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## Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea

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## **Abstract**

This Note analyzes Japan's and the Republic of Korea's competing claims to Liancourt in light of traditional public international law, specifically the 1982 Convention and customary law found in past decisions by the International Court of Justice ("ICJ") and arbitral bodies (collectively "international adjudicatory bodies"). Part I of this Note provides not only a brief historical overview on Japanese-Korean relations, but also a detailed review of relevant public international law. It outlines important provisions of the 1982 Convention, discusses widely-recognized means of territorial acquisition, and summarizes relevant decisions of international adjudicatory bodies. Part II examines each country's claim to Liancourt. The third and final part argues that according to current public international law, the Republic of Korea establishes a superior claim to Liancourt than does Japan. Accordingly, this Note concludes that the Republic of Korea should become Liancourt's sovereign.

# TOKDO OR TAKESHIMA? THE TERRITORIAL DISPUTE BETWEEN JAPAN AND THE REPUBLIC OF KOREA

*Benjamin K. Sibbett\**

"Rarely have the tempers of ostensible allies flared so greatly over such insignificant real estate."<sup>1</sup>

## INTRODUCTION

With the introduction of the 1982 United Nations Convention on the Law of the Sea<sup>2</sup> ("UNCLOS III" or "1982 Conven-

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1. *Islets Issue Must Be Put Back on Shelf*, MAINICHI DAILY NEWS, Feb. 29, 1996, § Asia Focus, at 11.

2. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS III]. The first United Nations Convention on the Law of the Sea convened in 1958 in Geneva, Switzerland and resulted in the following four conventions ("1958 Conventions"): 1) the Convention on the Territorial Sea and the Contiguous Zone, 2) the Convention on the High Seas, 3) the Convention on Fishing and Conservation of the Living Resources of the High Seas, and 4) the Convention on the Continental Shelf. *See, e.g.*, D.C. KAPOOR & ADAM J. KERR, A GUIDE TO MARITIME BOUNDARY DELIMITATION 5-6 (1986) (summarizing history of international community efforts to codify law of sea including attempts by League of Nations, Hague Conference of 1930, International Law Commission, and first United Nations Convention on Law of Sea that resulted in 1958 Conventions); Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. As of December 31, 1996, the status of the 1958 Conventions was as follows: Convention on the Territorial Sea and Contiguous Zone, 42 Signatories and 51 Parties (in force); Convention on the High Seas, 47 Signatories and 62 Parties (in force); Convention on Fishing and Conservation of Living Resources of the High Seas, 36 Signatories and 37 Parties (in force); and the Convention on the Continental Shelf, 44 Signatories and 57 Parties (in force). MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS OF 31 DECEMBER 1996 801, 807, 813, 815 (1997) [hereinafter MULTILATERAL TREATIES]; TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1997 394-95, 366 (1997). The second United Nations Convention on the Law of the Sea convened in 1960 but failed by one vote. *See, e.g.*, KAPOOR & KERR, *supra* at 6 (noting that second Convention on Law of Sea attempted to clarify issues left unresolved by 1958 Conventions regarding, *inter alia*, breadth of territorial sea and fisheries zone). Finally, the third United Nations Convention on the Law of the Sea opened for signature on December 10, 1982. *See id.* at 7-8 (tracing efforts since 1960 Convention, largely motivated by newly-independent states that felt compelled by 1958 Conventions to which they did not consent, to compile comprehensive review of law of sea that resulted in UNCLOS III's first conference in 1973).

tion”), sovereignty<sup>3</sup> over offshore territory<sup>4</sup> has become increasingly important.<sup>5</sup> Parties to UNCLOS III are entitled to as much as 200 nautical miles<sup>6</sup> of various maritime and jurisdictional exclusivity.<sup>7</sup> Moreover, states that have established sovereignty over

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UNCLOS III prevails over the 1958 Conventions. See UNCLOS III, *supra* note 2, art. 311(1), 21 I.L.M. at 1327 (providing that [“t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.”). UNCLOS III signatories, however, are free to make agreements modifying the 1982 Convention as it relates to their bilateral relations. *Id.* art. 311(3), 21 I.L.M. at 1327. In addition, UNCLOS III does not alter signatories’ rights and obligations arising from other agreements compatible with UNCLOS III as long as the agreements do not affect other signatories’ enjoyment of their rights and obligations under UNCLOS III. *Id.* art. 311(2), 21 I.L.M. at 1327.

3. See, e.g., *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Apr. 4, 1928) [hereinafter *Island of Palmas*] (stating that “sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State.”). In *Island of Palmas*, the Permanent Court of Arbitration (“PCA”) explained that sovereignty signifies independence in relation to other states and that this independence gives the sovereign the right to exercise state functions to the exclusion of any other state. *Id.* As regards territorial sovereignty, the PCA stated:

Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.

*Id.*

4. See, e.g., HIRAN W. JAYWARDENE, *THE REGIME OF ISLANDS IN INTERNATIONAL LAW*, xxi (1990) (listing features like islands, islets, rocks, shoals, reefs, low-tide elevations, atolls, archipelagos, and artificial islands).

