi* through the production of official documents alone may suffice for the establishment of Korean sovereignty over the Liancourt Rocks, in the absence of any competing sovereign acts from Japan during the period. The arbitrator will likely find that the Liancourt Rocks was under Korean jurisdiction within this period.

## **VII. Korea Maintained Sovereignty Over the Liancourt Rocks before Falling under Japanese Annexation**

The beginning of the 20<sup>th</sup> century was the time of Japanese imperialism over the Korean peninsula. The significance of this period was that the territorial gains that Japan made through imperialistic means were restored to the newly independent states in the aftermath of World War II. The legal instruments of Japanese surrender had the effect of restoring the sovereignty status of the Liancourt Rocks just prior to the 1910 Japanese annexation of Korea. Therefore Korea needs to prove that the Liancourt Rocks was a Korean territory before Korea lost its statehood in 1910, in order to validate its unilateral occupation of the islands in the aftermath of the Japanese surrender.

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64) *Supra* note 20.

65) *Id.*

### 1. Korea's Display of Sovereignty and Japanese Recognition

In 1900, Korea issued the Imperial Edict No. 41 to proclaim the incorporation of the Ulleung Island, the Juk Island, and the Liancourt Rocks into a single county to be governed by a magistrate.<sup>66)</sup> Japan raises a doubt that the name of the third island used in the Imperial Edict is different than the traditional ones and thus may not have referred to the Liancourt Island.<sup>67)</sup> Even if the doubt is cleared, Japan argues that the Imperial Edict alone cannot constitute a valid title without effective occupation.<sup>68)</sup>

The Japanese counterclaim is unlikely to stand at the arbitration. First, there is no other island around the Ulleung Island that can be the third island but the Liancourt Rocks. A mere usage of a different name cannot be deemed to exclude the Liancourt Rocks in favour of an imaginary, nonexistent island. Second, the past international arbitrations recognized sovereign titles established by mere passage of legislations without physical occupation. In the *Eastern Greenland* case, the Court ruled that "very little in the form of a *corpus possessionis* was required to satisfy the requirements of effective occupation" in the absence of claims by other powers to sovereignty.<sup>69)</sup> At least since 1868, Japan had not made any positive displays of sovereign act or an intention to possess the island until 1905. In fact, during the discussion leading to the decision to incorporate the Liancourt Rocks on January 28, 1905, Japan issued a statement that "no evidence can be found of this uninhabited island being under the possession of any foreign country,"<sup>70)</sup> and therefore the Liancourt Rocks as *terra nullius* is subject to unilateral incorporation.<sup>71)</sup> More importantly, there is no evidence of Japanese objection to the Korean proclamation. Such lack of objection by Japan is striking in a situation where Japan has been gaining imperialistic

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66) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 26, at 9.

67) Ministry of Foreign Affairs, Japan, *supra* note 28, at 7 and 10.

68) *Id.*

69) SURYA P. SHARMA, *supra* 5 at 82.

70) Korean Embassy, *Dokdo: Korean Territory Since the Sixth Century*, [http://www.koreaembassy.org/bilateral/political/recent\\_img/dokdo0717.pdf](http://www.koreaembassy.org/bilateral/political/recent_img/dokdo0717.pdf).

71) *Id.*

foothold in Korea since February 27, 1876, when the Treaty of Ganghwa was signed to open three ports to Japanese trade. By 1894, Japanese troops were stationed within Korea, and their political grip on Korea was powerful enough to assassinate the Empress of Korea and desecrate her body in 1895 in a broad daylight with no punitive consequences. Any Japanese argument for the invalidity of the Korean proclamation, based on the assertion that Japan was unaware of such sovereign act by Korea, does not hold, as the Japanese presence and influence in Korea in 1900 necessitated the awareness of any Korean state activity by Japan. Japan's inaction, while being aware of the Korean proclamation, amounted to lack of claim over the Liancourt Rocks or, in the case of a potential claim by Japan, acquiescence. Thus, with no competing claim over the Liancourt Rocks by another state, the mere issuing of an Imperial Edict in 1900 amounted to establishing sovereignty until a stronger display of sovereignty was carried out by a competing state. The case for Korea is especially strong, considering the political climate of the time when Korea was under the domination of Japanese imperialism.

