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## Resolution of Territorial Disputes in East Asia: The Case of Dokdo

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# Resolution of Territorial Disputes in East Asia: The Case of Dokdo

Laurent Mayali & John Yoo\*

*This Article seeks to contribute to solving of the Korea-Japan territorial dispute over Dokdo island (Korea)/Takeshima (Japanese). The Republic of Korea argues that Dokdo has formed a part of Korea since as early as 512 C.E.; as Korea currently exercises control over the island, its claim to discovery would appear to fulfill the legal test for possession of territory. Conversely, the Japanese government claims that Korea never exercised sufficient sovereignty over Dokdo. Japan claims that the island remained terra nullius—in other words, territory not possessed by any nation and so could be claimed—until it annexed Dokdo in 1905. Japan also claims that in the 1951 peace treaty ending World War II, the Allies did not include Dokdo in the list of islands taken from Japan, which implies that Japan retained the island in the postwar settlement. This article makes three contributions. First, it brings forward evidence from the maps held at various archives in the United States and Western Europe to determine the historical opinions of experts and governments about the possession of Dokdo. Second, it clarifies the factors that have guided international tribunals in their resolution of earlier disputes involving islands and maritime territory. Third, it shows how the claim of terra nullius has little legitimate authority when applied to East Asia, an area where empires, kingdoms, and nation-states had long exercised control over territory.*

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INTRODUCTION .....	505
I. THE FACTS OF THE DOKDO ISLAND DISPUTE .....	507
A. <i>The Historical Claims to Dokdo by Korea and Japan</i> .....	508
B. <i>Historical Maps of Dokdo</i> .....	514
C. <i>Academic Debate Over Dokdo</i> .....	520
II. THE INTERNATIONAL LAW OF TERRITORIAL POSSESSION .....	525
A. <i>Types of Territorial Acquisition</i> .....	526
III. INTERNATIONAL LAW AND THE DOKDO ISLAND DISPUTE .....	533
CONCLUSION .....	550

### INTRODUCTION

Both the Republic of Korea and Japan claim sovereignty over the island of Dokdo (in Korean) or Takeshima (in Japanese).<sup>1</sup> Korea has exercised continuous control over the island since at least 1946, when the Supreme Allied Command in Japan excluded Dokdo from the territory within Japan's jurisdiction.<sup>2</sup> Today, the island hosts two Korean private citizens and a Korean coast guard unit.<sup>3</sup>

The Republic of Korea argues that Dokdo has formed a part of Korea since as early as 512 C.E., when historical state archives first appear to describe the island.<sup>4</sup> As Korea currently exercises control over the island, its claim to discovery would appear to fulfill the legal test for possession of territory, which we will discuss at greater length below. Conversely, the Japanese government claims that Korea never exercised sufficient sovereignty over Dokdo. Japan claims that the island remained *terra nullius*—in other words, territory not possessed by any nation and so could be claimed—until it annexed Dokdo in 1905.<sup>5</sup> Korea responds that Dokdo could not have retained the status of *terra nullius* due to repeated exercises of authority over the island. Yet Japan claims that in the 1951 peace treaty ending World War II, the Allies did not include Dokdo in the list of islands taken from Japan, which implies that Japan retained the island in the postwar settlement.

Resolution of this legal dispute revolves around three issues. First, which nation had valid title to the island before 1905? Second, did Japan assume

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<sup>1</sup> Jon M. Van Dyke, *Disputes Over Islands and Maritime Boundaries in East Asia*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 46 (Seung-Yong Hong & Jon M. Van Dyke, eds., 2009).

<sup>2</sup> *Id.*

<sup>3</sup> Sheila A. Smith & Charles T. McClean, *Japan's Maritime Disputes: Implications for the U.S.-Japan Alliance*, in *CNA MARITIME ASIA PROJECT WORKSHOP THREE: JAPAN'S TERRITORIAL DISPUTES* 16 (2013).

<sup>4</sup> See Hoon Lee, *Dispute over Territorial Ownership of Tokdo in the Late Choson Period*, 28 *KOREA OBSERVER* 389, 393 (1997).

<sup>5</sup> Van Dyke, *supra* note 1.

possession of the island by virtue of its 1904 act creating a protectorate over Korea, its 1905 annexation of Dokdo, or its 1910 annexation of Korea? Third, did the 1951 San Francisco Treaty return the island to Korea? This Article addresses the first and second of these questions; a later article will address the third issue.

After considering the historical evidence and reviewing the secondary literature, we conclude that the Republic of Korea has the superior claim to possession of Dokdo. According to the disputed historical material, Korea appears to have discovered the island and exercised effective control over it until at least 1905. International courts have accorded predominant weight to these two factors in resolving recent territorial disputes over islands.<sup>6</sup> This Article presents new evidence on these questions by expanding the pool of relevant maps to those produced and located in European and American archives, which are unlikely to have a bias on the outcome of this issue due to the Western lack of knowledge of Korean-Japanese relations and the relative resistance to contact with the Western world during this period. These maps, which we present in an attached appendix, either do not show the island or display it as falling within Korea's territorial boundaries.<sup>7</sup>

These maps undermine Japan's claim to the island under the international legal doctrine of *terra nullius*. *Terra nullius* cannot apply if a nation has already discovered and maintained control over territory. This Article presents new arguments against the application of *terra nullius* in East Asia. Our analysis shows that nations invoked the doctrine to support Western imperialism in Asia, rather than to describe the discovery of truly unknown or unclaimed territory. We expect that international courts will soon limit or reject the application of *terra nullius* in most territorial disputes in Asia.

Without the availability of the *terra nullius* argument, either as doctrine or as applied to the facts, Japan's account of its acquisition of Dokdo becomes strained. If Korea possessed Dokdo up through the early twentieth century, it could only have come within Japan's possession through the Japan-Korea Annexation Treaty of 1910.<sup>8</sup> While Japan would have enjoyed possession of Dokdo from that time, it would have lost the island at the end of World War II, when Japan was required by the San Francisco Peace Treaty to recognize the independence of Korea. The 1945 Potsdam Declaration set out the terms of peace that the Allies expected of Japan, including the liberation of Korea and the 1943 Cairo Declaration's demand that "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914."<sup>9</sup> As a result, after the formal surrender of Japan on September 2,

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<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Appendix.

<sup>8</sup> Korea had become a protectorate of Japan in a 1905 Treaty and had voluntarily given up power over internal administration in a 1907 Treaty.

<sup>9</sup> See DECLARATION OF THE THREE POWERS—GREAT BRITAIN, THE UNITED STATES AND CHINA REGARDING JAPAN (Dec. 1, 1943), [www.ndl.go.jp/constitution/e/etc/c03.html](http://www.ndl.go.jp/constitution/e/etc/c03.html); Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT'L L. 157, 182 (2007).

1945, Korea would have returned to its status as a sovereign nation-state and would have recovered the territory it possessed at the time of the 1910 annexation, or, if Japan claimed it had acquired the island after the annexation, it would have to return the island as part of its post-1914 acquisitions.

The only legal argument that could counter the effect of the Potsdam Declaration would necessarily depend on any further rearrangement of territorial boundaries by the 1951 San Francisco Peace Treaty, which formally ended World War II in Asia. The 1951 San Francisco Peace Treaty presents a difficult question, which we will examine in greater detail in future work. Article 2(a) of the treaty declares that “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet” (the Western reference to Ulluengdo).<sup>10</sup> Japan argues that the explicit enumeration of three islands as part of the territory returned to Korea implies the exclusion of any other islands, such as Dokdo.<sup>11</sup> We believe that this question is a closer one because of the negotiating history of the treaty. On first pass, however, the text of Article 2(a) of the 1951 Treaty seems best interpreted to include other islands, such as Dokdo, that were historically Korean territory.

This Article is divided into three parts. Part I discusses the legal and historical context of the dispute and reviews the relevant scholarly literature. Part II sets forth the international law of territorial acquisition as developed by custom and the decisions of international tribunals. It reports on our review of maps held in the Library of Congress in Washington, D.C.; the Vatican Library in the Vatican; the Dutch East India Company records; and the national libraries of Portugal, Spain, and the United Kingdom. Part III discusses the implications of both the law of territory and the facts provided by the maps for Korea’s claim to sovereignty over Dokdo and Japan’s *terra nullius* argument.

## I.

### THE FACTS OF THE DOKDO ISLAND DISPUTE

Korea and Japan have disputed the territory of Dokdo (Korean)/Takeshima (Japanese) for many decades.<sup>12</sup> Some Western sources refer to the islands as the Liancourt Rocks or Hornet Island.<sup>13</sup> Dokdo is located in the East Sea (Sea of Japan), about 88 kilometers from the Korean island of Ulleungdo and 158 kilometers from the Japanese island of Oki.<sup>14</sup> Dokdo is comprised of two islets and about thirty-two smaller rocks that jut from the sea.<sup>15</sup> Under the United

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<sup>10</sup> Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

<sup>11</sup> See Seokwoo Lee & Jon M. Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo*, 9 CHINESE J. INT’L L. 741, 742 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 743; see also LI JIN-MIEUNG, DOKDO: A KOREAN ISLAND REDISCOVERED 63 (2011).

<sup>14</sup> See Van Dyke, *supra* note 9, at 157, 165.

<sup>15</sup> *Id.* at 157.

Nations Convention on the Law of the Sea, possession of the island implies control over about 16,600 square nautical miles of sea around it.<sup>16</sup>

Section A first discusses the claims to the discovery of Dokdo by Korea and Japan based on the applicable historical materials. Korea makes an earlier claim to sovereignty over Dokdo, which Japan does not seek to disprove by any competing sign of discovery. Section B discusses our review of the maps, both Asian and Western, concerning the location and possession of Dokdo. Section C then reviews the scholarly literature on the dispute.

#### A. *The Historical Claims to Dokdo by Korea and Japan*

The number of available historical documents that mention Dokdo is fairly small. Because of this dearth of conclusive documentary evidence on Dokdo, some scholars have relied on documents on Ulleungdo or other unidentified islands that could possibly be Dokdo, to establish that Dokdo had been under Korean jurisdiction for the last fifteen centuries. The earliest known document that these scholars base their claim on is the *History of the Three Kingdoms (Samguk Sagi)*, a historical record compiled by historians under the order of the Goryeo Kingdom's King Injong, which was completed in 1145.<sup>17</sup> In 512 C.E., the Kingdom of Silla conquered the State of Usan, which was based on the modern-day Korean island of Ulleungdo and included Dokdo.<sup>18</sup> The relevant passage from the Korean government chronicles declares that:

In June in the 13th year, Usanguk surrendered and has since paid a tribute of staple products each year. Usanguk is an island country in the middle of the sea due east of Myeongju and is also called Ulleungdo. The area is 100 *ri*. The people were fierce and did not surrender, so Ichan Isabu was appointed the lord of Asulnaju to subjugate them . . . the people of Usanguk were terrified of him and soon surrendered.<sup>19</sup>

Dokdo is not specifically mentioned in this record. However, other historical records, appearing as early as the mid-fifteenth century, describe a nearby island named Usando, which appears to be modern-day Dokdo.<sup>20</sup> Korean scholars have argued that Usando (literally meaning Usan Island) was part of Usanguk (literally

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<sup>16</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122; see also Michael McDevitt, *The Sovereignty Dispute over Dokdo/Takeshima (Liancourt Rocks) and Its Impact on ROK-Japan Relations*, in CNA MARITIME ASIA PROJECT WORKSHOP THREE: JAPAN'S TERRITORIAL DISPUTES 49 (2013) ("At stake are economic claims to about 16,600 square nautical miles of sea and seabed, including areas that may hold some 600 million tons of gas hydrate.").

<sup>17</sup> MARK PETERSON & PHILLIP MARGULIES, A BRIEF HISTORY OF KOREA 61 (2009).

<sup>18</sup> Shin Yong-ha, *Korea's Territorial Rights to Dokdo: A Historical Study*, in INSIGHT INTO DOKDO: HISTORICAL, POLITICAL AND LEGAL PERSPECTIVES ON KOREA'S SOVEREIGNTY 73–74 (Korea Herald & Park Hyun-Jin eds., 2009).

<sup>19</sup> *Id.*

<sup>20</sup> See Van Dyke, *supra* note 9, at 165; see also Hee Kwon Park & Jong-In Bae, *Korea's Territorial Sovereignty over Tokdo*, 24 KOREA OBSERVER 121, 134–35 (1998).

meaning State of Usan), and because Usando refers to Dokdo, Dokdo had been part of Korea since Silla's subjugation of Usanguk in 512 C.E.<sup>21</sup> Usando is mentioned in the *Gazetteer of the Annals of King Sejong (Sejong Silok Jiriji)*, completed in 1432, as part of the *Annals* of King Sejong of the Joseon dynasty.<sup>22</sup> Scholars rely on this record to explain that Usando is Dokdo:

The two islands of Usan and Mureung (Ulleungdo) are located due east of the country. As the two islands are in close proximity to one another, they are visible from each other on a clear day. During the Silla period, the island was referred to as "Usanguk." It was also known as "Ulleungdo." Its extent is 100 *ri* (1 *ri* is about 393 meters).<sup>23</sup>

Other Korean geographical records mention Usando as well. For example, in the *Gazetteer of the Annals of Goryo (Jiriji of Goeyousa)*, completed in 1451, Usando and its relation to Ulleungdo is described in a similar way:

Here lies Ulleungdo. The island is located due east of the county. During the Silla period, it was referred to as "Usanguk." The island was also known as "Mureung" or "Ureung." Its extent is 100 *ri* . . . . According to some, Usan and Muresung are two separate islands situated adjacent to each other, which are visible from each other on a clear day.<sup>24</sup>

*Sinjeugn Dongguk Yeoki Seungnam*, another geographical record drafted during the Joseon Dynasty in 1530, also mentions Usando:

[Usando and Ulleungdo] This group of two islands is also known as "Mueung" or "Ureung." They are located in a sea area due east of the county . . . . According to some sources, the two are one and the same island.<sup>25</sup>

These geographical records lead to a number of conclusions. First, they support the view that the Korean people had been aware of the existence of an island located near Ulleungdo. Korea believed it acquired the island when the kingdom of Silla absorbed Usanguk in 512 C.E. Whether Usando refers to Dokdo in these documents, however, cannot be independently verified by reference to non-Korean legal documents. Usando is most likely Dokdo because the documents refer to its visibility from Ulleungdo on a clear day. This reference implies that Usando is not a small additional formation within the same island cluster, but a separate and distant island. Second, these records support the conclusion that the Korean government considered Ulleungdo and Dokdo as a

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<sup>21</sup>Van Dyke, *supra* note 9, at 165.

<sup>22</sup>See Yong-ha, *supra* note 18, at 87.

<sup>23</sup>SONG BYEONG-KIE, HISTORICAL VERIFICATION OF KOREA'S SOVEREIGNTY OVER ULLEUNGO AND DOKDO 20–21 (Nat'l Assembly Library trans., 2010).

<sup>24</sup>*Id.* at 22.

<sup>25</sup>*Id.*

single administrative unit, rather than as two independent islands. Third, Korean records support the observation that Ulleungdo and a second Korean island were fairly distant from each other, but still within the horizon.