5. Compare Convention on the Territorial Sea and Contiguous Zone, *supra* note 2, art. 10, 15 U.S.T. at 1609-10, 516 U.N.T.S. at 212 (failing to grant any maritime jurisdiction to offshore territory except island entitlement to territorial sea), with UNCLOS III, *supra* note 2, arts. 55-8, 121, 21 I.L.M. at 1280, 1291 (granting maritime jurisdiction in form of territorial sea, contiguous zone, and exclusive economic zone to islands and, in some cases, rocks).

6. See WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1198 (2d ed. 1983) (defining nautical mile as “unit of linear measure for ships and aircraft, equal to . . . about 6,080 ft.”); INTERNATIONAL LAW 979, n.2 (Barry E. Carter & Phillip R. Trimble eds., 2d ed. 1995) (stating that one nautical mile equals 1.151 miles); RANDOM HOUSE WEBSTER’S DICTIONARY 440 (1993) (setting forth that one nautical mile is equal to 1.852 kilometers).

7. See UNCLOS III, *supra* note 2, arts. 2-33, 55-75, 21 I.L.M. at 1272-76, 1280-84 (governing territorial sea, contiguous zone, and exclusive economic zone). Maritime or jurisdictional exclusivity refers to the rights, jurisdiction, and duties of states in the territorial sea, contiguous zone, and exclusive economic zone (“EEZ”). See *id.* (defining states’ rights, jurisdictions, and duties such as administering passage of ships and exploring, exploiting, conserving, and managing living and non-living natural resources).

UNCLOS III defines the territorial sea as follows:

1. The sovereignty of a coastal State extends, beyond its land territory and

offshore territory may be entitled to additional exclusivity.<sup>8</sup> As a result, the outcome of maritime boundary disputes often depends on the ownership and classification of such features as an island or a rock.<sup>9</sup>

Disputes over offshore territory in Central East Asia are ubiquitous<sup>10</sup> and have proven difficult to resolve.<sup>11</sup> Surrounded

internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

*Id.* art. 2, 21 I.L.M. at 1272. The territorial sea may not exceed 12 nautical miles. *Id.* art. 3, 21 I.L.M. at 1272.

UNCLOS III defines the contiguous zone as follows:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
  - (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
  - (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

*Id.* art. 33, 21 I.L.M. at 1276.

UNCLOS III defines an EEZ as "an area beyond and adjacent to the territorial sea . . . ." *Id.* art. 55, 21 I.L.M. at 1280. EEZs provide coastal states with various sovereign rights over living and non-living resources. *Id.* arts. 56-7, 21 I.L.M. at 1280 (defining EEZ breadth as no greater than 200 nautical miles and outlining coastal state rights, jurisdiction, and duties such as protecting and preserving marine environment). The EEZ originated in two previous concepts—the continental shelf regime and fisheries regime. *See e.g.*, Convention on the Continental Shelf, *supra* note 2, arts. 1-3, 15 U.S.T. at 473, 499 U.N.T.S. at 312-14 (recognizing coastal state sovereignty over natural resources of continental shelf such as "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species . . ."); Convention on the Territorial Sea and the Contiguous Zone, *supra* note 2 arts. 1-2, 15 U.S.T. at 1608, 516 U.N.T.S. at 206-08 (granting coastal states sovereignty over territorial sea although breadth was undefined); Convention on the High Seas, *supra* note 2, art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-84 (defining freedom of high seas to include freedom of fishing); Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 2, art. 1, 17 U.S.T. at 140, 559 U.N.T.S. at 286-88 (recognizing states' rights to engage in fishing high seas).

8. *See* UNCLOS III, *supra* note 2, art. 121(2), 21 I.L.M. at 1291 (setting forth that "[e]xcept as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.").

9. *See, e.g.*, Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 727-29 (1995) (discussing impact of offshore territory on maritime boundaries in East Asian Sea although territories are often relatively small).

10. *See, e.g.*, Kendrick F. Royer, Note, *Japan's East China Sea Ocean Boundaries: What*

by eleven nations, Central East Asia's seas are relatively small.<sup>12</sup> History has shown the area to be an ambitious arena for competing claims to offshore sovereignty.<sup>13</sup> Japan's dispute with the Republic of Korea concerning the Liancourt Rocks<sup>14</sup> ("Liancourt")

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*Solutions Can a Confused Legal Environment Provide in a Complex Boundary Dispute?*, 22 VAND. J. TRANSNAT'L L. 581, 585-96 (1989) (describing and addressing situation in East China Sea regarding various boundary disputes between Japan, China, Taiwan, and South Korea concerning, for example, continental shelf, Senkaku islands, Danjo Gunto and Tori Shima islands, and Ryukyu islands).

11. See, e.g., 8 L. SEA INST. WORKSHOP 3 (1987) [hereinafter WORKSHOP] (discussing different legal problems of implementing UNCLOS III in East Asian disputes); see also Charney, *supra* note 9, at 725 (mentioning generality and indeterminate nature of UNCLOS III articles and consequent difficulty in its application).