## *2. Japan's Unilateral Incorporation of the Liancourt Rocks in 1905 was Invalid*

In January, 1905, Japan made a Cabinet decision to incorporate the Liancourt Rocks into the Shimane Prefectural Government's jurisdiction.<sup>72)</sup> It was the first instance where the highest level of the Japanese governing body ever expressed its direct opinion regarding the Liancourt Rocks. Japan claimed that, at the time of incorporation, the Liancourt Rocks was *terra nullius*, subject to incorporation by any state. Considering the Liancourt Rocks as *terra nullius* was an acknowledgement that it was not known to the Japanese state previously or, at least, that Japan never recognized it to be its territory. Since it was the first time dealing with the Liancourt Rocks, the Cabinet did not have a Japanese terminology to refer to it, thus using the Western-derived name "Lyanko" islands in its incorporation documents.<sup>73)</sup> The name "Takeshima" was first given in

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72) Ministry of Foreign Affairs, Japan, *supra* note 28, at 5.

73) *Id.* at 8.

January 1905.<sup>74)</sup> The Japanese incorporation happened only 5 years after the Korean proclamation that the island was to be part of a single county along with the Ulleung Island. Given that Korea laid claims of sovereignty prior to the Japanese incorporation in 1905, Japan could have acquired sovereignty only through prescription or conquest, which are the modes of acquisition when the territory in question had been under another state's sovereignty at the time of the incorporation. On the other hand, acquisition through occupation requires the occupied territory to have been a *terra nullius*.<sup>75)</sup> Therefore, the occupation of the Liancourt Rocks as a *terra nullius* is out of question in this case as there is evidence of Korean assertion of sovereignty in 1900. Thus it is found that the Japanese incorporation failed to meet the requirements of either prescription or conquest. Therefore the Japanese incorporation failed to acquire a valid title.

1) *The Japanese Incorporation Did Not Meet the Requirements of Prescription*

Prescription is a process of acquiring a previously appropriated territory from one territorial entity by a long, continued and uninterrupted possession.<sup>76)</sup> Various legal scholars such as Openheim, Philimore, and O'Connell defined the conditions of prescription. The requirements are (1) "continuous and undisturbed (*peaceful*) exercise of sovereignty... during such a period as is necessary" [*italic added by the author*] under the contemporary international order,<sup>77)</sup> (2) publicity,<sup>78)</sup> (3) "the employment of labour and capital upon the possession by the new possessor,"<sup>79)</sup> (4) "absence of any attempt to exercise proprietary rights by the former possessor,"<sup>80)</sup> and (5) "proof of actual consent to a territorial claim, or a failure to protest against it" by the prior holder of sovereignty<sup>81)</sup> (acquiescence). The claim of prescription is not allowed in the absence of

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74) *Id.*

75) SURYA P. SHARMA, *supra* note 5, at 61.

76) *Id.* at 107.

77) *Id.* at 109.

78) *Id.*

79) *Id.*

80) *Id.*

81) *Id.* at 110.



these conditions.<sup>82)</sup>

The arbitrator will likely find that Japan has not fulfilled the requirements of acquisitive prescription. The requirement of the possession for a certain length of time meant that the mere act of incorporation did not establish the Japanese sovereignty in 1905. There is lack of agreement on how much time is required to establish a valid title.<sup>83)</sup> Nonetheless the act of incorporation itself did not consolidate the acquisition of the Liancourt Rocks as it was done in a non-publicized manner.