Japanese records do not appear to document contact with Dokdo until the seventeenth century. According to an official Japanese government paper, in 1618 two Japanese merchants received permission from the feudal lord of Tottori, acting on behalf of the Tokugawa Shogunate, to travel to Ulleungdo (known as the Utsuryo island in Japanese).<sup>26</sup> To reach Ulleungdo to harvest abalone, sea lions, and bamboo, merchants (Japanese scholars argue) would have had to stop at Dokdo on the way. According to the Japanese government, these voyagers fished at Dokdo too.<sup>27</sup> The Japanese Ministry of Foreign Affairs observes that the Shogunate's ban on foreign travel in 1653 did not extend to the two islands, implying that the government considered Dokdo to fall within Japanese territory.<sup>28</sup>

In the 1667 *Records of Observations of Onshu (Onshu Shicho Goki)*, Saito Hosen, a retainer of the Izomo domain, inspected Oki Islands on orders of his feudal lord.<sup>29</sup> Hosen drew the Japanese national boundary at Onshu (present-day Oki Island) to the northwest and implicitly recognized that Ulleungdo and Dokdo were *not* part of Japanese territory:

Onshu is in the middle of the North Sea, so it is called Okinoshima . . . . If one sails one night and two days in the direction of northwest, one arrives at Matsushima [Dokdo]. Another day's voyage and one will reach Takeshima [Ulleung]. Another name for the island is Isonotakeshima where bamboo, fish and sea lions abound. These two islets are uninhabited, and face the land of Goryeo as Onshu does vis-à-vis Oki. Therefore, it is thought Onshu marks the northwesternmost boundary of Japan.<sup>30</sup>

The first known conflict between Korea and Japan over Dokdo is recorded in the *Annals of King Sukjong (Sukjong Sillok)*.<sup>31</sup> It depicts an incident involving Ahn Yong Bok, a Korean fisherman who was captured and brought to Japan in 1693 while fishing near Ulleungdo. Ahn protested his capture and claimed that Ulleungdo and Dokdo were Korean islands.<sup>32</sup> Records show that he successfully convinced the governors that the islands belonged to Korea, and the Edo Shogun issued an official statement confirming this fact.<sup>33</sup> The existence of this official decree cannot be verified, however, using authoritative English sources.

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<sup>26</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, 10 ISSUES OF TAKESHIMA 5 (2008), <https://www.ro.emb-japan.go.jp/files/000132863.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Yong-ha, *supra* note 18, at 95.

<sup>30</sup> *Id.* at 95–96.

<sup>31</sup> See Park & Bae, *supra* note 20, at 141–42.

<sup>32</sup> See *id.* at 142; see also BYEONG-KIE, *supra* note 23, at 66–68.

<sup>33</sup> Yong-ha, *supra* note 18, at 97.



The Lord of Tsushima attempted to negotiate with the Korean government to ban Korean fishing around Ulleungdo.<sup>34</sup> Tsushima's basic position was that Ulleungdo belonged to Japan because Korea's Joseon Dynasty had neglected the island for centuries. This negotiation failed, however, and the envoy from Tsushima returned to Japan.<sup>35</sup> In 1696, this issue came to the attention of the Edo Shogun, who asked the Lord of the Tottori Domain if Takeshima (Ulleungdo) and Matsushima (Dokdo) were part of either Inaba or Hōki Province. The following lists relevant questions by the Edo Shogun and answers provided by the Lord of Tottori:

Edo Shogun: "Since when has Takeshima (Ulleungdo) as part of Inaba Province and Hoki Province, become under these two's jurisdiction? Is it before or after the year 1632, when the ancestors (Japanese name) was given land . . . ?"

Lord of Tottori: "Takeshima does not belong to Inaba Province or Hoki Province. When (Japanese name) was the Lord (1617~1632), (Japanese names) have been crossing the sea and fishing. I've also heard that this was permitted through an official document issued by government officials I've also heard that these activities had been conducted before that era but this is not confirmed . . . ."

Edo Shogun: "Besides Takeshima (Ulleungdo), are there any other islands that are within the two areas jurisdiction? Do citizens from these two areas exercise their fishing and gathering on the island?"

Lord of Tottori: "There are no other islands belonging to the two prefectures including Takeshima (Ulleungdo) and Matsushima (Dokdo) . . . ."<sup>36</sup>

Based on answers provided by Tottori, the Shogunate issued an official ban on Japanese navigation to Ulleungdo.<sup>37</sup> The ban on navigation, however, did not explicitly mention Dokdo.<sup>38</sup> Korean scholars have argued that because Ulleungdo and Dokdo have historically been considered as a set, it was implicit in the shogun's decision that he also meant to include Dokdo.<sup>39</sup> On the other hand, based on the absence of an express mention of Dokdo, the Japanese government argues that the original permission given by the Tokugawa Shogun in 1618 to sail to Dokdo remained valid.<sup>40</sup>

During the 1870s and 1880s, the Meiji government's perception of Ulleungdo and Dokdo remained unchanged from the Edo period. There are several documents that support this conclusion. Following the establishment of the Meiji government in 1868, the Japanese Ministry of Foreign Affairs sent envoys on a mission to assess the internal situation in Korea. The compilation of

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<sup>34</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 6.

<sup>35</sup> *See id.*

<sup>36</sup> *See* BYEONG-KIE, *supra* note 23, at 85–86.

<sup>37</sup> Van Dyke, *supra* note 9, at 166.

<sup>38</sup> Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 423, 449–50 (1997).

<sup>39</sup> *See generally* Lee, *supra* note 4.

<sup>40</sup> Yong-ha, *supra* note 18, at 93–94.

their mission, *A Confidential Inquiry into the Particulars of Korea's Foreign Relations (Chosenkoku Kosaishimatsu Naitansho)*, contained a section, "How Takeshima and Matsushima Came to Belong to Joseon":

Circumstances under which Takeshima [Ulleungdo] and Matsushima [Dokdo] have become Korean possession:

Regarding this case, Matsushima is an island adjacent to Takeshima and no document has been made on it to date; concerning Takeshima, Korea sent people to settle there for a while after the Genroku period. Then the island became uninhabited as before. Bamboo and ditch reed, which is thicker than bamboo and ginseng, are found there. Besides, the island is said to be fit for fishing . . .<sup>41</sup>

Even though it does not contain substantial information, this report records that the Meiji Government considered Ulleungdo and Dokdo to be part of Korea. On March 20, 1877, the Japanese Supreme Council (Daijo-kan) issued an order stating that:

With regard to Takeshima and another island that was the subject of an inquiry, let it be known that the two islands are unrelated to our country (Japan).<sup>42</sup>

Korean scholars have argued that "another island" mentioned in the order refers to Dokdo, since by this time, the presence of Dokdo had been well known.<sup>43</sup>

After the end of the Joseon Dynasty, the new government under the Empire of Korea (Daehan Jeguk) attempted to fortify its control over Ulleungdo.<sup>44</sup> By this time, the activity of private Japanese citizens on the island had increased.<sup>45</sup> In response, the new Korean government issued Imperial Decree No. 41, which upgraded the status of Ulleungdo to an independent county, Uldo County, and placed Dokdo (referred to as Seokdo) and Jukseodo (referred to as Jukdo) under the jurisdiction of Uldo County:

Article 1:

Ulleungdo shall be redesignated Ulleung County, placed under Gangwon Province; the title of island superintendent shall be changed to county magistrate; it shall be incorporated into the administrative system and the county shall be of grade five.

Article 2:

The county office shall be located at Daehadong; the county shall have under its jurisdiction the whole island of Ulleung, Jukdo and Seokdo.<sup>46</sup>

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<sup>41</sup> *Id.* at 107.

<sup>42</sup> BYEONG-KIE, *supra* note 23, at 209.

<sup>43</sup> *See* Yong-ha, *supra* note 18, at 109–10.

<sup>44</sup> *See id.* at 120–23.

<sup>45</sup> *See id.* at 120–21.

<sup>46</sup> *Id.* at 121–22.

The Empire of Korea reorganized Ulleungdo-Dokdo and announced to the world that Dokdo was under its dominion. Japan argues, however, that Jukdo and Seokdo islands do not refer to Dokdo; yet it is unclear to which islands Jukdo and Seokdo could refer if not Dokdo.<sup>47</sup>

Despite Korea's official proclamations, Imperial Japan annexed Dokdo on February 22, 1905, on the ground that the island was *terra nullius*.<sup>48</sup> During the Russo-Japanese war, Japan recognized the strategic importance of Dokdo, and began to build watchtowers and cables on the island.<sup>49</sup> Around the same time, a Japanese fisherman named Nakai Yozaburo, who wanted to expand his sea lion hunting business through a monopoly on fishing near Dokdo, applied for such permission.<sup>50</sup> The Japanese government initially rejected Yozaburo's application, seemingly believing that Dokdo was a Korean territory. The following is an excerpt from Yozaburo's record of his application process for the fishing permit:

As I thought that the island was Korean territory attached to Ulleungdo, I went to the capital trying to submit a request of the Residency-General. But, as suggested by Fishery Bureau Director Maki Bokushin, I came to question Korea's ownership of Takeshima. And at the end of my investigation into the matter, I became convinced that this island was absolutely ownerless through the conclusion by the then Hydrographic Director Admiral Kimotsuki. Accordingly, I submitted an application through the Home Ministry . . . .

The Home Ministry authorities had the opinion that the gains would be extremely small while the situation would become grave if the acquisition of a barren islet suspected of being Korean territory at this point of time [during the Russo-Japanese War] should amplify the suspicions of various foreign countries that Japan had an ambition to annex Korea. Thus, my petition was rejected.<sup>51</sup>

Yozaburo further stated that, after becoming aware of this situation, the Political Affairs Bureau Director, Yamaza Enjiro, deemed his application as an urgent matter.<sup>52</sup> Enjiro forced the Home Ministry to refer his application speedily to the Foreign Ministry, where the application was quickly approved.<sup>53</sup> Yozaburo's record suggests that, even though the prevalent opinion in Japan at that time was that Dokdo was Korean territory, Japan's imperial policies drove the government to annex Dokdo, without informing the Korean government of

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<sup>47</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 8–9.

<sup>48</sup> BYEONG-KIE, *supra* note 23, at 302–03.

<sup>49</sup> See Yong-ha, *supra* note 18, at 130.

<sup>50</sup> *Id.* at 131–32.

<sup>51</sup> *Id.* at 132–33.

<sup>52</sup> *Id.* at 133.

<sup>53</sup> *Id.*

this fact.<sup>54</sup> In February 1905, the governor of Japan's Shimane Province announced that the island was to be named "Takeshima."<sup>55</sup>

### *B. Historical Maps of Dokdo*

The main source of historical documentation on Dokdo relies on various sets of maps, numbering in the hundreds, that were printed over a period of several centuries in several countries.<sup>56</sup> These maps are accessible in various national and university libraries.<sup>57</sup> The most comprehensive ones depict the contours and possessions of the States and seas bordering China and Korea, including descriptions of the maritime area between Korea and Japan.<sup>58</sup> Over this long period, there is a great variation in the amount of information the maps provide.<sup>59</sup> Some maps show more detailed description of the shoreline and the physical and political features of the mainland.<sup>60</sup> Some maps focus on distinct areas while others aim at providing a broader picture of a larger area.<sup>61</sup>

An exhaustive comparative analysis of these maps would be a complex and difficult process. It would require far more time and human resources than permitted for our purpose in order to compile a complete list of documents, both manuscripts and printed sources and to assemble, physically or digitally, all the sources of information in one archive. Maps often combine historical, cultural, and political knowledge with geographical evidence. It is possible, however, to access a significant amount of dependable information by relying on printed compilations and archival collections that are currently available in various European and Asian countries. In addition to Korea and Japan, we selected countries with a colonial and commercial tradition that were present in the area prior to the twentieth century. For this research project, we consulted several hundred maps in American, Dutch, French, Portuguese, Spanish, and Vatican libraries. We also consulted printed compilations of maps especially relevant to this issue including but not limited to the compilations published by the Korean Ministry of Foreign Affairs and Trade.

Maps vary in size and scope. They also convey different types of information for their individual purposes.<sup>62</sup> They may reflect different perceptions of space as

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<sup>54</sup> Yong-ha, *supra* note 18, at 133, 137.

<sup>55</sup> *Id.* at 136.

<sup>56</sup> See generally THE HISTORY OF CARTOGRAPHY: CARTOGRAPHY IN THE TRADITIONAL EAST AND SOUTHEAST ASIAN SOCIETIES 235–345 (J.B. Harley & David Woodward eds., 1994) [hereinafter THE HISTORY OF CARTOGRAPHY].

<sup>57</sup> *Id.* at 236–37.

<sup>58</sup> See generally *id.*

<sup>59</sup> *Id.* at 235.

<sup>60</sup> *Id.* at 236.

<sup>61</sup> *Id.*

<sup>62</sup> See CHRISTIAN JACOB, THE SOVEREIGN MAP: THEORETICAL APPROACHES IN CARTOGRAPHY THROUGHOUT HISTORY at xiv (2006) ("If we admit that a part of the power of maps is to convince their users that the world looks as the map displays it, such a power should be understood in its specific social and institutional frame. It reflects the power of specific milieus whether political, clerical,

they express the subjective spatial awareness of their authors and the expectations of the people for whom they were produced. Spatial consciousness, in turn, reflects a people's distinct culture and relationship to its land.<sup>63</sup> It may thus change from one society to another and from one century to another. In the history of a country as defined by its people, maps performed the triple function of a political statement, the textual record of a cultural legacy, and the visual representation of distinct knowledge.<sup>64</sup> Therefore, objective physical details may vary in size and location according to their subjective significance. For instance, ancient maps of Korea locate Ulleungdo and Dokdo closer to the Korean coast, because they reflect the Korean possession of these islands as part of the kingdom regardless of their physical distance.<sup>65</sup>

The treatment of geographical information followed distinct procedural and visual standards that were often copied from one map to another.<sup>66</sup> The sixteenth century's development of printing transformed map production into a straightforward and cheaper procedure without completely modernizing its basic conventions.<sup>67</sup> The printing process allowed for a faster updating of existing maps as new material was gathered, modern States collected strategic information, and efficient techniques brought greater accuracy to geographical data.<sup>68</sup> However, as new data entered the pool of cartographic knowledge, it rarely led to a complete overhaul of existing map frameworks.<sup>69</sup> It is therefore possible to trace distinct patterns through three centuries that accurately reflect the history and geography of the maritime territory of Ulleungdo and Dokdo. Although the maps do not constitute conclusive legal proof of possession of the island by either Korea or Japan, they initially provide relevant and valuable historical context for evaluating Japan's invocation of *terra nullius* in 1905 and the years since.

We may classify these maps into three categories. The first comprises maps that were made, at the demand of—or for the benefit of—Korean and Japanese authorities. We include in this group a few maps resulting from private initiatives but describing the territory in accordance with official views. The second category comprises maps that were sketched by European cartographers on the basis of information provided by Christian missionaries (including Jesuit priests and laymen), merchants, and travelers who visited or briefly resided in these countries. They present a visual record of information gathered through various informants. Although these maps are mostly the product of secondhand knowledge, they include figures and facts from the written reports of firsthand observers. The third category comprises maps that were specifically made for navigational purposes

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administrative, technical or scientific.”).

<sup>63</sup> See generally JERRY BROTON, A HISTORY OF THE WORLD IN TWELVE MAPS (2012).

<sup>64</sup> See THE HISTORY OF CARTOGRAPHY, *supra* note 56, at 235.

<sup>65</sup> See Van Dyke, *supra* note 9, at 165–66.

<sup>66</sup> See generally THE HISTORY OF CARTOGRAPHY, *supra* note 56.

<sup>67</sup> See *id.* at 293–305.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

and sailing voyages. These maps pay more attention to precise cartographic data and the accurate description of sea routes. The time period encompasses several centuries. Although the *terminus a quo* is difficult to identify precisely because the first available maps do not have exact dates, the *terminus ad quem* is the 1905 Japanese annexation of the islands.<sup>70</sup>

In the first category, maps, political objectives, and idealized projections of the States' jurisdiction often prevail over geographic precision.<sup>71</sup> The significance of these maps resides less in their accuracy than in their function as keepers of their country's history because they were used for strategic, administrative, and military purposes.<sup>72</sup> They reflect events and facts kept in the collective memory of the country and its inhabitants. They transform space into a legally defined and politically cohesive area that defines the common identity of a people.