12. See, e.g., Charney, *supra* note 9, at 724 (describing Central East Asia as area encompassing South China Sea, East China Sea, Sea of Japan, and Yellow Sea, that is surrounded by People's Republic of China, Taiwan (Republic of China), Japan, North and South Korea, Philippines, Indonesia, Vietnam, Malaysia, Brunei, and Russia).

13. See Choon-ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources*, 5 OCEAN DEV. & INT'L L.J. 27 (1978) (concentrating on Spratly Islands dispute between People's Republic of China, Vietnam, Taiwan, Malaysia, Brunei, and Philippines concerning chain of small islets, rocks, reefs, and atolls in South China Sea that are coveted for possible mineral and petroleum reserves). Additional disputed areas include the Paracel Islands (Xisha) in the South China Sea that are claimed by China, Taiwan, and Vietnam; the Kuril (Northern) Islands in Sea of Japan that are claimed by Japan and Russia; and the Senkaku (Dioayuta, Tiao-yu-tai) Islands (Gunto) in the East China Sea. See Charney, *supra* note 9, at 725-28 (arguing that UNCLOS III, changes in political relations between littoral states, and advancement of international maritime boundary law have all impacted maritime boundary delimitation in Central East Asia).

14. See, e.g., Kazuo Hori, *Japan's Incorporation of Takeshima into Its Territory in 1905*, 28 KOREA OBSERVER 477, 488 (1997) (stating that French vessel renamed Takeshima/Tokdo in 1849 calling it Liancourt); Yong-Ha Shin, *A Historical Study of Korea's Title to Tokdo*, 28 KOREA OBSERVER 333, 348 (1997) (maintaining that French warship named Liancourt christened Takeshima/Tokdo Liancourt Rocks in 1849).

Japan describes Liancourt as "a pair of islands and numerous small reefs in the surrounding water 85 nautical miles northwest of the Oki Island, Shimane Prefecture. The combined area of the two main islands, the East Island (Onnajima) and the West Island (Otokojima), at 0.23 square kilometers is just about the size of the Hibiya Park in Tokyo." *Takeshima*, Document Received from the Japanese Mission to the United Nations, New York, N.Y. (Feb. 6, 1998) (on file with the *Fordham International Law Journal*); see *Japan Protests to Seoul at Construction on Island*, REUTERS WORLD SERVICE, Nov. 1, 1996, BC Cycle (stating that Liancourt has total area of approximately 58 acres); WORKSHOP, *supra* note 11, at 138 (noting Liancourt's location as west of Republic of Korea and north of southern-most portion of Japanese island Honshu); Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 423, 433 (1997) (maintaining that Liancourt's location as approximately 131° east longitude and roughly 37° north latitude). The Republic of Korea states, "Tokdo comprises two main islets, Tongdo on the east and Sodo on the west. Tongdo is 99.4 meters above sea level and Sodo, 174 meters. Including a reef, Tokdo's total area is 186,173 square meters." TAEJEONG KIM, KOREAN OVERSEAS INFORMATION SERVICE, WILD FLOWERS OF TOKDO ISLAND, KOREA 8 (1996). By analogy, Liancourt is approximately half the size of Vatican City in Southern Europe.

in the Sea of Japan<sup>15</sup> exemplifies one such claim.<sup>16</sup>

In early 1996, the Republic of Korea's foreign ministry announced that Liancourt had always belonged to the Republic of Korea.<sup>17</sup> In June 1997, Japan's foreign ministry countered that Liancourt belonged, and had always belonged, to Japan.<sup>18</sup> This Note analyzes these two countries' competing claims to Liancourt in light of traditional public international law, specifically the 1982 Convention and customary law<sup>19</sup> found in past de-

*See Holy See (Vatican City)* (visited Mar. 10, 1998) <<http://www.odci.gov/cia/publications/nsolo/factbook/vt-l.htm>> (also on file with the *Fordham International Law Journal*) (explaining that Vatican City's total land area is 0.44 square kilometers).

One Korean author describes Liancourt as a group of volcanic rocks upon which there could be no permanent dwelling. *See* Kajimura, *supra* at 433-34 (summarizing natural condition of Liancourt as rocky with little sand or soil and subject to typhoons and crashing waves). The same author reports an existing water well on Sodo that could be used for drinking, as well as various plants, shrubs, weeds, and herbs. *See id.* at 434 (characterizing water and vegetation situation and pointing out that Korean fishermen use rain water for cooking and normally bring drinking water from mainland). The author states that Liancourt "is absolutely not a place which can be cultivated" and is low in commercial value. *Id.* at 435.

15. THE HISTORICAL PRECEDENT FOR THE "EAST SEA", THE SOCIETY FOR EAST SEA, DEPARTMENT OF GEOGRAPHY EDUCATION COLLEGE OF EDUCATION SEOUL NATIONAL UNIVERSITY. The Republic of Korea's position is that the East Sea was unjustifiably and improperly renamed the Sea of Japan by the International Hydrographic Organization. *See id.* (reviewing historical background of name "East Sea," detailing renaming process of 1929 International Hydrographic Organization from which Korean representatives remained absent, and summarizing Korean efforts to reinstate term East Sea on world maps).