In the early 1906, a Japanese survey team visited the Magistrate of the Uldo County, requesting statistical information about the county, on the basis that it had now become Japanese territory.<sup>84)</sup> The news of incorporation was not clearly communicated to the Korean officials, as evidenced by the uncertainty expressed in the report by the County Magistrate to the *Uiyeongbu*, the top decision-making body of Korea in April 29, 1906.<sup>85)</sup> The report indicated that the Japanese “recorded the information as though they were undertaking a general survey and then left,” and that “the matter is thus reported to you for your consideration as it was reported to me for my consideration.”<sup>86)</sup> The report indicated that the news of the incorporation was not even communicated to the County Magistrate directly, as it was only reported by his subordinates for his consideration.<sup>87)</sup> This is an indication that Japan failed to communicate to Korea the intention to take over the Liancourt Rocks. The *Uiyeongbu* issued a directive on May 20, 1906, stating “the claim that Dokdo has become Japanese territory is completely groundless, so inquire again into the situation.”<sup>88)</sup> Then, in 1908, the Imperial Court of Korea published *Jeungbo Munheon Bigo* (增補文獻備考 - *The Revised and Enlarged Reference Compilation of Documents*) as a comprehensive list of territories, practices, and systems in Korea.<sup>89)</sup> The

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82) *Id.*

83) *Id.* at 111.

84) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 25, at 24.

85) *Id.*

86) *Id.*

87) *Id.*

88) *Id.* at 25.

89) *Id.* at 13.

compilation listed the Liancourt Rocks as a Korean territory, forming a part of the Uldo County along with the Ulleung Island.<sup>90)</sup>

The facts show that Japan failed to satisfy the requirements of ‘publicity’, ‘absence of any attempt to exercise proprietary rights by the former possessor’, and ‘proof of actual consent to a territorial claim, or a failure to protest against it’ by the prior holder of sovereignty, thereby invalidating the incorporation under prescription. Upon incorporation, Japan failed to notify Korea directly in an official channel, instead leaving Korea in doubt as to whether it was merely a rumour. Although there is evidence that a local newspaper in the Shimane prefecture featured news of the incorporation, such avenue without an audience in Korea did not constitute valid publicity which would give the competing state a chance to either acquiesce or protest the claim. Moreover, the Shimane Prefectural Notice No. 40, the document of incorporation, was issued secretly, not being published in the official gazette, nor was it done in the name of the prefectural governor.<sup>91)</sup> Therefore, Japan failed to satisfy the publicity requirement.

Being able to list a territory as within its jurisdiction in an official state publication is a proprietary right. The publication of *The Revised and Enlarged Reference Compilation of Documents* in 1908 was a display of sovereignty and an exercise of a proprietary right which was exclusive to the sovereignty holder. Thus the requirement of the lack of any proprietary right by the prior holder of sovereignty was not met. This fact is also relevant to the fifth requirement: proof of actual consent to a territorial claim, or a failure to protest against it. The exercise of a proprietary right by Korea served as the proof of lack of consent to Japan’s territorial claim. Japan could argue that Korea still failed to protest against it directly to Japan. However, there is no evidence of an official notification from Japan to Korea. This leads back to the fact that the news of the Japanese incorporation was never officially communicated to Korea in a state-to-state manner. The facts show that the only instances of communications were marked by its casual, limited in scope, and ambiguous manner which caused scepticism and uncertainty on the Korean part as to whether the

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90) *Id.*

91) SURYA P. SHARMA, *supra* note 75, at 9.

news was a rumour.

The semi-colonial relationship between Korea and Japan may play a role in deciding the legality of the Japanese incorporation. The nature of the relationship at the time of the Japanese incorporation necessarily created a state of power imbalance within which Korea was under duress, materialized by the threat of military domination by Japan. A party under duress is not in the position to exercise the proprietary rights or protest the acquisitive actions by the aggressor due to the fear of consequences which prevent the party from acting out its true intentions and voluntary wills. Korea, as a party under duress, cannot be put in the position of rendering its silence as acquiescence to Japanese assertions. Therefore, Korea's silence in the face of Japanese incorporation cannot be used by Japan to establish acquiescence by Korea.

In conclusion, the examination of the facts following the Japanese incorporation indicate that three of the five requirements of acquisitive prescription were not met: (1) 'publicity', (2) 'absence of any attempt to exercise proprietary rights by the former possessor', and (3) 'proof of actual consent to a territorial claim, or a failure to protest against it' by the prior holder of sovereignty. Therefore, the arbitrator is likely to find that the acquisition of the Liancourt Rocks was not accomplished through acquisitive prescription.