From this perspective, it is important to observe that several early Korean maps, both private and official, show Ulleungdo and Dokdo as part of the Korean kingdom.<sup>73</sup> These maps represent the Korean view of these islands and highlight their connection to the mainland. Given the limited charting technology available at that time, cartographers focused less on the exact location of islands than to name and identify them as part of the Korean kingdom.<sup>74</sup> A good example is the map in Figure 1, the *Paldo Chongdo*, a map included in the 1530 geographic atlas produced by the government. While Figure 1 is not spatially accurate, it depicts two large islands—presumably Ulleungdo and Dokdo—off Korea's east coast.<sup>75</sup>

On the other hand, Japanese maps of the same period rarely depict Ulleungdo and Dokdo.<sup>76</sup> When the islands appear, they are often shown outside of Japan's possessions. Japanese cartographers' indecision reflects in part the varying interpretations of the locations of Takeshima and Matsushima during the sixteenth and seventeenth centuries, as well as the Japanese public authorities' divergent opinions regarding the legal status of the islands.<sup>77</sup> Japan's historical doubts reveal tensions between local administration and the central government that should be considered within the broader Japanese political context and the enforcement of its domestic policies. Japanese central authorities were indeed aware of Korea's jurisdiction over the islands.<sup>78</sup> During the 1870s and 1880s, the new Meiji government's perception of Ulleungdo and Dokdo remained as it had been in the Edo period, namely that they were Korean territories.<sup>79</sup> By the end of the

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<sup>70</sup> See Van Dyke, *supra* note 9, at 177.

<sup>71</sup> See generally THE HISTORY OF CARTOGRAPHY, *supra* note 56.

<sup>72</sup> See *id.* at 236.

<sup>73</sup> Van Dyke, *supra* note 9, at 165–66.

<sup>74</sup> See THE HISTORY OF CARTOGRAPHY, *supra* note 56, at 294–95.

<sup>75</sup> See HAN YOUNG-WOO ET AL., THE ARTISTRY OF EARLY KOREAN CARTOGRAPHY 21 (Choi Byoungnyon trans., 2008).

<sup>76</sup> See generally Van Dyke, *supra* note 9.

<sup>77</sup> See *id.* at 165–68.

<sup>78</sup> *Id.* at 166.

<sup>79</sup> *Id.* at 174.

nineteenth century, successive Japanese governments ended the domestic controversy and confirmed the official recognition of Korean jurisdiction.<sup>80</sup>

Cartographic observations do not provide undisputed evidence of Korea's claim. They nevertheless clearly corroborate historical evidence such as administrative reports and governmental inquiries that attest to Korea's longstanding sovereignty over the islands. They also substantiate the claim that the islands were considered part of the Korean kingdom by both countries. Although the International Court of Justice (ICJ) observed in the *Burkina Faso v. Republic of Mali* case that maps are only circumstantial "evidence of varying reliability[.]"<sup>81</sup> it also believed maps to be relevant proof because they reflect a government's intention to claim land as within its territory. And failure to include an island within its territorial boundaries, even only on a map, would reflect a government's belief that it had no claim to possession. In line with this analysis, it should be noted that some of the oldest Korean maps relevant here were drawn at the explicit request of the governmental authorities. Such maps fall into the category identified by the ICJ as the "physical expression of the will of the State" that show evidence of an intention to exercise sovereign control over the territory.<sup>82</sup>

The second category of maps comprises European historical representations of Korea, illustrated by the series of maps that aim broadly at presenting Asia and the Far East to the European elite. Their purpose is not to provide a detailed description of the geographic features of the region but to convey instead a broader sense of their location within a space that remains in part unknown and mysterious. Figure 2 is such a map from an atlas by Henri Hondius printed in 1634.

Joan Blaeu's 1655 map of Japan, which was based on Martino Martini's Atlas of China, illustrates a similar conception. In Figure 3, we can see that Korea is limited to a few features while the main Japanese islands such as Oki are included. There is no marking of Ulleungdo or Dokdo, which is telling because this map provides a detailed depiction of Japan. It is important to observe that while European maps of Korea included occasionally Ulleungdo and Dokdo as islands that are placed close to the Korean shoreline, no European map of Japan from the same period included these two islands. For example, Jacques Nicolas Bellin's *Carte des Isles du Japon*, printed in 1735, depicts Japan in this way in Figure 4. A similar version is found in the *Carte de l'empire du Japon pour servir à l'histoire générale des voyages*, printed in 1752, by the same cartographer, in Figure 5. While Oki and its surrounding islands are clearly identified, no attempt is made to locate any island northwest of Oki. In fact, the area where Dokdo is located is not even present in the map.

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<sup>80</sup> *Id.*

<sup>81</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 54 (Dec. 22); Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045 (Dec. 13).

<sup>82</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 56 (Dec. 22).

In drafting these maps, European cartographers relied in large part on two sources of information. First, eyewitness reports filed by Christian missionaries provided new information. The second and more reliable source, in the view of cartographers of the time, consisted in reproducing earlier maps. These so-called “géographes de cabinet,” or “armchair cartographers,” did not leave their offices in order to take part in geographical surveys and discovery expeditions. They produced maps for an audience that was more curious about the existence of diverse societies than concerned about the exact location of their countries. Historical details and geographical accuracy came second to the general description of the territories, which were often presented as distant lands inhabited by strange people with bizarre customs and a colorful way of life. This political geography reflected Europeans’ preconceived notions of distant countries and their inhabitants;<sup>83</sup> Montesquieu’s theory of climate in *The Spirit of the Laws* (1748) similarly made broad generalizations about the snow people and the sun people with little direct knowledge of the cultures or histories involved.<sup>84</sup>

The maps in Figures 6 through 9 illustrate this sixteenth- and seventeenth-century approach to mapping of the region: Johannes van Keulen, *Nieuwe passaert van Oost Indien* 1680 (Figure 6); and French royal geographer Sanson d’Abbeville, *Royaume de la Chine* (1652) (Figure 7). Other typical examples of this approach include *La partie orientale de l’Asie où se trouvent le grand empire des tartares chinois et celui du Japon* (1705), by the printer and royal geographer Nicolas de Fer, and Guillaume de l’Isle’s *Carte de Tartarie* (1706), printed in Paris, and *Carte des Indes et de la Chine*, reprinted in Amsterdam. These cartographers compiled various information from a variety of sources. Another example is D’Anville’s *Carte générale de la Tartarie chinoise dressée sur les cartes particulières faitessur les lieux par les révérends pères jésuites et sur les mémoires particuliers du père Gerbillon, imprimée en 1732* in Figure 8. The islands are not mentioned at all in the *Carte de Tartarie dressée sur les relations de plusieurs voyageurs de Différentes nations et sur quelques observations qui ont été faites dans ce pays là, Par Guillaume de l’Isle, premier géographe du Roy* (1706) in Figure 9. Maps from these centuries omit many significant geographical features. These maps were reprinted several times over a limited period with no or very little alteration.

Modern types of maps of the Korean coasts and the East Sea do not appear until the voyage of the French explorer Jean-Francois de Galoup, Comte de La Perouse, at the end of the eighteenth century. They are more accurate and conceived as geographical and geological indexes. Although La Pérouse did not sail near Dokdo, his naming of Ulleungdo as Dagelet and his mention of the island’s inhabitants drew the attention of the next generation of cartographers.<sup>85</sup>

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<sup>83</sup> PIERRE BOURDIEU, *CE QUE PARLER VEUT DIRE* 227 (1982).

<sup>84</sup> Robert Shackleton, *The Evolution of Montesquieu’s Theory of Climate*, 9 *REVUE INTERNATIONALE DE PHILOSOPHIE* 317 (1955) (Fr.).

<sup>85</sup> See JEAN-FRANÇOIS DE LA PÉROUSE, 2 *VOYAGE DE LA PÉROUSE AUTOUR DU MONDE* 390 (Louis-Antoine Milet-Mureau ed., Paris, Imprimerie de la République 1797).



La Pérouse implicitly acknowledged that the island was not *terra nullius* because, although he named Ulleungdo as Dagelet, he did not attempt to claim discovery on behalf of France.<sup>86</sup> Following La Pérouse's journey and its reports, maps of the area no longer adopted the traditional cartographic conventions of the previous century. They relied instead on new information provided by European explorers who pursued different interests than those of the missionaries and merchants. A few years later, English naval officer and explorer James Colnett's mistaken location of Dagelet and its naming as Argonaut did not change Ulleungdo's and Dokdo's distinct status. Failure to claim possession indicates that nineteenth century European cartographers considered the islands as part of the Korean kingdom (see Figure 10).

The third category of maps confirms this conclusion. They reflect a different perspective over the previous mainland-based approach as they were used for seafaring. This category includes most of the maps kept in the archives of the Dutch East India Company in the Netherlands and several maps printed in England in the second half of the nineteenth century. Although Dokdo was rarely mentioned, the mistaken juxtaposition of Argonaut and Dagelet followed a pattern that strikingly evokes the geographical configuration of Ulleungdo and Dokdo. Carl Ferdinand Weiland's treatment of these two islands in *Das chinesische Reich und das Kaisertum Japan* (1830 & 1832) in Figure 11 illustrates this mistake while color-coding (blue) the islands as being part of the Korean kingdom.

Subsequent maps maintain the distinction between Argonaut and Dagelet, without attributing them to Japan. Such is the case of Justus Perthes' *Das chinesische Reich mit seinen Schutzstaaten nebst dem japanischen Inselreiche* in Figure 12, printed one year after Weiland's 1832 map. Incidentally, the use of Japanese names for identifying these islands did not imply recognition of Japanese sovereignty.

We can observe a similar approach in successive maps of the area, such as Adrien Bruet's *Carte physique et politique de l'Asie* (reprinted 1850), von Stülpnagel's *China und Japan* (1850), and the corrected reprint of Weiland's map printed by Riepert in 1857. These maps never identify the islands as part of Japan. When Whittingham wrote his *Notes on the late expedition against the Russian settlements in eastern Siberia* (Figure 13), he illustrated his account with a map, printed in 1856, showing the track of his seafaring journey that also placed Argonaut and Dagelet outside Japanese territory.

Close examination of all European maps produced in the nineteenth century reveals a similar understanding. Despite their various origins and purpose, maps of the disputed area display considerable evidence of the historical status of the Ulleungdo group of islands, including Dokdo. This reflects the existence of an international understanding that Korea possessed both islands. Although maps alone do not definitely prove Korean sovereignty over the islands, they strongly suggest that Ulleungdo and Dokdo were neither abandoned nor forgotten by the

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<sup>86</sup> *Id.* at 391.

country that had first asserted its jurisdiction over them—despite their remoteness and difficult access.

### C. Academic Debate Over Dokdo

A review of the contemporary literature shows that a majority of scholars have concluded that Korea has the superior claim to sovereignty over Dokdo.<sup>87</sup> Until recently, however, research into the Korean claims for sovereignty over Dokdo was much less extensive than for the Japanese.<sup>88</sup> Scholars have made a variety of arguments in support of Korea: Korean and Japanese historical records which indicate Korean control before 1905; Korean and Japanese historical maps; the nature of Japan's 1905 annexation of Dokdo; the silence of the 1951 San Francisco Peace Treaty; and Korea's effective occupation and control of Dokdo since the 1950s. Over the years, Japanese arguments have shifted from ones based on annexation, to ones grounded in *terra nullius* and the San Francisco Treaty, to ones focusing on confusion in the relevant historical maps.

Numerous scholars cite several key pieces of historical evidence establishing Korean sovereignty over Dokdo prior to 1905. Nearly all of them first observe that Korean records of Dokdo date back to 512 C.E., far earlier than any Japanese counterparts.<sup>89</sup> Several also note that some of the oldest Japanese records of Dokdo, dating to the seventeenth century, position Ulleungdo and Dokdo beyond Japan's territorial boundaries and within Korea's instead.<sup>90</sup> Another frequently mentioned historical factor is the Ahn Yong-bok incident.<sup>91</sup> Korea followed with regular inspection of the islands for trespassers over several centuries, whereas Japan enforced a travel ban upon its fishermen until as late as 1903.<sup>92</sup>

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<sup>87</sup> In fact, some scholars reach this conclusion when incorporating a survey of the existing literature in their own work. See, e.g., Michael C. Davis, *Can International Law Help Resolve the Conflicts Over Uninhabited Islands in the East China Sea?*, 43 DENV. J. INT'L L. & POL'Y 141 (2015) (noting that the "dominant view in case law and the literature has generally been favorable to the South Korean territorial claim to the Dokdo/Takeshima Islands"); Chen-Ju Chen, *Multipolar Disorder in the East China Sea: Learning From the Experiences in Building the Legal Systems of the Arctic and the Antarctic*, 30 Y.B. INT'L L. & AFF. 111 (2012) ("[I]t has long been considered that Korea's claim over Dokdo is stronger than that of Japan's, according to the historical evidence of its exercise of authority, the connection between Japan's claim of annexation in 1905 and Japanese expansionist activities over the Korean Peninsula, the principle of contiguity, and Korea's actual physical control of the islands during the past half-century.").

<sup>88</sup> See Hoon Lee, *supra* note 4 at 390–91.

<sup>89</sup> See, e.g., Davis, *supra* note 87, at 142–43; Kiran Kim, *Dokdo or Takeshima?*, 2 CLA J. 33 (2014); Yong-ha, *supra* note 18, at 75–91; PILKYU KIM, CLAIMS TO TERRITORY BETWEEN JAPAN AND KOREA IN INTERNATIONAL LAW 53–57 (2014); Van Dyke, *supra* note 9, at 166.

<sup>90</sup> See Lee, *supra* note 4, at 396; Kim, *supra* note 89, at 33–34; Van Dyke, *supra* note 9, at 166.

<sup>91</sup> See *supra* Part I.A.

<sup>92</sup> See Lee, *supra* note 4, at 395–412; Van Dyke, *supra* note 9, at 166, 174; Kim, *supra* note 89, at 33–35; KIM, *supra* note 89, at 53–57, 66–67, 70–71 (specifically noting that an application for a hunting and fishing license for Dokdo by a Japanese fisherman was rejected by the Japanese government because it "recognizes the island as the territory of Korea"); Yong-ha, *supra* note 18, at 75–91; Davis, *supra* note 87, at 142–43; Myung-Ki Kim, *A Study on Legal Aspects of Japan's Claim to Tokdo*, 28 KOREA OBSERVER 363–64 (1997); Kazuo Hori, *Japan's Incorporation of Takeshima into its Territory*

Scholars also point to Japanese government records. They argue that these records explicitly concede Korean ownership of Dokdo, pointing to instances such as the 1869 survey of Japan's territories that the Dajokan (Japan's highest governing body at the time) ordered to give a full accounting of how Ulleungdo and Dokdo came to be Korean territory;<sup>93</sup> a statement by the Dajokan in 1877 that Dokdo was not part of Japanese territory;<sup>94</sup> and a confirmation of this official Japanese position by the Japanese Foreign Ministry in response to an inquiry by the Japanese Ministry of Home Affairs in 1881.<sup>95</sup>

Other arguments rely on Korea's internal government policies. They point to the "vacant island" policy Korea adopted from the fifteenth through the nineteenth century, under which the Korean government prohibited its citizens from settling on Ulleungdo and Dokdo.<sup>96</sup> The Korean government noted that this should not be construed as abandonment of the islands but instead as an exercise of sovereignty itself.<sup>97</sup> Korea reversed the policy as a reaction to perceived encroachment by the Japanese in the late nineteenth century,<sup>98</sup> culminating in Imperial Ordinance No. 41 issued by the Korean government in 1900, and which expressly designated an administrative unit and inspector for Dokdo.<sup>99</sup> Despite the limited number and scope of Korean activities with respect to Dokdo, multiple authors conclude that such activities nonetheless sufficiently establish sovereignty for a small and generally uninhabitable island like Dokdo, since what international law requires depends on the nature of the territory,<sup>100</sup> and they conclude that on balance the history of activities favors Korea.<sup>101</sup>

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in 1905, 28 KOREA OBSERVER 477, 485–86 (1997); see also Lee, *supra* note 4, at 498 (noting Korea's consistent objections to trespassing by Japanese fishermen in 1888, 1895, 1898, and 1899).

<sup>93</sup> SANG HYUNG NA, THE KOREAN-JAPANESE TERRITORIAL DISPUTE OVER DOKDO/TAKESHIMA 36 (2007); Yong-ha, *supra* note 18, at 107–113.

<sup>94</sup> Kim, *supra* note 89, at 35; see also Seokwoo Lee, *Dokdo/Takeshima Islands from a Korean Perspective*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014).

<sup>95</sup> Hori, *supra* note 92, at 494.

<sup>96</sup> Van Dyke, *supra* note 9, at 166.