16. *See e.g.*, Charney, *supra* note 9, at 728 (noting difficulty of maritime delimitation in seas adjacent to Central East Asia, focusing specifically on territorial disputes over islands and other small features).

17. Press Conference with Japanese Foreign Ministry Spokesman Nobuaki Tanaka (June 3, 1997) (visited Feb. 2, 1998) <<http://www.mofa.go.jp/press/1997/6/603.html#2>> (stating that "Takehima Island is an integral part of Japanese territory and this has been our long-standing position on Takehima Island. There is no question about this.").

18. *See South Korea Brushes off Japanese Protests over Disputed Islets*, AGENCE FRANCE PRESSE, Feb. 9, 1996 available in WESTLAW, Allnewsplus Database (stating that "'Tokdo is our territory, historically and under international law.'").

19. *See, e.g.*, I.A. SHEARER, STARKE'S INTERNATIONAL LAW 31-37 (11th ed. 1994) (explaining that customary rules surface in international organs, diplomatic relations between states, state laws, decisions of state courts, and state military or administrative practices). Customary international law consists of rules that evolved over time and eventually became recognized by the international community. *Id.* The Third Restatement of the Foreign Relations Law defines customary international law as "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The Statute of the International Court of Justice defines customary international law as "international custom, as evidence of a general practice

cisions by the International Court of Justice<sup>20</sup> ("ICJ") and arbi-

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accepted as law . . . ." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevens 1179, 1187 [hereinafter ICJ Statute]. All Members of the United Nations are *ipso facto* parties to the ICJ Statute. U.N. CHARTER art. 93, para 1.

Prior to the recent codifications, the law of the sea functioned largely on the basis of custom. Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 871 (1985). Customs developed over time due to uniform state practice that was consistently observed and considered obligatory in most instances. *Id.* UNCLOS III, in large part, reflects the development of custom and state practice. *Id.* Thus, the relationship between customary international law and its codification in multilateral treaties as it relates to the 1982 Convention may be stated as follows:

The 1982 Convention may:

1. reinforce traditional customary law of the sea by repeating rules embodied in the 1958 Law of the Sea Conventions;
2. foster new customary law by giving written expression to customary law that has developed since 1958, often in contradiction to the 1958 Conventions; or
3. direct the development of future customary law of the sea by giving expression to concepts not yet accepted as customary law but which are likely to become part of that law.

John King Gamble, Jr. & Maria Frankowska, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491, 492 (1984). "Without a doubt, the above enumeration correctly depicts the traditional method of determining the relationship between the 1982 Convention and customary international law." Caminos & Molitor, *supra*, at 873.

20. See U.N. CHARTER art. 92 (declaring that International Court of Justice ("ICJ") shall be United Nation's principal judicial organ). The ICJ is only one forum for resolving boundary disputes between states. See, e.g., Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994 I.C.J. 6 (Feb. 3) [hereinafter *Libyan*] (determining boundary of frontier between Republic of Chad and Libyan Arab Jamahiriya). "Owing to the relative scarcity of authoritative pronouncements, ICJ judgments and even ad hoc arbitration awards generally assume considerable importance in international law." Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227, 227 (1994). The Statute of the International Court of Justice, however, eliminates the doctrine of *stare decisis* in international adjudications. See ICJ Statute, *supra* note 19, art. 59, 59 Stat. at 1062, 3 Bevens at 1190 (announcing that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."). One maritime law expert argues that maritime boundary decisions form a classic common law upon which states may rely. See Charney, *supra*, at 228 (explaining that ICJ and arbitral bodies have defined methods of analyzing maritime boundary disputes and have limited relevant considerations that may be accounted for when determining the boundary). Thus, although UNCLOS III codifies international maritime boundary law, its indeterminate nature necessitates effective third-party dispute settlement capability. *Id.*

Consequently, Part XV of UNCLOS III provides a complicated yet comprehensive dispute settlement system that includes additional dispute settlement fora to the ICJ. UNCLOS III, *supra* note 2, arts. 279-99, 21 I.L.M. at 1322-26; see John King Gamble, Jr., *The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?*, 9 B.U. INT'L L.J. 39, 43 (1991) (detailing UNCLOS III's dispute settlement sections and advocating a



tral bodies (collectively "international adjudicatory bodies").<sup>21</sup> Part I of this Note provides not only a brief historical overview on Japanese-Korean relations, but also a detailed review of relevant public international law. It outlines important provisions of the 1982 Convention, discusses widely-recognized means of territorial acquisition, and summarizes relevant decisions of international adjudicatory bodies. Part II examines each country's claim to Liancourt. The third and final part argues that according to current public international law, the Republic of Korea establishes a superior claim to Liancourt than does Japan. Accordingly, this Note concludes that the Republic of Korea should become Liancourt's sovereign.