## 2) *The Japanese Incorporation Did Not Meet the Requirements of Conquest*

Conquest involves "the taking possession of the territory by force, display of intention to retain the territory, and an ability to hold as its sovereign."<sup>92)</sup> Acquisition of a title by conquest is completed when "the intention to annex, as shown by the claimant's actions, was signalled and the territory in question was completely occupied."<sup>93)</sup> Conquest requires the use of force to acquire possession of a territory and the occupation of it by force. There is no evidence of Japanese armed forces arriving on the Liancourt Rocks along with the incorporation of the Liancourt Rocks in 1905. Therefore, the necessary condition of using armed invasion to constitute conquest was not met.

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92) SURYA P. SHARMA, *supra* note 5, at 143.

93) *Id.*

Upon examining the validity of the Japanese activities in 1905 under the only two available means of acquisition relevant to the facts of the case, which are prescription and conquest, the act of unilateral incorporation by Japan failed to satisfy the requirements of either mode. Therefore, the arbitrator is likely to find that the incorporation of the Liancourt Rocks under the Shimane Prefecture did not constitute any legal acquisition of title by Japan. The sovereignty status of the Liancourt Rocks remained unaffected by the incorporation in 1905. Therefore, the Liancourt Rocks remained a Korean territory at least until the complete annexation of Korea by Japan in 1910, when the Korean statehood was extinguished for the next 35 years, annexed by Japan with the signing of the *Korea-Japan Annexation Treaty of 1910*. The Japanese occupation over the Korean peninsula came to an end in August 15, 1945.

### **VIII. The Treaty of San Francisco Restored the Korean Sovereignty to the Pre-Annexation Extent, Which Included the Liancourt Rocks**

With the declaration of surrender by the Japanese emperor in August 15, 1945, Japan agreed to be bound by the Potsdam Declaration announced in July 26, 1945, through which the United States, Britain, and China laid down the terms for Japan's surrender. A series of declarations and treaties were drafted and put into effect to decide the fate of Japan after its defeat. The Potsdam Declaration, the Cairo Declaration, and the Treaty of San Francisco included the terms that disposed of the territorial gains that Japan made through imperialistic practices.

The status of the Liancourt Rocks was not decided in the Potsdam Declaration. Within the Declaration, the only term that is relevant to territorial sovereignty is the Article 8: "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 Cairo Declaration, released in 1943, also did not explicitly settle the sovereignty status of the Liancourt Rocks, although there was a vague provision regarding the independence of Korea: "in due course Korea shall

become free and independent.” In terms of the general acquisition of territory by Japanese imperialism, the Cairo Declaration stipulated that “Japan will also be expelled from all other territories which she has taken by violence and greed.” The Cairo Declaration had the legal effect of nullifying the *Korea-Japan Annexation Treaty of 1910*. Nonetheless the loose qualifier, such as ‘taken by violence and greed’, failed to settle the issue explicitly.

The Treaty of San Francisco, signed in September 1951, also failed to settle the issue. It stated that “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.” This is a confirmation of the Cairo Declaration regarding the nullification of the *Korea-Japan Annexation Treaty of 1910*. All the rights over Korea relegated to Japan through the annexation treaty were formally restored to Korea through the operation of the Treaty of San Francisco. Yet, the fact that the Liancourt Rocks was not mentioned prevented the conclusive determination of the sovereignty status at the immediate aftermath of the World War II. Japan presently argues that the omission of the Liancourt Rocks necessarily implies the Japanese sovereignty over the islands.<sup>94)</sup> Korea counter-argues that the list is not exhaustive, considering there are more than 3,000 islands under Korea’s jurisdiction which are not mentioned.<sup>95)</sup> In conclusion the post-World War II treaties and the instruments of Japanese surrender have failed to conclude the sovereignty dispute over the Liancourt Rocks definitively. The sovereignty status of the Liancourt Rocks was unaffected by the treaties. What was settled conclusively, however, was the nullification of *The Korea-Japan Annexation Treaty*. Therefore, all the territories that belonged to Korea before the treaty, including the Liancourt Rocks, were returned to the jurisdiction of the newly independent Republic of Korea.

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94) Ministry of Foreign Affairs, Japan, *supra* note 28, at 10.

95) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 25, at 28.

## **IX. The Unilateral Inclusion of the Liancourt Rocks by the Republic of Korea was Consistent With Its Rights under the International Law**

With the demise of the Japanese Empire and the establishment of the Republic of Korea, the first Korean president, Syngman Rhee, issued the Presidential Declaration of Sovereignty over Adjacent Seas in 1952. The declaration unilaterally established the Syngman Rhee Line, a national boundary line of the Republic of Korea which included the Liancourt Rocks. Since then, Korea seized all foreign vessels in breach of the line, constructed a lighthouse, a dock, a helicopter pad, a household registered as permanent residents, and police barracks with officers on active duty.

The issue here is whether the unilateral declaration of the national boundary and the inclusion of the Liancourt Rocks within it is valid under the international law. The difference between the establishment of the Syngman Rhee Line and the unilateral Japanese incorporation of the Liancourt Rocks in 1905 was that Korea had a prior sovereignty claim over the island which existed before the Japanese annexation of Korea and restored after the Treaty of San Francisco. On the other hand, Japan was in the position of acquiring a new territory either from another state or a *terra nullius*, never having made any formal claim of sovereignty over the Liancourt Rocks prior to its unilateral incorporation in 1905. Therefore, while the legality of Japan's incorporation is to be judged in regard to prescription and conquest, Korea's action in 1952 is to be construed as a continuation of its previous territorial assertions over the Liancourt Rocks just prior to Japanese colonialism. If Korea held sovereignty over the island before annexation by Japan, then the sovereignty must be considered to have returned to Korea with the operation of the Treaty of San Francisco. As previously concluded, the arbitrator is likely to find Japan's unilateral incorporation in 1905 illegal, thus reserving the Korean sovereignty over the islands until the total annexation in 1910. Therefore, as an extension the same legal analysis, the inclusion of the Liancourt Rock within the Syngman Rhee Line is likely to be held legal, along with the provision of the Treaty of San Francisco which restored Korean sovereignty over all of its pre-annexation territories.

## X. Republic of Korea Currently Maintains Effective Occupation, Valid under the International Law

Since the establishment of the Syngman Rhee Line in 1952, Korea still maintains the occupation of the Liancourt Rocks. The issue is then whether the modern occupation alone, without considering the legal issues of the past instances of the acquisition from either side, can constitute a valid establishment of sovereignty under international law. The fundamental principle of international law that allows such reasoning, as established in the *Island of Palmas* case, is that “proof even of a perfect title in the past will not be enough to establish title today because international law has in the meanwhile developed a specific rule that sovereignty must be continuously maintained.”<sup>96)</sup>

The relevant mode of acquisition in the current analysis is effective occupation. Although the acquisition by occupation is addressed in a previous section, the current analysis should be conducted under the modern principles of international law in accordance to the concept of intertemporal law. There has been a shift in the concept of effective occupation since 1885.<sup>97)</sup> Since the Berlin Congress in 1884, the modern law of effective occupation does not require ‘settlement’ or ‘administration’ as necessary elements in an uninhabited territory.<sup>98)</sup> There has also been a shift away from the taking of physical possession of the territory to the display and exercise of state functions.<sup>99)</sup> As discussed previously, the *Island of Palmas* established the test for effective occupation as “continuous and peaceful display of territorial sovereignty or the functions of the State.”<sup>100)</sup> The *Eastern Greenland* case established the test as “the intention and will to act as a sovereign” and “some actual exercise or display of such authority.”<sup>101)</sup> The key words then are “continuous,” “peaceful,” and

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96) SURYA P. SHARMA, *supra* note 5, at 99.

97) *Id.* at 97.

98) *Id.*

99) *Id.*

100) *Id.* at 98.