<sup>97</sup> REPUBLIC OF KOREA, MINISTRY OF FOREIGN AFFAIRS, DOKDO: KOREA'S BEAUTIFUL ISLAND 21.

<sup>98</sup> See Davis, *supra* note 87, at 142; Hori, *supra* note 92, at 498; Kim, *supra* note 92, at 363–64; Lee, *supra* note 4, at 398; Van Dyke, *supra* note 9, at 166, 174–75; KIM, *supra* note 89, at 99–100.

<sup>99</sup> Hee Kwon Park & Jong-In Bae, *Korea's Territorial Sovereignty Over Tokdo*, 29 KOREA OBSERVER 121–63 (1998); Yong-ha, *supra* note 18, at 123.

<sup>100</sup> See Park & Bae, *supra* note 20, at 129–30 (arguing that for a territory like Dokdo all that would be required under international law is for Korea to "genuinely consider [Dokdo] as its own territory and treat it as such with some display of authority"); Phil Haas, *Status and Sovereignty of the Liancourt Rocks: The Dispute Between Japan and Korea*, 15 GONZ. J. INT'L L. 2, 8 (2011) ("Applying case law, Korea can argue that [Dokdo is] remote and that even Korea's 'intermittent and discontinuous' presence on the island establishes its territorial sovereignty over the island."); KIM, *supra* note 89, at 133 (observing that for an island like Dokdo, "international law requires very little in the way of the actual exercise of sovereign rights").

<sup>101</sup> See generally Van Dyke, *supra* note 9; Davis, *supra* note 87; Kim, *supra* note 89; Yong-ha, *supra* note 18; KIM, *supra* note 89; Kajimura, *supra* note 38; Haas, *supra* note 100; Benjamin K. Sibbett, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 FORDHAM INT'L L.J. 1606, 1606–46 (1998); Park & Bae, *supra* note 20. One scholar even suggests that the best way to understand Japanese records is by placing them within the larger historical-

Some researchers also refer to Korean and Japanese maps as additional evidence of Korea's superior claim. Maps published by the Japanese government, the Japanese military, and prominent Japanese scholars in the eighteenth and nineteenth centuries exclude Dokdo from Japanese territory while including it in Korea's.<sup>102</sup> Those citing this cartographic evidence argue that it was highly likely that these maps reflected the territorial consciousness of the Japanese government at the time, as well as that of Japanese fishermen.<sup>103</sup> At least one author has in turn concluded that since Dokdo is depicted in Korean territory consistently by Korean maps and sometimes by Japanese maps, international tribunals would very likely rule in favor of Korea.<sup>104</sup>

Existing literature commonly addresses the implications of the 1905 annexation of Dokdo. Many experts dismiss it as an illegitimate basis for Japan's claim to Dokdo under international law.<sup>105</sup> However, the details of how Japan annexed Dokdo—by printing news of its annexation only in a local Japanese newspaper and without official announcement, resulting in Korea not even being aware of this event until 1906—are cited by several experts as indicative of an awareness by the Japanese government that Dokdo was Korean territory, since a more open and notorious approach would have likely resulted in rebuke by Korea and possibly other nations.<sup>106</sup> One author further supports this theory by pointing to Japanese scholarship from the immediate post-annexation period which continued to recognize the island as Korean territory (albeit now annexed by Japan).<sup>107</sup>

The 1951 San Francisco Peace Treaty is the next major source of authority addressed by the existing literature on Dokdo. The obvious argument here is that Korea is not a signatory to the 1951 Treaty and therefore even if it had definitely determined ownership of Dokdo, such determination would not be binding on

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political context: records of the mid-seventeenth century were first collected into published compilations by the Japanese at a time when the Japanese government was facing a series of international crises brought on by contact with the United States and Russia, which in turn informed a revisionist paradigm that framed prior acts of foreign policy passivity or acquiescence as mistakes that led Japan to the then-current crisis. See Lee, *supra* note 4, at 419–21. Thus, the Japanese “began to write as if Takeshima . . . [was] originally Japanese territory but ceded to [Korea],” exemplifying the policy blunders from the past that Japan needed to avoid in the future. *Id.* at 419–20.

<sup>102</sup> Hori, *supra* note 92, at 487–88; KIM, *supra* note 89, at 58; Van Dyke, *supra* note 9, at 167, 174; NA, *supra* note 93, at 22.

<sup>103</sup> Kim, *supra* note 89, at 36; Van Dyke, *supra* note 9, at 174; NA, *supra* note 93, at 22.

<sup>104</sup> Hyung K. Lee, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL'Y J. 186 (2005) (“[I]nternational tribunals accord more credence to the maps produced by a neutral party . . . if a map produced by a neutral party is deemed to be free of any political bias, then a map produced by the party with adverse interests may receive even greater deference . . . and might prove to be a decisive factor to the outcome of the adjudication if Japan and Korea refer their dispute to an international tribunal.”); see also Haas, *supra* note 100.

<sup>105</sup> See, e.g., Park & Bae, *supra* note 20, at 161; Van Dyke, *supra* note 9, at 165, 180–81.

<sup>106</sup> See NA, *supra* note 93, at 69–70; Yong-ha, *supra* note 18, at 173.

<sup>107</sup> NA, *supra* note 93, at 98–99.

Korea.<sup>108</sup> In addition, after examining the negotiating history and context, many scholars conclude that there was no consensus among the drafters as to which country had the better claim to Dokdo and for that reason and others, the drafters deliberately sidestepped the issue.<sup>109</sup> Much has been made of various statements by US representatives, such as Dean Rusk and William Sebald stating that the United States believed Dokdo belonged to Japan.<sup>110</sup> The United States sought to combat the spread of communism in Asia by binding Japan as a strong ally, particularly given the outbreak of the Korean War and the possibility that Dokdo could end up in the communist sphere.<sup>111</sup> These scholars also observe that the United States began to prefer a shorter version of the 1951 Treaty that intentionally left some matters unaddressed (like Dokdo) in order to facilitate a faster conclusion to the negotiations.<sup>112</sup> Responding to pressing geopolitical issues may well have urged in favor of leaving the Dokdo issue unresolved: the

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<sup>108</sup> See, e.g., KIM, *supra* note 89, at 130; Lee, *supra* note 4.

<sup>109</sup> See Van Dyke, *supra* note 9, at 184 (concluding that the Allies decided not to settle the matter because “not enough information had been provided regarding the historical events surrounding Japan’s incorporation of Dokdo/Takeshima, or because the Allied powers felt themselves to be incapable, or inadequate, adjudicators”); Joshua Castellino & Elvira Dominguez Redondo, *The Title to Dokdo/Takeshima: Addressing the Legacy of World War II Territorial Settlements/Finding the Right Settlement of Dispute Mechanism*, 22 INT’L J. ON MINORITY & GROUP RIGHTS 550, 560–61 (2015) (“Allies believed that the dispute would die a natural death, or be resolved bilaterally or multilaterally by the parties.”); Kimie Hara, *50 Years From San Francisco: Re-examining the Peace Treaty and Japan’s Territorial Problems*, 74 PAC. AFF. 362 (2001) (observing that leaving the Dokdo question unresolved was consistent with how the drafters left a number of other territorial questions unresolved).

<sup>110</sup> See e.g., Lee & Van Dyke, *supra* note 11 at 745–47, 749.

<sup>111</sup> See Hara, *supra* note 109, at 370–71; Lee & Van Dyke, *supra* note 11, at 745–48 (noting that the drafters of the 1951 Treaty switched their positions regarding Dokdo preceding the outbreak of the Korean War, and then avoided the issue except in the final draft, in which they recognized Japan’s sovereignty over Dokdo, following the outbreak of the Korean War); KIM, *supra* note 89, at 129 (noting that recently declassified documents reveal that a US legal adviser for the treaty negotiations even stated that “a thorough study, with guidance of experts in Oriental history, would have to be made,” that Rusk’s statements should not be relied on to interpret the Treaty as they were “political statements,” and that it remained a question “whether the statement made in Mr. Rusk’s letter entails the legal conclusion that the peace treaty leaves Dokdo [Takeshima] to Japan”); see also Kajimura, *supra* note 101, at 461 (“America’s views do not have any definite meaning.”). Seokwoo Lee and Jon Van Dyke also point to Dulles’s reversal of position on letting Korea be a signatory to the 1951 Treaty as further evidence that geopolitical considerations rather than legal assessments dominated the negotiations, since Korea was excluded as a signatory so as to avoid legitimizing or strengthening the legal property positions and benefits that could go to Koreans living in Japan, many of whom were from North Korea and proponents of communism in Japan. See Lee & Van Dyke, *supra* note 11, at 751. Even now, the official US government position is that it takes no side in the Dokdo dispute, that this dispute is one for Korea and Japan to settle bilaterally, and that this has always been the US position since 1952. See WHITE HOUSE OFFICE OF COMM’NS, PRESS GAGGLE BY DANA PERINO AND DENNIS WILDER (Aug. 4, 2008).

<sup>112</sup> Some scholars even theorize that the United States may have intentionally preferred ambiguity in the 1951 Treaty since that would (i) likely put them in a prime position to be the party to solve or broker territorial disputes created by such ambiguities, ultimately resulting in greater US power and leverage over Asia-Pacific countries, and/or (ii) create sources of conflict between Japan and communist Russia and a potentially communist Korea, which would tend to drive Japan closer to the United States. See Hara, *supra* note 109, at 373; Lee & Van Dyke, *supra* note 11, at 748, 750.

faster the negotiations, the faster the resumption of normal diplomatic relations with Japan, and the faster the United States would be able to re-deploy its troops, then stationed in Japan as occupying forces, to fight in the Korean War.<sup>113</sup> Even if the United States had stated a definite position, some authors note that both US negotiating personnel and the information the United States had available were heavily biased in favor of the Japanese.<sup>114</sup> Others also observe that the end result of the 1951 Treaty, including the lack of definite assignment of Dokdo to Korea, speaks more to the significant disparity in influence, experience, sophistication, and resources between Korea and Japan at the time than the relative merits of their claims.<sup>115</sup>

In contrast to the inconclusive nature of the 1951 Treaty, many scholars cite the more recent history of Korean occupation and Japanese reactions as factors that unambiguously weigh in Korea's favor. Such recent historical evidence may carry greater weight because the older history of the island is spottier and contested, while the history of Korea's occupation and control over Dokdo since the 1950s is relatively clear and unbroken.<sup>116</sup> A variation of this argument is that Korea's effective control over Dokdo since the 1950s, combined with the 1965 Normalization Treaty between the two countries, in which Japan arguably acquiesced to Korean control over Dokdo by not raising it as an issue, means the balance should tilt in Korea's favor.<sup>117</sup> One analysis even suggests that

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<sup>113</sup> See Hara, *supra* note 109, at 372; Seokwoo Lee, *The 1951 San Francisco Peace Treaty With Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL'Y J. 63, 136 (2002); Lee & Van Dyke, *supra* note 11, at 748.

<sup>114</sup> See YOUNG KOO KIM, A PURSUIT OF TRUTH IN THE DOKDO ISLAND ISSUE 17 (2003) (noting Sebald's influence); SEOKWOO LEE & HEE EUN LEE, THE MAKING OF INTERNATIONAL LAW IN KOREA: FROM COLONY TO ASIAN POWER 57 (stating that the information regarding Dokdo available to the United States at the time was "based for the most part on Japanese language sources available in the Department of State and the Library of Congress, studies prepared by the Department of State, and studies by the Japanese Foreign Office."); see also Hara, *supra* note 109, at 370.

<sup>115</sup> Jung Byungjoon, *Korea's Post-Liberation View on Dokdo and Dokdo Policies (1945-1951)*, 5 J. OF NORTHEAST ASIAN HISTORY 5, 53 (2008) (arguing that Korea was at a severe disadvantage during the negotiations because (i) research and survey reports gathered by the US military government in Korea during the transitional period of 1947-48, which supported the Korean claim, were not transferred to the newly established Korean government; (ii) the Korean government did not have the resources to give extensive attention to Dokdo because of the Korean War, and in light of this, its main priorities were lobbying to become a signatory to the treaty, obtaining economic compensation from Japan, prosecuting war criminals, and being awarded sovereignty over a few other islands it deemed more important; (iii) Korea did not even know Japan was contesting Korea's sovereignty over Dokdo; and (iv) Korea was a new country with far less diplomatic experience and skill than Japan); Lee & Van Dyke, *supra* note 11, at 750 ("President Rhee placed too much attention on an unrealistic demand for Korean sovereignty over Tsushima Island, and did not produce a scholarly, well-documented study of the Korean historical record on Dokdo, which could have offered American drafters an alternative to the Japanese Foreign Ministry's monograph entitled 'Minor Islands in the Sea of Japan.'").

<sup>116</sup> Garret Bowman, *Why Now is the Time to Resolve the Dokdo/Takeshima Dispute*, 46 CASE W. RES. J. INT'L L. 433, 453 (2013). See also Sean Fern, *Tokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute*, 5 STAN. J. EAST ASIAN AFF. 78, 87-88 (2005) (noting that under the *Palmas* and *Clipperton* standards, Korea has a stronger claim to Dokdo based on a comparison of the history of Korea's manifestations of sovereignty with those of Japan).

<sup>117</sup> Lee & Van Dyke, *supra* note 11, at 756-57.

international tribunals could apply the doctrine of *uti possidetis ita possidetis* (as you possess, so you possess), which “privileges the *status quo* by protecting existing arrangements of possession without regard to the merits of the dispute.”<sup>118</sup> Under such a doctrine, Korea would have sovereignty over Dokdo, with Japan perhaps being granted certain use rights with respect to the territory (such as fishing rights).

A minority of scholars contend that Japan has the better claim. Some maintain that Japan has a superior historical record of effective displays of sovereignty, while others argue that Dokdo was *terra nullius* prior to the 1905 annexation.<sup>119</sup> The latter scholars focus on the absence of Dokdo from many of the older Korean records or the inconsistent use of names for Ulleungdo and Dokdo, suggesting that many records meant to support the Korean claim to Dokdo are in fact merely further support for the Korean claim to Ulleungdo (which is not disputed).<sup>120</sup> A less obvious argument is that the United States has sovereignty over Dokdo because (i) the island falls within the territorial sphere controlled by US military authorities following World War II and (ii) the 1951 Treaty did not expressly assign the island to any country in particular, so it remains under US sovereignty as “un-demarcated territory”.<sup>121</sup>

## II.

### THE INTERNATIONAL LAW OF TERRITORIAL POSSESSION

This section reviews the international law of territorial disputes. International law recognizes several ways to gain legal possession of territory. There is no authoritative international agreement or other positive law on this question. Instead, judicial and arbitral decisions, the practice of nations, historic custom, and scholarly commentary have contributed to the definition of territorial acquisition under international law.<sup>122</sup> Due to this decentralized distribution of authority, the international law of possession can and has changed over time. Conquest, or *subjugatio*, for example, used to constitute a commonly accepted method of territorial acquisition. After the U.N. Charter’s prohibition on aggressive war and its guarantee of every member state’s territorial integrity, however, conquest has disappeared.<sup>123</sup> Different bases for legitimate possession can produce conflicting claims by nations over the same territory.

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<sup>118</sup> Castellino & Redondo, *supra* note 109, at 568, 577.

<sup>119</sup> See Hori, *supra* note 92, at 524 (summarizing the majority and minority position); see also Raul Pedrozo, *Sovereignty Claims Over the Liancourt Rocks (Dokdo/Takeshima)*, 28 CHINESE (TAIWAN) Y. B. INT’L L. & AFF. 78–97 (2010).

<sup>120</sup> See generally Pedrozo, *supra* note 119.

<sup>121</sup> Roger C. S. Lin & Richard W. Hartzell, *Final Solution for the Dokdo Dispute*, KOREA TIMES (June 6, 2006), <http://www.taiwanbasic.com/tw/kt-dokdo.htm>.

<sup>122</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt.b, n.2 (explaining bases for development of customary international law).