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single organizational approach as opposed to more confusing provisioning of UNCLOS III); see generally Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?* 46 *LAW & CONTEMP. PROBS.* 195, 195 (1983) (recognizing that comprehensive dispute settlement provisions would eliminate difficulties associated with unilateral interpretation of UNCLOS III such as instability, unpredictability, and deadlock). Generally speaking, UNCLOS III provides the following dispute settlement options that can be exercised at signing, ratification, or accession:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

UNCLOS III, *supra* note 2, art. 287(1), 21 *I.L.M.* at 1322-23. Under UNCLOS III, parties to a dispute select any settlement method desired as long as the method is peaceful. *Id.* arts. 279-80, 21 *I.L.M.* at 1322. Article 281(1), however, provides that if parties to a dispute are unable to agree on a method, then the procedures outlined in Part XV of UNCLOS III apply. *Id.* art. 281(1), 21 *I.L.M.* at 1322. Article 281(1) states:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

*Id.* If the parties to a dispute have not selected the same forum, then the dispute must be submitted to arbitration unless otherwise agreed. *Id.* art. 287(5), 21 *I.L.M.* at 1323. Litigators will likely face problems deciding among the various settlement fora. See Gerald A. Malia, *The New "International Tribunal for the Law of the Sea": Prospects for Dispute Resolution at the "Sea Court"*, 7 *GEO. INT'L ENVTL. L. REV.* 791, 792 (1995) (addressing new tribunal for law of sea dispute resolution and recognizing difficult choice facing litigators in that although arbitration is usually cheap and fast, it is often unsatisfactory).

21. See, e.g., J.L. SIMPSON & HAZEL FOX, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 1-24 (1959) (tracing development of public arbitration since 1794, paying specific attention to 1899 and 1907 Hague Peace Conferences from which Permanent Court of Arbitration was established which consists of list of names from which arbiters may be selected).

## I. JAPANESE-KOREAN HISTORICAL PERSPECTIVE AND PUBLIC INTERNATIONAL LAW

It is difficult to understand contemporary Japanese-Korean relations without considering the past.<sup>22</sup> Koreans feel an emotional need to anchor their modern-day policies to recollections of former Japanese misconduct.<sup>23</sup> Conversely, the Japanese would prefer concentrating on the present and replacing the past with a new relationship.<sup>24</sup>

The current dispute over Liancourt illustrates these antithetical approaches.<sup>25</sup> If or when a third-party adjudges the question of Liancourt's sovereign, public international law will undoubtedly influence the outcome.<sup>26</sup> Consequently, an objective application of international law limits the position Korean and Japanese litigators or diplomats may tenably assume when presenting the dispute to a third-party for settlement.<sup>27</sup>

### A. Historical Perspective

Japanese-Korean relations are paradoxical.<sup>28</sup> Japan and Korea are similar geographically and culturally,<sup>29</sup> yet their past casts

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22. BRIAN BRIDGES, JAPAN AND KOREA IN THE 1990S: FROM ANTAGONISM TO ADJUSTMENT 163 (1993).

23. See *id.* (explaining that concept of *han*, representing combination of resentment, regret, and renewed suffering, controls how many Koreans reflect on past and often stimulates desires to revive past events as calculated bargaining postures when dealing with Japanese business and government).

24. See *id.* (explaining that Japan often dismisses Korean references to past as conscious tactical decision-making to secure Japanese concessions without recognizing degree to which Koreans actually feel that Japan has not taken responsibility for past transgressions).

25. Compare *Takehima*, *supra* note 14 (setting forth Japan's policy of resolving Liancourt dispute peacefully and without incident), with Hoon Lee, *Dispute over Territorial Ownership of Tokdo in the Late Choson Period*, 28 KOREA OBSERVER 389, 390 (1997) (noting Republic of Korea's view that Liancourt has always belonged to Korea and, therefore, is simply not subject to dispute).

26. See Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in INTERNATIONAL MARITIME BOUNDARIES 131-32 (Jonathan I. Charney & Lewis M. Alexander eds., 1993) (arguing that international law is extremely relevant to voluntary maritime boundary settlements because jurisprudential developments in this area influence interstate negotiations).

27. See Charney, *supra* note 20, at 228 (arguing that because diplomats are aware that resort to third-party dispute settlement is real possibility in maritime boundary disputes, awareness limits credible positions by devaluing those that would be untenable to third party).

28. CHONG-SIK LEE, JAPAN AND KOREA: THE POLITICAL DIMENSION 1 (1985).

29. See *id.* at 1 (noting geographic proximity, similar thinking, and behavior pat-

an enduring shadow on the present.<sup>30</sup> Thus, one writer attributes the Liancourt dispute to historical differences rather than a desire for money or territory.<sup>31</sup>

Japanese and Koreans interacted long before Japan and Korea emerged as political entities.<sup>32</sup> Between the early-fifteenth and early-nineteenth centuries, national characteristics such as Japan's military prowess and Korea's attitude of moral superiority highlighted Japanese-Korean relations.<sup>33</sup> Japan's pragmatic approach, however, overpowered Korea's Confucian idealism.<sup>34</sup> As a consequence, each country disguised its communications with the other to avoid impeding diplomatic progress.<sup>35</sup>

As Western expansionism heightened during the nineteenth century, Korea developed a seclusionary external policy.<sup>36</sup>

terns that stem from same cultural heritage, language similarities because Japanese and Korean share same syntax and are largely based on Chinese, and interdependence on trade and import/export).