101) *Id.*

“actual.” In all four cases which discussed the concept of the “continuous” display (the *Island of Palmas* case, the *Eastern Greenland* case, the *Clipperton Island* case, and the *Minquiers and Ecrehos* case), it was held even intermittent and irregular gaps in a display of sovereignty was “compatible with the maintenance of the right,” given the circumstances of the territory.<sup>102)</sup>

In the current case, there is no evidence to show that, since 1952, there has been any gap in the Korean occupation of the Liancourt Rocks. Since 1952, Korea has continuously maintained a police barrack, a lighthouse, and a residential household with the address registered officially under the Dokdo jurisdiction.<sup>103)</sup> Therefore the current occupation by Korea is likely to be found by the arbitrator to satisfy the requirement of the continuous display of sovereignty.

The requirement of a “peaceful” display of sovereignty consists of the original assumption of sovereignty.<sup>104)</sup> It means that the acquisition should not have taken the form of usurping another country’s existing occupation. “Peaceful” is not clearly defined in any cases. Rather the arbitrator will construe the standard for “peaceful” in accordance to the circumstances. The only factor that can render the current occupation by Korea not “peaceful” is the consistent verbal protests from Japan. The issue is then whether verbal protests alone can defeat the argument of peaceful display of sovereignty under the international law. There is a consensus among legal scholars that “mere protests from the rival state may not prove to be fatal to the claim of peaceful character of occupation.”<sup>105)</sup> Japan has not been able to access the Liancourt Rocks at all since 1954, despite its regular verbal protests throughout the time. Therefore the peaceful nature of Korea’s occupation is established.

An “actual” exercise of sovereignty means that the display of sovereignty cannot just be a “mere paper claim pretended to be an act of sovereignty.”<sup>106)</sup> At the same time, the sovereignty does not have to be

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102) *Id.* at 104.

103) Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 25, at 30.

104) SURYA P. SHARMA, *supra* note 5, at 100.

105) *Id.*

106) *Id.* at 101.



exercised at every moment on every point of territory to suffice the requirement.<sup>107)</sup> It is enough to exercise the sovereignty in respect of the territory as a whole.<sup>108)</sup> In an uninhabitable island like the Liancourt Rocks, “very little actual exercise of state functions might be necessary.”<sup>109)</sup> The facts show that Korea is exercising its sovereignty in an outright and extensive manner, the degree of which goes beyond a mere paper claim. The installation of the police barracks which are manned at all hours, the sewage treatment system, and the ferry system that maintains the supply channel for those living on the islands all demonstrate direct and extensive display of sovereignty by Korea. The fact that the Korean government invited a family to live on the Liancourt Rocks and turn an otherwise uninhabitable territory into an inhabited place by supplying them with the necessities of life shows that the state involvement is extensive and evident. Therefore it is highly likely that the arbitrator will find the display of sovereignty by Korea to be “actual.”

In conclusion, the exercise of sovereignty by Korea through its current operations satisfies the requirements of effective occupation under the modern principles of international law. Therefore, it is concluded that the present occupation of the Liancourt Rocks by Korea constitutes the valid sovereignty under international law.

## XI. Conclusion

Both Korea and Japan relied on inconclusive arguments to support their claims of discovery. Therefore the discussion of discovery alone did not resolve the dispute. The examination of the parties’ conducts beyond discovery, however, has shown that there is evidence to support the earlier display of sovereignty by Korea than Japan. The lack of Japanese competition until the early 20<sup>th</sup> century allowed Korea to maintain its title over the Liancourt Rocks even without direct control over it, due to the operation of the principle of continuity emanating from the undisputed

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107) *Id.*

108) *Id.*

109) *Id.*

Korean sovereignty over the Ulleung Island. Later in 1910, the temporary loss of the Korean statehood to the Japanese annexation had an effect of establishing the Japanese sovereignty over the Liancourt Rocks for the duration of the annexation. However, the Treaty of San Francisco in 1951 nullified the effects of the Japanese annexation and restored the Korean statehood and sovereignty over all of its territories including the Liancourt Rocks. Therefore, it was within the rights of Korea to unilaterally assume control over the Liancourt Rocks and display state authority by installing various state apparatus. The control of the Liancourt Rocks by Korea continues today in the form of effective occupation, valid under the modern international law. Therefore, the analysis ends with a conclusion that Korea has had a stronger display of sovereignty over the Liancourt Rock throughout history, and the continuation of the effective occupation by Korea will be found to be legal in the event of an arbitration.

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