<sup>123</sup> U.N. Charter art. 2.4 reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any

### A. Types of Territorial Acquisition

To summarize different types of acquisition of territory under international law:

1. Historic title. A nation may have possessed territory through an ancient and historic connection with the land.<sup>124</sup>
2. Contiguity. A nation may acquire unclaimed territory that is geographically proximate to land that it already possesses. Contiguity provides the basis for claims to the possession of the territorial sea, continental shelf, and exclusive economic zones in the seas adjacent to land.
3. Discovery & Occupation. A nation may discover land that is unclaimed by any other organized political unit. Such land is considered *terra nullius*. In order to maintain title, a nation must maintain effective occupation of the discovered land.<sup>125</sup> Some international tribunals have defined effective occupation to require acts that a) show an intention to occupy and b) display government authority in a continuous and uncontested fashion.<sup>126</sup>
4. Prescription. A nation can acquire territory that is possessed by another state. It might acquire by prescription if it asserts discovery in good faith and exercises effective control over the territory, even though another actually has title. Even if the acquiring state did not discover the territory in good faith, it can also gain title through long, continuous, uninterrupted, and public possession in which other nations acquiesce.<sup>127</sup> Prescription resembles the common law doctrine of adverse possession or Roman law's *usucapio*.

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other manner inconsistent with the Purposes of the United Nations.”

<sup>124</sup> See, e.g., Phase I: Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), 114 I.L.R. 2 (Perm. Ct. Arb. 1998).

<sup>125</sup> See, e.g., Island of Palmas (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 869 (Perm. Ct. Arb. 1928); Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 (Sept. 5); Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47.

<sup>126</sup> See Island of Palmas (Neth. v. U.S.), *supra* note 125 (holding that “inchoate” rights created at the time of an island's discovery must be completed through “continuous and peaceful” display of sovereignty). See also Eritrea v. Yemen, 22 R. Int'l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998) (“The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.”); Case Concerning Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Judgment, 1992 I.C.J. 351, 563 (requiring “peaceful and continuous” exercise of State functions).

<sup>127</sup> L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. I—PEACE, 400–02 (Sir Ronald Roxburgh ed., 3d ed. 1920).



5. Accretion. A nation may increase its territory due to natural changes in the features of land. Examples can include alteration of the course of a river that serves as a border, expansion of a coastline, or the emergence of new islands.<sup>128</sup>
6. State Secession, or *Uti Possidetis*. New states that come into existence from the dissolution of an empire or larger nation will maintain previous colonial borders.<sup>129</sup>
7. Cession. Nations can transfer possession of territory by treaty or other agreement. Cession can be voluntary through an exchange of lands, financial payment, or even gift.<sup>130</sup> Cession can also occur at the end of war, when the defeated nation (such as Germany at the end of World Wars I or II and Japan at the end of World War II) gives up territory as part of a peace settlement.
8. Conquest. Although now generally considered illegitimate, conquest was a historic means of acquiring territory. It required both defeat of an enemy in war, known as *debellatio*, and subjugation of the territory through annexation.<sup>131</sup>

With island disputes, international courts and arbitral bodies have usually decided possession based on the traditional factors of discovery and continuing occupation.<sup>132</sup> A review of the relevant customs and decisions will provide the proper legal context for the dispute over Dokdo, but it should be clear that the primary factor in such cases is occupation. International authorities often place importance on legal “title” to a territory, but in most cases the nations at odds will dispute title and instead the case will turn on control, or what is sometimes called “*effectivités*.”<sup>133</sup> International courts define control as both the intention to exercise sovereignty and actual, continuous displays of governmental authority.

Under this test, as developed by modern international tribunals, Korea’s continuing and effective display of control over Dokdo grants it legal title to the island even if historical claims over discovery cannot be resolved. This Section reviews the leading cases to show the manner in which international tribunals have resolved competing claims over discovery and how they have refined the concept of *effectivités*.

Perhaps the most widely respected decision on the possession of islands is the *Island of Palmas* arbitration of 1925.<sup>134</sup> The dispute between the United States

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<sup>128</sup> *Id.* at 390–94.

<sup>129</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 54 (Dec. 22).

<sup>130</sup> OPPENHEIM, *supra* note 127, at 376–82.

<sup>131</sup> *Id.* at pp. 394–400; *but see* U.N. Charter, *supra* note 123.

<sup>132</sup> Eritrea v. Yemen, 22 R. Int’l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998).

<sup>133</sup> Case Concerning Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 3, 556–57 (Dec. 22).

<sup>134</sup> The Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January

and the Netherlands revolved around the Island of Palmas, located between the Philippines and Indonesia.<sup>135</sup> As the colonial power over the Philippines at the time, the United States claimed it had acquired the island through cession from Spain in the Treaty of Paris of 1898, which ended the Spanish-American War.<sup>136</sup> The Netherlands claimed ownership of the island as the colonial power at the time over Indonesia. The United States traced its title to the original discovery of the island by Spain, its cession to the United States in the 1898 Treaty, which specifically included the island in its transfer of territory, and its contiguity to the Philippines.<sup>137</sup> The Netherlands claimed that the Dutch East India Company had come into possession of the island as early as 1677 as part of agreements of suzerainty over the local princes of nearby Indonesian islands.<sup>138</sup>

Judge Max Huber of the Permanent Court of Arbitration found that the Dutch possessed the Island of Palmas.<sup>139</sup> Regardless of the American claim to original discovery, the court found that effective displays of sovereignty had to accompany title.<sup>140</sup> Indeed, continuous control expressed the same concept as title. “It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation,” Judge Huber wrote.<sup>141</sup> “So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.”<sup>142</sup> Control has to apply not only at the time of the transfer of title, but at the time that the dispute occurred. Control must be proven by “continuous and peaceful display of the functions of a state.”<sup>143</sup>

According to Judge Huber, Dutch activities on the Island of Palmas met this standard of sovereignty. The Netherlands produced eighteenth century reports of the flying of the Dutch flag by inhabitants, the enforcement of Dutch criminal law on the island, and the inclusion of the island in reports by Dutch colonial officials.<sup>144</sup> In the mid-nineteenth century, Dutch colonial officials presented extensive information on the island and its inhabitants, reported that the inhabitants paid taxes or tribute, and in 1895 a Dutch official was the first European to step foot on the island.<sup>145</sup> While admitting that the Dutch displays of

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23, 1925 *Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)*, 2 R. Int'l Arb. Award 829 (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT'L L. 867 (1928).

<sup>135</sup> *Island of Palmas Case (Neth. v. U.S.)*, 2 R. Int'l Arb. Award 829, 836 (Perm. Ct. Arb. 1928).

<sup>136</sup> *Id.* at 837.

<sup>137</sup> *Id.* at 837–38.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 871.

<sup>140</sup> *See id.* at 839–40.

<sup>141</sup> *Island of Palmas Case (Neth. v. U.S.)*, 2 R. Int'l Arb. Award at 839 (Perm. Ct. Arb. 1928).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 840.

<sup>144</sup> *Id.* at 862–63.

<sup>145</sup> *Id.* at 865.

sovereignty were “not numerous” and that there were “considerable gaps in the evidence of” continuity, the court found nonetheless that the displays were “open and public.”<sup>146</sup> Meanwhile, cession to the United States by the 1898 Treaty could “exist only as inchoate title, as a claim to establish sovereignty by effective occupation.”<sup>147</sup> Judge Huber concluded: “[A]n inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.”<sup>148</sup>

A second pre-WWII decision relevant to the Dokdo dispute is the 1931 arbitration over Clipperton Island between Mexico and France.<sup>149</sup> France claimed title to the uninhabited island, which lies 600 miles from Mexico, by discovery in 1858.<sup>150</sup> France, however, had not undertaken significant activity on Clipperton and a concession to develop guano deposits went unexploited.<sup>151</sup> In 1897, a Mexican naval vessel landed and forced three Americans living on the island to lower the US flag. Mexico then contested French sovereignty and claimed title going back to earlier discovery by Spain in the eighteenth century.<sup>152</sup> King Victor Emmanuel of Italy, the chosen arbitrator, ruled in favor of France.<sup>153</sup> He found that Clipperton, because it was uninhabited, was *terra nullius* at the time of the 1858 discovery.<sup>154</sup> But equally as important as discovery, the King declared, were active displays of sovereignty. The King observed that:

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.<sup>155</sup>

A nation meets this standard when it “establishes in the territory itself an organization capable of making its laws respected.”<sup>156</sup> The King found that France had discovered the island and openly established its sovereignty, and that its lack of activity on the island in the following four decades did not indicate “the *animus*

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<sup>146</sup> *Id.* at 867–68.

<sup>147</sup> Island of Palmas Case (Neth. v. U.S.), 2. R. Int’l Arb. Award at 869 (Perm. Ct. Arb. 1928).

<sup>148</sup> *Id.*

<sup>149</sup> Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico), Jan. 28, 1931, *reprinted in* 26 AM. J. INT’L L. 390 (1932) [hereinafter Clipperton Arbitration].

<sup>150</sup> MARK JOHN VALENCIA ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA 17 (1997).

<sup>151</sup> *Id.*

<sup>152</sup> Clipperton Arbitration, 26 AM. J. INT’L L. at 390, 392.

<sup>153</sup> VALENCIA ET AL., *supra* note 150, at 17–18.

<sup>154</sup> Clipperton Arbitration, 26 AM. J. INT’L L. at 390, 393.

<sup>155</sup> *Id.* at 393.

<sup>156</sup> *Id.* at 394.

of abandoning the island.”<sup>157</sup> Therefore, the King concluded, Mexico could not disturb France’s exercise of sovereignty over the island.<sup>158</sup>

A third important international decision bearing on the Dokdo dispute is the 1933 *Eastern Greenland* decision by the Permanent Court of International Justice.<sup>159</sup> There, Norway had proclaimed that it would occupy parts of Eastern Greenland on the theory that the land was *terra nullius*.<sup>160</sup> Denmark brought the lawsuit on the ground that Norway was violating Denmark’s existing sovereignty over all of Greenland.<sup>161</sup> Agreeing with the analysis in *Island of Palmas*, the court held that “a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”<sup>162</sup> According to the evidence, Denmark had begun to settle Greenland as early as the seventeenth century, and no other country had ever claimed sovereignty to any part of Greenland until 1931.<sup>163</sup> While most Danish activity occurred in the western part of the island, the court found that some of Denmark’s governing decrees, such as trading monopolies, extended to all of Greenland.<sup>164</sup> Denmark openly displayed sufficient sovereignty by enforcing a legal exclusion of competitive economic activity over the entire territory, even though its settlements were concentrated in one part of the land.<sup>165</sup>

Facts most similar to the Dokdo dispute arose in the 1953 International Court of Justice decision, the *Minquiers and Ecrehos* case. Each composed of two to three islands, islets, and rocks, the Minquiers and Ecrehos sit in the English Channel between the United Kingdom and France.<sup>166</sup> Both nations claimed an unbroken, ancient title to the islands.<sup>167</sup> British claims derived from the 1066 invasion by William the Conqueror, which united England and the Duchy of Normandy, including the islands.<sup>168</sup> When France expelled the Normans in 1204, William’s descendants retreated from continental France but kept the Channel Islands.<sup>169</sup> France claimed that the 1204 expulsion gained the Minquiers and

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 (Sept. 5).

<sup>160</sup> *Id.* ¶ 64.

<sup>161</sup> *Id.* ¶ 1.

<sup>162</sup> *Id.* ¶ 96.

<sup>163</sup> See generally SOREN RUD, COLONIALISM IN GREENLAND: TRADITION, GOVERNANCE AND LEGACY (2017).

<sup>164</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 ¶ 108.

<sup>165</sup> *Id.* ¶ 126.

<sup>166</sup> The Minquiers and Ecrehos Case (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, 53 (Nov. 17).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Ecrehos for the French crown.<sup>170</sup> The International Court of Justice found that neither side could prove its case with subsequent medieval Anglo-French treaties, which reaffirmed the existing possession of islands for each side, but did not identify them by name.<sup>171</sup>

The court treated the Minquiers and Ecrehos separately for purposes of occupation and control. With respect to Ecrehos, it found significant internal orders of the British monarchy granting rights over the islands to vassals during the medieval period.<sup>172</sup> It also deemed important a close administrative relationship between Ecrehos and the island of Jersey, over which the United Kingdom held undisputed sovereignty.<sup>173</sup> British administrative officials on Jersey had exercised criminal jurisdiction over crimes on Ecrehos, built houses, and enforced British tax and customs laws.<sup>174</sup> France claimed sovereignty over the island for the first time in 1886.<sup>175</sup> Before then, and only sporadically, France asserted that Ecrehos might be *terra nullius*.<sup>176</sup> It did nothing to exercise any physical control over the islands.<sup>177</sup> As a result, the court found the Ecrehos belonged to the United Kingdom.<sup>178</sup>

The ICJ adopted a similar approach with the Minquiers. It did not find the assertions of the United Kingdom or France dispositive based on feudal and historic claims.<sup>179</sup> While France had more contact with the island, it also did not declare any claim to sovereignty until 1888.<sup>180</sup> By contrast, the United Kingdom conducted government functions on the Minquiers during the nineteenth and twentieth centuries, such as resolving disputes and enforcing criminal, maritime, and customs laws.<sup>181</sup> The ICJ declared that “[w]hat is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”<sup>182</sup> Later courts have similarly read the ICJ decision as privileging current control over an island above historic information.<sup>183</sup> The arbitral court in the *Eritrea-Yemen* case observed “there had also been much argument about claims to very ancient titles,” but it is the relatively recent history of use and possession

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 53–55.

<sup>172</sup> *Id.* at 62.

<sup>173</sup> *Id.* at 63–65.

<sup>174</sup> *Id.* at 65–66.

<sup>175</sup> *Id.* at 59.

<sup>176</sup> *Id.* at 67.

<sup>177</sup> The Minquiers and Ecrehos Case (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, 67 (Nov. 17).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 70–71.

<sup>180</sup> *Id.* at 71.

<sup>181</sup> *Id.* at 55, 56, 59, 71.

<sup>182</sup> *Id.* at 57.

<sup>183</sup> Castellino & Redondo, *supra* note 109, at 551, 562, 568, 574.

that ultimately proved to be a main basis” of the *Miniquiers and Ecrehos* decision.<sup>184</sup>

International decisions after 1953 have only amplified the fundamental importance of open displays of sovereignty to establish legal possession of disputed islands. Two ICJ decisions applied the doctrine established in the *Miniquiers and Ecrehos* decision. In the 1992 *Gulf of Fonseca* case, Nicaragua and Honduras disputed the possession of islands the Spanish had discovered in 1522, which are located within the gulf that borders both countries.<sup>185</sup> Along with El Salvador, which also borders the Gulf of Fonseca, the three nations had come into existence after the dissolution of the Spanish Empire in the Americas.<sup>186</sup> The three nations inherited the administrative boundary lines from the Empire under the doctrine of *uti possidetis*, but no title benefited any of them because the Spanish colonial system had left the location of the islands within its administrative borders unclear.<sup>187</sup> Conflicting accounts of “colonial *effectivités*”—open displays of control by Spanish imperial officials—prevented the conclusive establishment of title with any of the three nations.<sup>188</sup> The court found that this history made the case less like the *Isle of Palmas* and *Eastern Greenland* cases, which involved the discovery and occupation of *terra nullius*, and more like the *Miniquiers and Ecrehos* decision.<sup>189</sup>

Again, in the case of disputed historical title, the court looked for open displays of sovereignty and whether other nations had objected. Such *effectivités* would not amount to prescription, but instead would confirm the historic title granted at the time of dissolution of the Spanish Empire to one of the three nations. “Possession backed by the exercise of sovereignty may be taken as evidence confirming the *uti possidetis juris* title.”<sup>190</sup> The court recognized one island, El Tigre, to be possessed by Honduras, which had occupied it, enforced its law there for much of the nineteenth century, and made agreements with Britain and the United States for its use.<sup>191</sup> The court found that other nations had acted upon the assumption that Honduras possessed the island.<sup>192</sup> The court awarded a second island to El Salvador because of its enforcement of domestic criminal and civil laws, and construction of government buildings and infrastructure, without objection from Honduras.<sup>193</sup>

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<sup>184</sup> Phase I: Territorial Sovereignty and Scope of the Dispute (*Eritrea v. Yemen*), 114 I.L.R. 2 (Perm. Ct. Arb. 1998) at 312.