30. See, e.g., BRIDGES, *supra* note 22, at 1 (explaining that Japan's colonial occupation of Korea only intensified long-standing enmity between Korea and Japan dating back several decades).

31. Michael A. Lev, *A Point of Contention in the Sea of Japan: Seoul Testily Asserts Old Claim*, CHI. TRIB., Mar. 4, 1996. Addressing the disagreement over Liancourt, this writer hypothesizes,

In one sense, the disagreement over the island—called Takeshima by Japan—is about money. As governments remap their borders according to the latest version of the international law of the sea, owning the island would mean the chance to claim exclusive fishing and mineral rights in the area.

But in a deeper sense, it matters very little where the island is, what it looks like or whether there is good fishing nearby.

The argument isn't about ownership; it's about history, a previous war and what Koreans emotionally consider to be unfinished business with Japan.

*Id.*

32. See e.g., BRIDGES, *supra* note 22, at 7 (detailing Japanese and Korean interaction in form of travels and migrations during fourth and seventh centuries).

33. ETSUKO HAE-JIN KANG, *DIPLOMACY AND IDEOLOGY IN JAPANESE-KOREAN RELATIONS* 223 (1997).

34. See *id.* (noting that Korea's moralistic approach proved unsuccessful in conjunction with Japan's attitude of militaristic and economic advancement). The author contends that Japan and Korea were on equal ground diplomatically in that the Japanese shoguns and Korean kings exchanged state letters and culture. *Id.* Japan and Korea clashed ideologically, however, because each claimed its own centrality. *Id.* In reference to the countries' diplomatic and ideological relations, the author cites Hans Morgenthau who stated, "all politics are invariably associated with the pursuit of power, and ideologies serve as a justifying tool as well as a mask of power politics." *Id.*

35. See *id.* (concluding that self-centered and fictitious diplomatic ideologies resulted in concealment of true state of affairs between Japan and Korea in diplomatic intercourse).

36. *Id.* at 227-30. Because of its perfunctory external intercourse with the outside

Conversely, Japan adopted an expansionist external policy.<sup>37</sup> Japan's imperialist appetite culminated in its colonial occupation of Korea from 1910 to 1945.<sup>38</sup> During this time, Japan impelled Koreans to speak Japanese, adopt Japanese names and Japan's state religion, and sacrifice enormous educational opportunity.<sup>39</sup>

The 1951 San Francisco Peace Treaty<sup>40</sup> forced Japan to recognize Korea's independence at the close of World War II.<sup>41</sup> Shortly thereafter, Korea declared its sovereignty over a portion of the sea by setting up the so-called *Rhee Line*<sup>42</sup> that included the waters surrounding Liancourt.<sup>43</sup> This declaration sparked the modern-day controversy between Japan and the Republic of Korea over Liancourt.<sup>44</sup>

### B. *Public International Law*

The sea, occupying two-thirds of the world's surface, has always been a source of food and a means of communication, travel, and trade.<sup>45</sup> With technological advancements such as modern drilling machinery and shipbuilding capabilities, the sea is an increasingly lucrative source of natural resources and mari-

world, Korea was known as the "Hermit Kingdom" until the late-nineteenth century. WOONSANG CHOI, *THE DIPLOMATIC HISTORY OF KOREA* 1-2 (1987).

37. See e.g., LEE, *supra* note 28, at 3 (setting forth that political upheaval of 1868 Meiji Restoration jolted Japan out of its seclusion and resulted in Japan's expansionist policies).

38. See e.g., BRIDGES, *supra* note 22, at 7-9 (outlining Japanese intervention in Korea including Russo-Japanese War and subsequent establishment of Japanese residency-general held by Ito Hirobumi, a veteran politician). One author details Korea's reaction to Japan's occupation as follows:

Korea had watched with repugnance the Japanese attempt to emulate the West, taking it as proof of Japanese perfidy against the very essence of Eastern culture and tradition. When the Japanese applied the strength they had gained by learning Western technology to the conquest of Korea, the Koreans could not have been more humiliated.

LEE, *supra* note 28, at 3.

39. See e.g., BRIDGES, *supra* note 22, at 8 (explaining that Japan tried to minimize Korea's national identity).

40. See Treaty of Peace with Japan, Sept. 8, 1951, art. 2(a), 3 U.S.T. 3169, 3172, 136 U.N.T.S. 45, 48 (stating "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea . . .").

41. *Id.*

42. See Kajimura, *supra* note 14, at 463 (highlighting Korea's Declaration of Maritime Sovereignty in January 18, 1952 that set up Korea's territorial boundaries to protect Korean fishermen).