<sup>185</sup> Case Concerning Land, Island and Maritime Frontier Dispute (*El Sal. v. Hond.*), Judgment, 1992 I.C.J. 351, 563 (Sept. 11).

<sup>186</sup> *Id.* at 380, ¶ 28.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 563–64.

<sup>190</sup> *Id.* at 566.

<sup>191</sup> *Id.* at 566–70.

<sup>192</sup> *Id.* at 567–69.

<sup>193</sup> *Id.* at 577–90.

An identical analysis prevailed in the ICJ's 2002 decision in a dispute between Malaysia and Indonesia over Ligitan and Sipadan, two small islands off Borneo.<sup>194</sup> Indonesia claimed possession from title originally obtained by the Dutch East India Company and passed to the Netherlands, while Malaysia claimed its right had come to it from Spain to the United States to Great Britain.<sup>195</sup> The court found that none of the treaties that had passed territory down from the colonial powers to Indonesia and Malaysia had clearly included the two islands.<sup>196</sup> As a result, the court turned to *effectivités* again to determine who possessed the islands.<sup>197</sup> Indonesia could offer only a limited number of visits to the islands by the Dutch and Indonesian navies, which the court dismissed because they were not of a "legislative or regulatory character."<sup>198</sup>

By contrast, Malaysia had a better record of displays of sovereignty. According to the ICJ, Malaysia had enforced regulations of native species on the islands as early as 1914, constructed and operated lighthouses and tourist facilities, and enforced its laws within the territory.<sup>199</sup> "The activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts," the court found.<sup>200</sup> "They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands."<sup>201</sup> Even though the Malaysian *effectivités* were sparse, Indonesia did not object to Malaysian activity until 1969.<sup>202</sup> Based on this record of unchallenged displays of sovereignty, the court awarded the islands to Malaysia.<sup>203</sup>

### III.

#### INTERNATIONAL LAW AND THE DOKDO ISLAND DISPUTE

This Part applies the international law of territory to the facts of the Dokdo dispute. Under the approach employed by the tribunals discussed in Part II, Korea has a superior claim to Dokdo due to original title and *effectivités*. Korea presents proof of discovery from the sixth century C.E., while Japan's claim arises in the

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<sup>194</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625 (Dec. 17).

<sup>195</sup> See *id.* at 626.

<sup>196</sup> *Id.* at 652–53, 660–62.

<sup>197</sup> *Id.* at 678.

<sup>198</sup> *Id.* at 683, ¶ 137.

<sup>199</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, 681 ¶ 132 (Dec. 17).

<sup>200</sup> *Id.* at 685 ¶ 148.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 627, 678 ¶ 123.

<sup>203</sup> *Id.* at 686 ¶ 150.

seventeenth century.<sup>204</sup> Japan's assertion of discovery contradicts its public justification that the island was *terra nullius* at the time of its 1905 annexation. Even if the historical claims of discovery cannot be resolved, Korea has had stronger *effectivités* for most of the island's history. Japan's claims not only contradict themselves, but the available materials suggest that Japan acquiesced to Korean sovereignty before its 1905 seizure of the island.

On the question of discovery, Korean government documents refer to the island now known as Dokdo beginning in the twelfth century C.E. Those documents describe the Silla dynasty's conquest of the island in the sixth century C.E. from the kingdom of Usan, which first discovered and occupied Dokdo, which was then called Usando.<sup>205</sup> Beginning in the fifteenth century, Korean archival documents record the incorporation of the island of Ulleungdo and an accompanying island, which is referred to as "Usando."<sup>206</sup> Korean sources changed the name of the island from Usando to Dokdo. Title passed to the Silla dynasty upon its conquest of Usan, and then passed to the Joseon dynasty, which ruled Korea until the establishment of the Japanese protectorate in 1905.<sup>207</sup>

Japan's affirmative claim to title contradicts its original ground for annexing Dokdo in 1905. According to a Japanese government 2008 white paper, Japan first discovered and claimed sovereignty over the island in the mid-seventeenth century.<sup>208</sup> It contends that any subsequent Korean interaction with the island, such as the 1693 incident with the Korean fisherman brought to Japan, cannot establish control due to the earlier Japanese discovery.<sup>209</sup> In 1905, however, Japan claimed that it could annex Dokdo because it was *terra nullius*.<sup>210</sup> *Terra nullius* requires that the territory have been unknown and unclaimed at the time of annexation, which, even if one accepts Japan's claim that Korea's records of sixth century discovery are mistaken, is still impossible. Japan's 2008 white paper reports Korean activity on Dokdo and official claims to sovereignty before 1905.<sup>211</sup> Japan's *terra nullius* argument must fail at least because Japan has now discarded it.

Japan, however, must come to grips with the much older pedigree of Korean sovereignty. Japan cannot base its claim on an earlier discovery of the island. Instead, it argues that Korea's references to Dokdo are mistaken, either by conjuring a non-existing island or erroneously confusing Ulleungdo for Dokdo.<sup>212</sup> It seeks to take advantage of the lack of Korean maps meeting modern cartographic standards before the arrival of European explorers. Japan's

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<sup>204</sup> Yong-ha, *supra* note 18, at 95–96.

<sup>205</sup> Van Dyke, *supra* note 9, at 165.

<sup>206</sup> See text accompanying notes 18–25.

<sup>207</sup> *Id.*

<sup>208</sup> See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 3.

<sup>209</sup> *Id.* at 5–6.

<sup>210</sup> BYEONG-KIE, *supra* note 23, at 306.

<sup>211</sup> *Id.* at 205–09.

<sup>212</sup> See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 4.



arguments, however, work against its position. Korean maps during this period sought to symbolize the importance of political and cultural relationships of different lands and peoples, rather than to accurately portray geographic details.<sup>213</sup> Despite their inaccuracies, the non-Western maps show two large islands off the east Korean coast. Meanwhile, our survey of maps in European and American libraries indicates that Japanese maps through the middle of the nineteenth century continue to identify the Japanese border as no further northwest than Oki Island.

Ultimately, Japan's arguments about Korean mistakes in cartography prove too much. Japan could reject any opposing argument over any territorial dispute with Korea, China, or, for that matter, any nation in the region, that was not supported by scientific cartographic techniques. Since Western mapping of East Asia did not arrive until the seventeenth century, Japan's approach would undermine any borders drawn before the time of Western exploration. Japan's own borders would suffer from the same flaw. Japan relies on records about Dokdo that were not geographically verified at the time of alleged discovery using modern cartographic techniques. To undermine Korea's claim of discovery and occupation, Japan must do more than simply allege that other countries' borders are illegitimate unless supported by Western cartography.

Of course, as international decisions make clear, historic title without more does not conclusively prove legal possession. Korea must demonstrate open and continuous displays of sovereignty, or *effectivités*. Several seem to exist. Korean archives record Ulleungdo and Dokdo as falling within the administrative jurisdiction of Uljin County.<sup>214</sup> The Joseon dynasty sent regular inspectors to Ulleungdo.<sup>215</sup> From 1416 to 1881, it prohibited Korean citizens from inhabiting the islands, apparently to prevent them from evading Korean laws and to remove them from the reach of Japanese pirates.<sup>216</sup> During this period, no other country, particularly Japan, appears to have contacted Korea to challenge its sovereignty over the islands.

The case for possession here appears even stronger for Korea than it did for the Netherlands in the *Isle of Palmas* arbitration. In the latter, the tribunal observed that the United States might have the stronger case for original title, due to the Spanish cession of the Philippines at the end of the Spanish-American War.<sup>217</sup> But the title remained "inchoate" because neither Spain nor the United States had undertaken any open displays of sovereignty over the island.<sup>218</sup> Even if its original title were doubtful, the Netherlands had engaged in sufficient *effectivités* over the island.<sup>219</sup> Here, by contrast, Korea enjoys an original title that no other nation can contest. No other country claims that it discovered Dokdo

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<sup>213</sup> See JOHN RENNIE SHORT, *KOREA: A CARTOGRAPHIC HISTORY* 4–5 (2012).

<sup>214</sup> BYEONG-KIE, *supra* note 23, at 20.

<sup>215</sup> Hoon Lee, *supra* note 4 at 398 (citing *The Annals of the Dynasty of Choson*).

<sup>216</sup> Van Dyke, *supra* note 9, at 165.

<sup>217</sup> *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 845 (Perm. Ct. Arb. 1928).

<sup>218</sup> *Id.* at 846.

<sup>219</sup> *Id.* at 862–69.

earlier than Korea. Unlike the United States' position in the *Isle of Palmas* case, here there is no earlier or contemporaneous claim of discovery.

Even if another country raised doubt over the original discovery of Dokdo, subsequent actions by Korea would cure inchoate title. These *effectivités* are similar, but more conclusive than those in the *Island of Palmas* case. Even though it had established no permanent or even episodic physical presence on the territory, the Netherlands had taken steps to enforce its laws on Palmas.<sup>220</sup> Of significant relevance to the arbitrator, the Dutch had placed under their suzerainty local leaders who had included Palmas within their boundaries, even though those leaders did not themselves have any permanent outpost on the island.<sup>221</sup> The arbitrator found that Dutch jurisdiction over local governments that claimed sovereignty over the island was sufficient to establish Dutch possession.<sup>222</sup>

Here, Korea incorporated Ulleungdo Island in the sixth century C.E.<sup>223</sup> No other country disputed Korea's discovery or subsequent sovereignty over Ulleungdo. At the time, the Korean government included the second island, Dokdo, within the territory of the principality that it had absorbed.<sup>224</sup> Nevertheless, like Palmas, Dokdo formed part of a larger jurisdiction that indisputably fell within Korea's possession. But unlike the Netherlands' claim over Palmas, Korea did not act indirectly through suzerainty agreements with local princes. Instead, Korea directly exercised sovereignty over the territory. This should render Korea's claim to Dokdo more compelling than the Netherlands' over Palmas. The *effectivités* here merely confirm the validity of the original title.

A critic might respond that Korean displays of sovereignty focus on Ulleungdo, not Dokdo. Japan conceded Korean possession of Ulleungdo in the seventeenth century.<sup>225</sup> Control over Ulleungdo, however, would not extend to Dokdo, which remained uninhabited and hosted no permanent Korean installations. As previous international cases make clear, however, *effectivités* for an isolated island may be more sporadic than for a large landmass.<sup>226</sup> Due to the nature of the land, continual displays in one part of a territory will not amount to a concession over other, more remote portions of the territory to another nation. In *Eastern Greenland*, for example, the ICJ found that Denmark's lack of *effectivités* in eastern Greenland did not render it *terra nullius*.<sup>227</sup> In this case, Denmark's clear discovery of Greenland and its continuous displays of

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<sup>220</sup> *Id.* at 846.

<sup>221</sup> *Id.* at 856.

<sup>222</sup> *Island of Palmas* (Neth v. U.S.), *supra* note 125.

<sup>223</sup> Van Dyke, *supra* note 9, at 165.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 166.

<sup>226</sup> See, e.g., David A. Colson, *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 97 AM. J. INT'L L. 398, 404 (2003).

<sup>227</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at ¶¶ 107-08, 126.

sovereignty in the western part satisfied the test for discovery and occupation.<sup>228</sup> Here, similarly, Korea's title to both Ulleungdo and Dokdo from 512 A.D. and its open, unchallenged displays of sovereignty over the larger island should maintain its possession of the smaller one too.

A critic might also contend that Korea had deliberately abandoned the islands from the fifteenth to the nineteenth centuries, which made them available for occupation by Japan. This claim is not supported by the general understanding of abandonment, which is extremely rare in international law. The history of international law does not support Japan's invocation of *terra nullius* as a justification for the island's annexation by Japan and raises serious doubts about the accuracy and validity of the doctrine as a whole. International law scholars devised the legal principle of *terra nullius* in the eighteenth and nineteenth centuries from the Roman law of possession and its doctrine of *res nullius*,<sup>229</sup> which addressed the question of how to acquire things which belonged to no one. *Res nullius* was often compared with *res communis*, which Roman law defined as a thing that could not be owned by anyone in particular since it belonged to all. These two concepts were part of the general debate on private ownership. International legal scholars, however, later extended their relevance to the delineation of States' sovereignty over unoccupied territory. However, the arguments based on the combination of these separate doctrines were interpreted in favor of a more restrictive conception of States' territorial ambitions.<sup>230</sup>

The Roman doctrine was summarized in the sixth century in the *Institutes*, a legal manual prepared by the commission appointed by the Emperor Justinian to revise and harmonize Roman law.<sup>231</sup> The principle of *terra nullius* was later defined within the broader legal context of the law of nations (*ius gentium*)<sup>232</sup> and adopted in the legal theories of the medieval *ius commune* and the natural law doctrine that provided the foundation for a modern international law in the sixteenth and seventeenth centuries.<sup>233</sup>

It is worth quoting a passage from the *Institutes* on this point:

2.1.12

Wild animals, birds, and fish, the creatures of land, sea, and sky, become the property of the taker as soon as they are caught. Where something has no owner, it is reasonable that the person who takes it should have it. It is immaterial whether

<sup>228</sup> *Id.*

<sup>229</sup> UBALDO ROBBE, LA DIFFERENZA SOSTANZIALE FRA RES NULLIUS E RES NULLIUS IN BONIS E LA DISTINZIONE DELLE RES PSEUDO-MAREIANA 377 (1979).

<sup>230</sup> See generally Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, 38 AUSTRALIAN HIST. STUD. 1 (2007).

<sup>231</sup> JUSTINIAN'S INSTITUTES (Peter Birks & Grant McLeod trans., 1987).

<sup>232</sup> David Boucher, *The Law of Nations and the Doctrine of Terra Nullius*, in WAR, THE STATE AND INTERNATIONAL LAW IN SEVENTEENTH CENTURY EUROPE 63 (Olaf Asbach and Peter Schroder eds., 2010).

<sup>233</sup> Hans W. Blom, *Grotius' res nullius. Ein kosmopolitisher Streit über Eigentum und Allgemeingut*, in RES NULLIUS: ZUR GENEALOGIE UND AKTUALITÄT EINER RECHTSFORMEL 61 (Michael Kempe & Robert Suter eds., 2015).

he catches the wild animal or bird on his own land or someone's else's. Suppose a man enters someone else's land to hunt or to catch birds. If the landowner sees him, he can obviously warn him off. If you catch such an animal it remains yours so long as you keep it under your control. If it escapes your control and recovers its natural liberty, it ceases to be yours. The next taker can have it. It is held to have regained its natural freedom when it is out of your sight or when, though still in sight, it is difficult for you to reach it.

2.1.22

If, as does happen, an island arises in the sea, it vests in the first taker because it has no owner. But when, as commonly happens, an island is formed in a river, if it is in mid stream, it becomes the common property of those with land each side, in shares proportionate to the frontage along the river of each estate; but if it is nearer one side it goes to the owners on that side. If the river turns a man's land into an island by splitting at one point and joining up again lower down, ownership remains unchanged.

2.1.47

The logic of this supports the view that if an owner abandons a thing the property passes straight away to anyone who takes possession of it. The law sees a thing as abandoned when its owner throws it away intending that it shall cease at once to be his property.<sup>234</sup>

This principle of the law of nations (*ius gentium*) recognized “a title to the first occupant of that which had no owner.”<sup>235</sup> Occupation led in turn to possession through the process of acquisitive prescription, which transforms a *de facto* condition into a *de iure* title. In order to be valid, this process required that the thing or land to be taken was not already someone else's property. Absence of good faith resulting from the knowledge that the occupied land already belonged to someone else rendered the prescription null and void.<sup>236</sup> In the Western legal tradition, medieval jurists later expanded the good faith requirement<sup>237</sup> and imposed a much stronger interpretation of this principle. It remained a fundamental component of the doctrine of occupation that international law scholars have developed. As Emmerich de Vattel observed in his commentaries on the law of nations, the slightest suspicion of bad faith would suffice to end any claim of possession.<sup>238</sup> The *terra nullius* doctrine held both objective and subjective requirements: that the acquirer physically occupy the land with the intent to exercise sovereignty, and that it do so in the good faith belief that the land did not belong to another.

The Japanese government's invocation of *terra nullius* to justify the annexation of Dokdo did not meet either of these two requirements. First, Korea

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<sup>234</sup> JUSTINIAN'S INSTITUTES 2.1.12, 2.1.22, 2.1.47 (Peter Birks & Grant McLeod trans., 1987).

<sup>235</sup> EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS], Book I ch. 18, fol. 113 (1775).

<sup>236</sup> Jean le Moine, Glossa ordinaria in Librum Sextum 5.13.2, *non praescribit* at 533 (Rome 1584).

<sup>237</sup> *Id.* (“possessor malae fidei ullo tempore non praescribit.”) (The possessor in bad faith can never acquire through prescription.)

<sup>238</sup> VATTEL, *supra* note 235, at 199.

never abandoned Dokdo. Second, the Japanese government was well aware of Korea's sovereignty in 1905, but instead relied upon the declaration of one witness—who applied for economic exploitation rights in the island—to support the conclusion that Dokdo was abandoned. This conflict undermines the credibility of the Japanese fisherman's testimony and invalidates the whole process. Relying on inaccurate statements creates a strong presumption against Japan claiming possession of Dokdo in good faith. In this case, Japan cannot meet either the objective or subjective requirements of the *terra nullius* doctrine.

The invocation of *terra nullius* by various States to justify land conquest during the era of colonization reinforces this conclusion. The doctrine was used to legally justify the policies of colonial expansion and military conquest by various European States, particularly in Africa.<sup>239</sup> By the end of the nineteenth century and the beginning of the twentieth, *terra nullius* had “become shorthand for the doctrine of occupation,” observes Andrew Fitzmaurice.<sup>240</sup> Any claim based on *terra nullius* amounted not only to a denial of any prior State's sovereign rights but also to an “erasure of prior human presence” on the occupied land.<sup>241</sup> For instance, the British authorities invoked *terra nullius* to justify their annexation of Australia and to reject the rights of its indigenous people.<sup>242</sup> These claims and settlements were based on the fiction that these lands were without owners or were inhabited by people living in a primitive state of nature.<sup>243</sup> In the widely-discussed *Mabo* case,<sup>244</sup> the Australian High Court considered the long history of *terra nullius* and clearly rejected its reasoning.<sup>245</sup> A brief analysis of the events leading to the Japanese decision in 1905 following the violation of Korea's rights in the imposition of the protectorate confirms the understanding that *terra nullius* advanced colonial objectives rather than served as a neutral principle of international law.<sup>246</sup>

As to the objective requirement, Dokdo was not abandoned, or *res derelictae*. Living conditions on the islands made a permanent settlement particularly

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<sup>239</sup> See Laurent Benton & Benjamin Staumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 L. & HISTORY REV. 1 (2010).

<sup>240</sup> ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000 at 302 (2014).

<sup>241</sup> Whitney Bauman, *Creatio Ex Nihilo, Terra Nullius, and the Erasure of Presence*, in ECOSPIRIT: RELIGIONS AND PHILOSOPHIES OF THE EARTH 353, 362 (Laurel Kearns and Catherine Keller eds., 2007).

<sup>242</sup> Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 L. & HIST. REV. 95 (2005).

<sup>243</sup> *Id.*

<sup>244</sup> MICHAEL CONNOR, THE INVENTION OF TERRA NULLIUS: HISTORICAL AND LEGAL FICTIONS ON THE FOUNDATION OF AUSTRALIA, SYDNEY 362 (2005).

<sup>245</sup> *Mabo and Others v. State of Queensland* (1992) 175 C.L.R. 1 (High Ct. Australia). See also ESSAYS ON THE MABO DECISION 212 (1993); Ad Borsboom, *From Terra Nullius to Mabo: Land Rights and Self-Determination in Aboriginal Australia*, in PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT: LAND AND NATURAL RESOURCES IN SOUTHEAST ASIA AND OCEANIA 208, 295 (Toon Van Meijl and Franz Von Benda-Beckmann eds., 1999).

<sup>246</sup> Francis Rey, *La Situation Internationale de la Corée*, in REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 40, 46 (1906).

difficult but intermittent occupation does not imply abandonment of possession. As Carl Friedrich von Savigny confirms in his treatise on possession, “the possession of land continues so long as the power of dealing with it at will is not put an end to, and the constant corporal presence of the possessor . . . is not required for this purpose.”<sup>247</sup> A *res derelictae* is considered abandoned when its owner has the “deliberate intention that it shall no longer be part of his property.”<sup>248</sup> Moreover, the longstanding doctrine of *ius gentium* and natural law always considered that, even in dubious cases, abandonment should not be presumed.<sup>249</sup> Korea never manifested an intention to deliberately abandon its sovereignty over the islands. The fact that Japan made no attempt to inform the Korean government of its 1905 decision to annex the island is particularly troubling, given the well-documented history of prior disputes between the two countries. It is not unreasonable to believe that Japan’s failure to publicly announce the annexation of Dokdo was not merely an oversight but rather, the result of a deliberate decision that bordered on bad faith. The events following this declaration further attest to Japan’s hostile behavior and its use of the fiction of *terra nullius* to justify what was nothing other than a process of conquest.

Japan’s invocation of *terra nullius* has neither factual nor legal standing. The island was neither abandoned nor was the existing owner informed and thus given the possibility to oppose the annexation. Acquisitive prescription could not apply since the possessor did not act in good faith. Korea issued an edict evacuating Ulleungdo from 1416 to 1881 to prevent its citizens from escaping its civil and criminal laws.<sup>250</sup> Japanese fishermen and government officials who visited the island in this period would have found no evidence that it belonged to another country. The absence of civilian establishments, however, cannot convert sovereign territory into *terra nullius*. As international tribunals have made clear as early as the *Isle of Palmas* decision, official actions must not only objectively

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<sup>247</sup> KARL FRIEDRICH VON SAVIGNY, TREATISE ON POSSESSION OR, THE JUS POSSESSIONIS OF THE CIVIL LAW 260 (1848).

<sup>248</sup> JUSTINIAN’S INSTITUTES, *supra* note 231, at 2.1.47; *see also* VATTTEL, *supra* note 235, at Book II, ch. VII, 180 (“Tout ce que le pays renferme appartenant à la nation, et personne autre qu’elle même, . . . ne pouvant en disposer, si elle a laissé dans le pays des lieux incultes et déserts, qui que ce soit ne peut s’en emparer sans son aveu.”) (“And everything included in the country belongs to the nation and as none but the nation . . . if she has left uncultivated and desert places in the country, no person whatever has right to take possession of them without her consent.”).

<sup>249</sup> 1 CHRISTIAN FREIHERR VON WOLFF, INSTITUTIONS DU DROIT DE LA NATURE ET DES GENS, DANS LESQUELLES, PAR UNE CHAÎNE CONTINUE, ON DÉDUIT DE LA NATURE MÊME DE L’HOMME, TOUTES SES OBLIGATIONS ET TOUS SES DROITS 83 (Elie Luzac trans., Leyden, 1772) (“Comme il est certain que les hommes, à moins qu’ils ne soient privés de l’usage de la raison, aiment leurs choses, & ne veulent pas sans sujet, qu’elles soient à un autre; dans les cas douteux *personne n’est présumé jeter sa chose.*”) (“As it is ascertained that people, unless they no longer are able to reason properly, are keen on keeping their possessions and do not want them to be passed on to someone else without good reason, in dubious cases, no one is presumed to be willing to abandon his possession.”); *see also* VATTTEL, *supra* note 235, at Book II ch. XI, 203 (“Il est difficile de fonder une légitime présomption d’abandonnement sur un long silence.”) (“It is difficult to base a legitimate presumption of abandonment on a long silence.”).

<sup>250</sup> Kim, *supra* note 89, at 33.

exercise control over a territory, but they must also be undertaken with the *animus occupandi*, the intention to exercise sovereignty. Similarly, in the unlikely circumstance that a nation wishes to relinquish possession of territory without cession to another, it would have to act with the intention to give up sovereignty.

Indeed, this was exactly the conclusion of the *Clipperton* arbitration. In *Clipperton*, France had discovered the island in 1858, which the arbitrator found to be *terra nullius* at the time.<sup>251</sup> According to the Court, France apparently did nothing on the island until 1887, and a French warship visited in 1897.<sup>252</sup> Even though any other country that landed on the island would have seen no *effectivités* of French control, the Italian King did not find a case of abandonment.<sup>253</sup> The King observed that France had not undertaken any definitive act to return the island to the state of *terra nullius* and that there was no *animus* to abandon present.<sup>254</sup> A long absence of governmental presence does not amount to abandonment of sovereignty, especially over a small island, without an intention to relinquish possession. Here, Korea may have made the sovereign decision to keep Dokdo free from human settlement, but no other nation can show any action that demonstrates Korea's intention to abandon Dokdo.

Another important application of this principle occurred in the *Eastern Greenland* case. International law, the PCIJ observed, must take account of sporadic displays of sovereignty in light of the nature of the territory's environment.<sup>255</sup> In language explicitly relied upon by the ICJ in the *Ligitan and Sipadan* case, the court explained:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.<sup>256</sup>

In the *Ligitan and Sipadan* dispute, "in the case of very small islands which are uninhabited or not permanently inhabited," the ICJ further recognized, "*effectivités* will indeed generally be scarce."<sup>257</sup> The gaps in time between government exercises of authority do not undermine legal title or subsequent control, especially when the island in dispute is inhospitable.

Application of the principle from *Eastern Greenland* and *Ligitan and Sipadan* to this case works in Korea's favor. Dokdo is a small island. Its harsh environment and distance from the mainland make permanent settlement difficult.

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<sup>251</sup> *Clipperton Arbitration*, *supra* note 149, at 390.

<sup>252</sup> *Id.* at 391–92.

<sup>253</sup> *Id.* at 394.

<sup>254</sup> *Id.*

<sup>255</sup> *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at 46.

<sup>256</sup> *Id.*

<sup>257</sup> Colson, *supra* note 226, at 404.

International law, as international tribunals have developed, does not require a permanent, systematic presence on Dokdo to maintain Korean sovereignty. The small size and difficult environment reduces the number and intensity of displays of authority necessary to maintain possession by the Korean government. However, the absence of continuous physical actions of Korea does not show abandonment.

Japan argues that the long absence of Korean activity on the island shows either that Korea never found the island or that it never intended to occupy it. But Korea's explicit prohibition on travel to the islands shows the opposite. It demonstrates Korea's exercise of regulatory and legislative authority over Ulleungdo and Dokdo. Prohibiting civilians from living on the islands and exploiting their natural resources requires a greater exercise of coercive public authority than simply allowing unrestricted travel. The ICJ made a similar point in the *Eastern Greenland* case. The court accepted Norway's claim that Denmark had not undertaken any public or private activity in Eastern Greenland.<sup>258</sup> Nevertheless, the court found that the absence of activity in the eastern half of the island did not reflect Danish action and intention to abandon the territory.<sup>259</sup> Instead, the lack of activity resulted in part from the Danish restrictions on trade and commerce and in part from the long distance and difficult conditions there. The court concluded that the exercise of sovereign authority by Denmark had produced an absence of activity.

Any absence of human activity on Dokdo during the fifteenth to nineteenth centuries results from a similar exercise of sovereignty as that in Greenland, which should give similar dispositive weight to Korea's claim to Dokdo. Korea prohibited its citizens from traveling to Ulleungdo and Dokdo to prevent them from escaping Korean law. Korea's prohibition on its own citizens from establishing homes or businesses on Ulleungdo and Dokdo amounts to *effectivités* on par with the dispositive actions of Denmark in Eastern Greenland. Although Japanese visitors might have concluded that the islands were *terra nullius*, the absence of people in Ulleungdo and Dokdo was instead a result from the valid exercise of Korean sovereignty.

Indeed, a legal rule stating that a prohibition on settlement constitutes an *animus* and act of abandonment would run contrary to recognized and legitimate uses of property. Nations may wish to keep territory free of permanent installations for a variety of reasons, such as preventing their citizens from settling in dangerous locations, improving the environment, preserving endangered species, or protecting national security. International tribunals have recognized that preservation of the environment itself constitutes a sign of sovereign control over territory. In the *Ligitan and Sipadan* case, for example, the ICJ found that Malaysia had engaged in a dispositive display of sovereignty by limiting the collection of turtle eggs on disputed islands, creating a licensing system for fishing

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<sup>258</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at 184–85.

<sup>259</sup> *Id.*



in the waters nearby, and establishing a bird sanctuary.<sup>260</sup> Rather than finding abandonment, the ICJ found these efforts to preserve the natural environment to “show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.”<sup>261</sup>

Official Korean maps from this period support Korea’s claim to administrative control over Dokdo. In previous decisions, such as the *Isle of Palmas*, *Gulf of Fonseca*, and *Ligitan and Sipadan* cases, international tribunals have turned to maps as evidence of possession, as demonstrating both a will to possess and a record of the act of possession itself. The most dispositive weight comes in a treaty of cession or one that resolves a territorial dispute, which would prove title. But even where title remains in doubt, maps can help to provide evidence of *effectivités*. International tribunals, particularly those in the *Isle of Palmas* arbitration and the *Ligitan and Sipadan* case, rely on maps to show the extension of government administration and the *animus* to occupy territory. It is worth quoting in full the opinion of the ICJ in the 1986 *Frontier Disputes* case between Burkina Faso and the Republic of Mali, which the court explicitly relied upon in the later *Ligitan and Sipadan* case:

[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.<sup>262</sup>

As this passage makes clear, maps may show the “physical expressions of the will of the State” to extend its sovereignty over a territory even if they do not result from a treaty or mutual agreement between Korea and Japan.

In 1531, Korean authorities published an atlas of their nation, which included a map of the nation’s eight provinces.<sup>263</sup> This atlas itself was derived from a map first drawn up under the reign of King Sejong (ruled 1418–1450). Known as the *Paldo Chongdo*, the atlas shows two large islands off the east coast of Korea. One of them is designated as Ulleungdo and one as Usando, which would later come to be named Dokdo. The map, however, does not employ Western cartographic techniques, and so the relative sizes of different geographic features are distorted

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<sup>260</sup> Colson, *supra* note 226, at 403–04.

<sup>261</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, ¶ 148 (Dec. 17).

<sup>262</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554 (Dec. 22).

<sup>263</sup> See NA, *supra* note 93, at 18.

and the positions of the two islands are reversed. A second map from 1463, known as the *Dongguk Jido*, also records the two islands off Korea's east coast—though again, because of inaccurate measures, the map depicts the island much closer to the mainland than they are in reality. Similar maps during this period repeat this portrayal of Ulleungdo and Usando as falling within Korean territorial limits, but with their positions reversed and much closer to shore. These include the *Honilgangli Yeokdae Gukdo Jido*, a comprehensive map of the world and the nation's successive capitals, from 1402, and the *Cheonha Daechon Illa Jido* dating from sometime in the seventeenth century.<sup>264</sup> Nevertheless, these maps include the two islands within the territorial jurisdiction of Korea at a time when no Japanese authorities made any claim to the island.

Another important factor to support a claim of possession based on an inchoate or disputed title and subsequent control is whether other nations have acquiesced to a claim of sovereignty. International courts and tribunals have regularly found evidence of acceptance or even silence in the face of another country's exercise of sovereignty to be virtually dispositive in territorial disputes. In *Isle of Palmas*, for example, the arbitral tribunal found highly significant that neither the United States nor any other power had contested the Dutch acts of control over the island in dispute.<sup>265</sup> This served as important support for the exclusive display of Dutch sovereignty.<sup>266</sup> Judge Huber declared that his award of the island to the Netherlands:

[M]ust impose itself with still greater force if there be taken into consideration . . . all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which . . . may be regarded as sufficiently proving the existence of Netherlands sovereignty.<sup>267</sup>

Another example arose in the dispute between Malaysia and Indonesia over Ligitan and Sipadan Islands. After rehearsing the *effectivités* undertaken by Malaysia over the two small islands in dispute, the ICJ observed that it “cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.”<sup>268</sup>

Signs of acquiescence, however, cannot support the acquisition of territory by prescription. Rather, they show acceptance of the first nation's claim to original title because they reflect the second nation's understanding that it has no competing legal right. Even if title remains inchoate, acquiescence can also

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<sup>264</sup> See MINISTRY OF FOREIGN AFFAIRS AND TRADE TREATIES BUREAU, DOKDO AND OLD MAPS 8–11 (2006).