43. *Id.*

44. Lee, *supra*, note 25, at 389.

45. D.W. BOWETT, *THE LAW OF THE SEA* 1 (1967).

time research opportunities.<sup>46</sup> International efforts, therefore, focus on minimizing inequitable exploitation of the sea.<sup>47</sup> To this end, public international law has produced multilateral treaties and organizations such as the 1982 Convention, the United Nations, the International Maritime Organization,<sup>48</sup> and the International Seabed Authority<sup>49</sup> as well as international customary law promulgated by international adjudicatory bodies.<sup>50</sup>

### 1. UNCLOS III

In 1958, the original United Nations Convention on the Law of the Sea<sup>51</sup> convened in Geneva, Switzerland to codify the

46. See, e.g., Alexander Yankov, *A Historic Opportunity for the United Nations Law of the Sea Convention*, in *ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 15-27* (Myron H. Nordquist & John Norton Moore eds., 1995) (listing several improvements of UNCLOS III to help protect against inequitable results of technological advancement and maritime exploitation); *COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 95TH CONG., THE THIRD U.N. LAW OF THE SEA CONFERENCE 9* (Comm. Print 1978) [hereinafter 95TH CONG. LOSC] (articulating several modern-day advancements and technologies that necessitated additional maritime regulation).

47. See 95TH CONG. LOSC, *supra* note 46, at 3-18 (tracing development of law of sea from Grotius (1625), who argued that oceans were inherently indivisible and inexhaustible, through mid-20th century when United Nations General Assembly was charged with furthering international law's codification, to current 1958, 1960, and 1982 Conventions on law of sea).

48. Convention on the International Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48. The International Maritime Organization ("IMO"), originally known as the International Maritime Consultative Organization, is a principal forum and international legislative body for most maritime matters. See e.g., CLEOPATRA ELMIRA HENRY, *THE CARRIAGE OF DANGEROUS GOODS BY SEA: THE ROLE OF THE INTERNATIONAL MARITIME ORGANIZATION IN INTERNATIONAL LEGISLATION* 49 (1985) (demonstrating, by analyzing IMO's contribution to international rules of maritime transport, that international legislation may occur even without formally-recognized international legislators). The IMO "is also a cornerstone" of UNCLOS III. Mark J. Yost, *International Maritime Law & The U.S. Admiralty Lawyer: A Current Assessment*, 7 U.S.F. MAR. L.J. 313, 320 (1995). Indeed, the "competent international organization," as used in UNCLOS III, is intended to refer to the IMO. *Id.* Additionally, references to "generally accepted international rules or standards" include those developed by and through IMO." *Id.*

49. See UNCLOS III, *supra* note 2, art. 156, 21 I.L.M. at 1298 (establishing International Seabed Authority). The International Seabed Authority's primary function is to administer the activity affecting the resources of the deep seabed "for the benefit of mankind as a whole." *Id.* art. 140(1), 157(1), 21 I.L.M. at 1293, 1298.

50. See SHEARER, *supra* note 19, at 7-14 (explaining origins and development of present-day international law as product of 400 years evolving from modern European states and 16th, 17th, and 18th-century jurists to 19th and 20th-century international adjudicatory bodies and multilateral treaties due to rise of powerful new states, modernization of world transport, and increasing inventions and technologies).

51. 1958 Conventions, *supra* note 2.

existing law on the sea and to address the issue of conflicting state and community interests.<sup>52</sup> According to various scholars, the 1958 Conventions failed to resolve the reach of not only the territorial sea,<sup>53</sup> but also of any exclusive fishery zones<sup>54</sup> and exclusive economic zones ("EEZ").<sup>55</sup> In addition, subsequent political and scientific developments necessitated a reexamination of the existing law of the sea.<sup>56</sup> For these reasons, the third

52. BOWETT, *supra* note 45, at 1-4. Scholars have said,

[t]he historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, whilst rejecting all egocentric assertions of special interests in contravention of general community interests.

MYRES S. McDUGALL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 1 (1987).

53. See UNCLOS III, *supra* note 2, arts. 2-4, 21 I.L.M. at 1272 (defining territorial sea as coastal state sovereignty over air space, seabed, and seabed subsoil extending no farther than 12 nautical miles).

54. See Convention on the High Seas, *supra* note 2, art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82-84 (defining freedom of high seas to include freedom of fishing); Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 2, art. 1, 17 U.S.T. at 140, 559 U.N.T.S. at 286-88 (recognizing states' rights to engage in fishing high seas); William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OR. L. REV. 73 (1984) (discussing UNCLOS III provisions concerning accessing fisheries that are subject to national jurisdiction).

55. See UNCLOS III, *supra* note 2, arts. 55-58, 21 I.L.M. at 1280 (defining exclusive economic zones ("EEZ") as extending no farther than 200 miles and entitling coastal states certain sovereign rights, jurisdiction, and duties); see also BOWETT, *supra* note 45, at 5 (arguing indisputability of 1958 and 1960 Conventions' inability to complete codification of law of sea because each left open questions concerning breadth of territorial sea and exclusive fishery zones); Jonathan I. Charney, *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT'L L. 381, 383-85 (1995) (arguing that entry into force of UNCLOS III would stabilize and clarify international ocean regimes such as territorial sea, transit passage, EEZs, and coastal state legislative authority over living and non-living resources as well as environment).