<sup>265</sup> See *Island of Palmas (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 829, 870–71 (Perm. Ct. Arb. 1928).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 912.

<sup>268</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, Judgment, 2002 I.C.J. 625, ¶ 148 (Dec. 17).

demonstrate that occupation of a territory has been continuous and peaceful. In *Eastern Greenland*, for example, the court found that Denmark's claim to all of Greenland, combined with the inaccessibility of the eastern part of the island, and "the absence of any claim to sovereignty by another power" was sufficient to give Denmark "a valid claim to sovereignty."<sup>269</sup> As a result, the court observed the King of Denmark's "rights over Greenland were not limited to the colonized area."<sup>270</sup>

Here, Japanese acquiescence to Korean sovereignty over Dokdo occurred in the seventeenth century. In 1693, Japanese and Korean fishermen fought over fishing rights around Ulleungdo and Dokdo.<sup>271</sup> Japanese parties sought a judgment from the Japanese government, which decided that Ulleungdo constituted Korean territory and forbade Japanese fishermen from the island.<sup>272</sup> It appears that the Japanese government recognized that Dokdo was part of Ulleungdo. The Japanese Government today disputes whether the Japanese government included Dokdo within the ban on fishing by its nationals.<sup>273</sup> But the important implication of this incident is that the Japanese government did not make a claim of its own to possession of Dokdo, nor did it contest Korean jurisdiction over the island. At best, historical ambiguity may surround how far Japan's limitations on its own citizens ran during this period, but Japan's historical records do not register any disagreement or protest—not to mention extension of sovereignty—by Japan in regard to the island.<sup>274</sup> Instead, it appears that the Japanese government maintained its ban on fishing around the islands until at least 1877. In 1877, in response to a request from Shimane province to include Ulleungdo and Dokdo in the local land registry, the Meiji government stated: "Re Takeshima and another island, it is understood that our country has nothing to do with them."<sup>275</sup> At this time, the Japanese government referred to Ulleungdo as Takeshima; the phrase "another island" must refer to Dokdo. Both the 1693 and 1877 events show that Japan neither sought to extend its own borders to include Dokdo nor challenged Korea's continuing claim to possession. Japan's acquiescence in Korean displays of sovereignty on Dokdo provides powerful support to Korea's original title and its record of *effectivités*.

Japan does not make an affirmative claim to Dokdo through historic discovery and occupation. Instead, Japan raises doubt that the Korean official documents do not refer to Dokdo but a smaller island that rests one mile from

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<sup>269</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, ¶ 115.

<sup>270</sup> *Id.*

<sup>271</sup> See NA, *supra* note 93, at 16.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 16–17.

<sup>274</sup> See Lee, *supra* note 4 (providing facts of this historical dispute); Yong-Ha Shin, *A Historical Study of Korea's Title to Tokdo*, 28 KOREA OBSERVER 333 (1997). The Japanese version of events appears in Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 423 (1997).

<sup>275</sup> Myung Chul Hyun, *The Japanese Perception of Tokdo During the Opening of Ports*, 29 KOREA OBSERVER 93 (1998).

Ulleungdo. Only by claiming that Korea had neither discovered nor occupied Dokdo can the Japanese government claim to have discovered Dokdo before Korea did. Japan supports its position by claiming that Japanese fishermen at various times made use of the islands, and that the Korean government had abandoned the islands in the fifteenth century. Japan allowed fishermen to fish around Dokdo and in the nineteenth century, authorized the taking of animals on the island, such as sea lions.<sup>276</sup>

Japan's claims to contact with Dokdo from the seventeenth through nineteenth centuries can only support a claim of prescription. Those claims, however, show intermittent—rather than continuous—displays of control. Until the Russo-Japanese War, the Japanese government did not build any facilities on Dokdo.<sup>277</sup> It did not regularly send government officials nor attempt to enforce its laws on Dokdo.<sup>278</sup> Allowing private citizens to periodically fish off the island does not rise to the level of sovereignty set out in the *Minquiers and Ecrehos* decision. Even if the Japanese government could show continuous displays of control, it has not produced any definitive example of acquiescence by the Korean government during the period when it claims to have administered Dokdo. In fact, during the same period in dispute, Korean archival documents appear to report that the Korean government still considered Dokdo its sovereign territory and that it resisted any Japanese activity on the island.<sup>279</sup>

Prescription is difficult to prove. Indeed, it is arguable that no international tribunal has ever upheld a clear claim of acquisition of territory on that ground. Japan has produced no reliable legal renunciation of possession of Dokdo by Korea. As international courts have observed, occupation need not be continuous, particularly when it involves islands or inaccessible territory. By its own account, Japan took no measures to show intent of establishing sovereignty. Indeed, such arguments contradict its claim of *terra nullius* when it annexed the island in 1905.

Events in the twentieth century provide the true basis for any Japanese claim to Dokdo. After the Russo-Japanese War broke out on February 8, 1904, Japan took a number of steps to establish sovereignty over Korea. On February 23, Japan imposed a series of agreements upon Korea that allowed the presence of Japanese troops on Korean soil and required Korea to consult with Japanese officials on all matters of foreign affairs and finance.<sup>280</sup> Japanese officials quickly assumed authority in other Korean ministries as well, such as police, defense, education, and the royal household.<sup>281</sup> Because the seas between Korea and Japan assumed strategic importance in the naval struggle with Russia, Japan built observation

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<sup>276</sup> See Kanae Taijudo, *The Dispute Between Japan and Korea Respecting Sovereignty Over Takeshima*, 12 JAPANESE ANN. INT'L L. 1 (1968).

<sup>277</sup> See Yong-ha, *supra* note 18, at 130.

<sup>278</sup> See Van Dyke, *supra* note 9, at 175; see also Hori, *supra* note 92, at 511–23.

<sup>279</sup> Hori, *supra* note 92, at 479–88, 504–10.

<sup>280</sup> See KIM, *supra* note 89, at 71.

<sup>281</sup> See NA, *supra* note 93, at 41–42 n.141.

posts on Ulleungdo and Dokdo.<sup>282</sup> In January 1905, the Japanese government decided to incorporate Dokdo as *terra nullius* because it claimed no other nation had occupied the island.<sup>283</sup> Japan officially incorporated the island into one of its prefectures, which Japan claims to have maintained until the end of World War II.<sup>284</sup> After the end of the Russo-Japanese War in September 1905, Russia, Great Britain, and the United States entered agreements with Japan that recognized Japan's effective control over Korea.<sup>285</sup> At the same time, Japan imposed a treaty upon Korea forcing it to give up its foreign affairs to the control of a Japanese resident-general and making Korea a virtual Japanese protectorate.<sup>286</sup>

These 1904 and 1905 agreements prevented Korea from effectively challenging Japan's annexation of Dokdo as a violation of its territorial rights, because the power to direct Korean foreign affairs formally passed to Japan. This was a prelude to Japan's outright annexation of the entire Korean peninsula. In 1907, it imposed a treaty on Korea that required the approval of the Japanese resident-general for domestic laws, administration, and appointments.<sup>287</sup> In 1910, Japan forced the sitting Emperor of Korea to sign a treaty of cession that annexed the kingdom to Japan.<sup>288</sup> Debate continues over whether the Japan-Korea Treaty of 1910 was legal under the international law of its day.<sup>289</sup> If it is legal, it would have vested Japan with title over Dokdo even without the 1905 claim of *terra nullius*.

Regardless of the legality of the 1910 Treaty, however, the results of World War II completely voided the annexation of Korea. The Allies pursued the explicit goal of setting Korea free. In the 1943 Cairo Declaration, the United States, Great Britain and China declared that they were "fighting this war to restrain and punish the aggression of Japan."<sup>290</sup> As a result, "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914."<sup>291</sup> Although this text might be thought to exclude Dokdo, which Japan seized in 1904, the Allies went further. The Cairo Declaration stated: "Japan will also be expelled from all other territories which she has taken by violence and greed."<sup>292</sup> The great powers remained "mindful of the enslavement of the people of Korea" and made clear that they were "determined that in due course Korea shall become free and independent."<sup>293</sup> Cairo made clear that the

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<sup>282</sup> See *id.* at 57–59.

<sup>283</sup> See *id.* at 66–67.

<sup>284</sup> See Kanae Taijudo, *supra* note 276, at 7; see also Van Dyke, *supra* note 9, at 158, 194.

<sup>285</sup> Van Dyke, *supra* note 9, at 176–77.

<sup>286</sup> See *id.* at 177 (quoting text of 1905 agreement).

<sup>287</sup> *Id.*

<sup>288</sup> See Editorial, *The Annexation of Korea to Japan*, 4 AM. J. INT'L L. 923, 923–25 (1910).

<sup>289</sup> See, e.g., Van Dyke, *supra* note 9, at 178–79; Pedrozo, *supra* note 119, at 89–90.

<sup>290</sup> Van Dyke, *supra* note 9, at 181.

<sup>291</sup> *Id.* at 181; Sibbett, *supra* note 101, at 1637 n.196.

<sup>292</sup> Van Dyke, *supra* note 9, at 181.

<sup>293</sup> *Id.*

World War II Allies sought to reverse Japanese territorial gains from its period of imperial expansion, which began at least as early as the first Sino-Japanese War and the cessions in the resulting 1895 Treaty of Shimonoseki. Japan's annexation of Dokdo, of course, post-dates the Treaty of Shimonoseki and falls within the Cairo Declaration's reference to territories "taken by violence and greed."<sup>294</sup>

At the Potsdam Conference in July 1945, the Allies met to decide on the policies to finish the war against Japan. The Allies reaffirmed the principles of the Cairo Declaration and further declared: "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Shikoku, and such minor islands as we determine."<sup>295</sup> Both the Cairo Declaration and the Potsdam Declaration might be thought to represent nothing more than war aims, rather than binding international law. However, in signing the Instrument of Surrender on September 2, 1945, Japan agreed to "accept the provisions set forth in the declaration issued" by the Allies at Potsdam, to "carry out the provisions of the Potsdam Declaration in good faith," and to obey the orders of the Supreme Allied Commander "for the purpose of giving effect to that Declaration."<sup>296</sup>

Japan's signing of the Instrument of Surrender legally overturned the annexation of Korea and reversed Japan's territorial gains in East Asia. There is no indication in the Instrument of Surrender, which incorporated the past declarations about postwar policy toward Japan, that the Allies intended to exclude Dokdo from the general policy of returning Asia to the territorial *status quo* that prevailed before Japan's imperial aggression. As Supreme Commander for the Allied Powers in Japan, General Douglas MacArthur issued instructions that placed Dokdo outside of Japanese security and economic boundaries.<sup>297</sup> Debate continues over whether the 1951 Treaty of San Francisco, which formally ended the war with Japan, included Dokdo in its return of territory to Korea.<sup>298</sup> Article 2(a) of the Treaty declared: "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet."<sup>299</sup> The Treaty does not include Dokdo in its list of islands to return to Korea; however, it also does not provide an exhaustive and exclusive list of all territory returned to Korea. The fact that Article 2(a) lists "Quelpart, Port Hamilton and Dagelet" is best read as illustrative and inclusive. An exclusive list would have used explicit language such as "including only the islands of Quelpart, Port Hamilton and Dagelet."

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<sup>294</sup> See *id.*; see also NA, *supra* note 93, at 26.

<sup>295</sup> Lee, *supra* note 11, at 93.

<sup>296</sup> Instrument of Surrender, Sept. 2, 1945, Records of the U.S. Joint Chiefs of Staff, Record Group 218, National Archives, <https://www.archives.gov/files/historical-docs/doc-content/images/ww2-surrender-japan.pdf>.

<sup>297</sup> Van Dyke, *supra* note 9, at 183; see also *Occupation and Reconstruction of Japan, 1945-1952*, OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1945-1952/japan-reconstruction>.

<sup>298</sup> See, e.g., Van Dyke, *supra* note 9, at 183-84; Byungjoon, *supra* note 115, at 7-9; Castellino & Redondo, *supra* note 109, at 555-60.

<sup>299</sup> Van Dyke, *supra* note 9, at 183.

The drafting history of the San Francisco Treaty provides inconsistent evidence. Several earlier versions had included Dokdo explicitly as part of Korean territory, while others had specifically excluded it.<sup>300</sup> Standing alone, these differing drafts would not conclusively reveal an intention that could overcome any ambiguity in the treaty text. An important piece of the negotiating record, however, rests in the archives of the United States government. In response to a request by the Korean government that the Peace Treaty specifically include Dokdo in the territory to be returned from Japan, Dean Rusk, Assistant Secretary of State, stated, “As regards the island of Dokdo, otherwise known as Takeshima or Liancourt Rocks, this normally uninhabited rock formation was according to our information never treated as part of Korea and, since about 1905, has been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan. The island does not appear ever before to have been claimed by Korea.”<sup>301</sup> Although founded on mistaken information, Dean Rusk’s letter might support an inference that the silence on Dokdo in Article 2(a) of the Treaty implied its retention by Japan. Rusk’s letter, however, was sent only to Korea, which did not even negotiate or sign the San Francisco Treaty, and not to the multiple parties to the agreement.<sup>302</sup> Further historical research in official US archives will help determine whether Rusk’s letter represented the final American understanding of the treaty and the information communicated to the other parties of the multilateral treaty.

Regardless of the implications of these *travaux préparatoires*, there are two possible interpretations of Article 2(a) of the 1951 Treaty. First, the text of the treaty contains a broad understanding of the territory that Japan had to return to Korea. This approach would be consistent with the objectives of the Cairo and Potsdam Declarations. Second, the treaty does not include Dokdo in the list of territory that Japan had to return. If the former interpretation holds, then the question of Dokdo’s current status becomes clear—the Allies and Japan agreed to return the island to Korea. If the second reading prevails, then the treaty returns the analysis to the question whether the Japanese 1905 annexation of Dokdo was valid under international law. The effect of the second alternative is simply to eliminate the effect of the 1910 annexation of Korea and Japan’s other imperial gains of territory up through World War II. Our analysis indicates that the 1905 annexation violated international law because Dokdo was not *terra nullius*, due to Korea’s original discovery and long occupation of the island.

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<sup>300</sup> McDevitt, *supra* note 16, at 16 n.1.

<sup>301</sup> Letter from Dean Rusk, Assistant Sec’y, U.S. Dep’t of State, to Dr. You Chan Yang, Ambassador of S. Kor. (August 10, 1951).

<sup>302</sup> *See id.*

## CONCLUSION

This Article seeks to contribute to solving the Korea-Japan territorial dispute in three ways. First, it brings forward evidence from the maps held at various archives in the United States and Western Europe to determine the historical opinions of experts and governments about the possession of Dokdo. Second, it clarifies the factors that have guided international tribunals in their resolution of earlier disputes involving islands and maritime territory. Third, it argues that the claim of *terra nullius* has little legitimacy when applied to East Asia, an area where empires, kingdoms, and nation-states had long exercised control over territory.

Resolution of this dispute between Korea and Japan is important for several reasons. First, it could end a dispute between allies at a time of instability in East Asia. With Dokdo and other disputes behind them, Korea and Japan could engage in cooperation at a political level that could match their already deep ties in the economic sphere. Second, resolution of the dispute could help clarify the international law applicable to other territorial disputes in the region. China and Japan currently disagree over the possession of the Diaoyu/Senkaku Islands, Japan and Russia have not resolved islands seized by the Soviet Union at the end of World War II, and China has laid a claim to broad swaths of maritime territory in the South China Sea, which the Philippines and Vietnam also claim, among many others. Left unresolved, these disputes could cause further discord in the region. By showing that the facts and international law weigh heavily on Korea's side, this Article hopes to contribute to a peaceful resolution of at least one of these disputes.