56. UNCLOS III, *supra* note 2, pmbl., 21 I.L.M. at 1271. UNCLOS III's preamble suggests multiple reasons for the third conference. *Id.* For example, developments since the 1958 and 1960 Conferences accentuated the need for a new and generally acceptable codification on the law of the sea. *Id.* Furthermore, state parties to the Convention recognized

the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment . . . .

*Id.*

In addition, a 1978 report for use by the Committee on Commerce, Science, and

United Nations Convention on the Law of the Sea convened in 1975.<sup>57</sup>

Transportation during the second session of the 95th Congress details other motivating factors. 95TH CONG. LOSC, *supra* note 46, at 9. For instance, modern drilling technology expanded continental shelf claims deeper and outward. *Id.* Supertankers and nuclear submarines caused difficulties with regards to innocent passage of foreign flag vessels through territorial waters of coastal states. *Id.* Specifically, national security and environmental protection concerns necessitated further regulation. *Id.* Modern advancements in navigation and harvesting techniques strained commercial fisheries. *Id.* Giant fishing factories and processing ships intensified this difficulty. *Id.* Progression in mineral discovery and exploitation demanded a legal regime with regards to areas beyond coastal states continental shelf jurisdiction. *Id.*

A 1967 statement to the United Nations by Ambassador Arvid Pardo of Malta highlights a general concern, in light of mankind's newfound technological capabilities, that unilateral exploitation of the deep seabed be prohibited. *See* U.N. GAOR 1st Comm., 22d Sess., 1515 mtg., U.N.Doc.A/C.1/PV/1515 (1967) (discussing importance of ocean resources and impact exploitation of ocean resources will have on mankind as well as emphasizing that modern-day technological capabilities to exploit ocean necessitates updated law of sea). Consequently, but not without controversy, UNCLOS III established a comprehensive system regulating the exploitation of deep seabed mineral resources. UNCLOS III, *supra* note 2, part XI, 21 I.L.M. at 1293-1308. Notably, a 1994 compromise at a Special Session of the United Nations General Assembly reinterpreted UNCLOS III's provisions on deep seabed mining to produce ratification by the United States and other major industrial countries. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, *opened for signature* July 28, 1994, 33 I.L.M. 1309 (entered into force July 28, 1996).

57. UNCLOS III, *supra* note 2, 21 I.L.M. at 1261. UNCLOS III is an extensive document covering a wide range of maritime subjects. *Id.* UNCLOS III contains 320 articles and nine annexes. *Id.* One scholar contends that UNCLOS III's comprehensive scope distinguishes it from all preceding maritime law treaties. Yankov, *supra* note 46, at 16. UNCLOS III's framework governs all ocean space as well as the seas' primary uses and natural resources. *See id.* (describing UNCLOS III's broad governance including "the conduct of marine scientific research and protection of marine activities, such as navigation, fisheries, exploitation of oil, gas and other minerals from the seabed and ocean floor, preservation of the marine environment, conduct of marine scientific investigation and development of marine technology."). One ambassador enumerated UNCLOS III's notable improvements from the 1958 Conventions:

1. the concept of transit passage through straits used for international navigation;
2. the concept of archipelagic baselines and archipelagic waters;
3. the concept of the exclusive economic zone;
4. fundamental change in the definition of the legal continental shelf;
5. explicit recognition of the freedom of scientific research and of the freedom to construct artificial islands and other installations as additional freedoms of the high seas;
6. the duty of international cooperation in the development and transfer of marine science and technology; and
7. the concept of a comprehensive environmental law of the sea based on the obligation of all states to protect and preserve the marine environment.

Arvid Pardo, *Before and After*, 46 *LAW & CONTEMP. PROBS.* 95, 97 (1983).

Despite this early beginning, the 1982 Convention did not become effective until November 16, 1994.<sup>58</sup> As of December 31, 1996 UNLCOS III boasts 158 signatories, including Japan and the Republic of Korea.<sup>59</sup> The 1982 Convention entitles coastal states to as much as 200 nautical miles of certain sovereign rights to living and non-living resources.<sup>60</sup> In addition, any islands,<sup>61</sup> and in some instances rocks,<sup>62</sup> over which states establish sovereignty are also accorded individual maritime zones.<sup>63</sup>

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58. See UNCLOS III, *supra* note 2, art. 308(1), 21 I.L.M. at 1327 (providing that Convention would enter into force twelve months after sixtieth ratification or accession). Aside from waiting for a specific number of ratifications or accessions to occur, informal negotiating and consensus decision-making processes by which UNCLOS III was realized also belabored the progress. See Caminos & Molitor, *supra* note 19, at 873 (noting compromise, consensus, negotiation, and informal consultation processes that, although laborious, produced agreements).

59. See MULTILATERAL TREATIES, *supra* note 2, at 820 (listing 158 signatories and 110 parties to UNCLOS III). Japan signed UNCLOS III on February 7, 1983 and ratified it on June 20, 1996. *Id.* The Republic of Korea signed UNCLOS III on March 14, 1983 and ratified it on January 29, 1996. *Id.*

60. UNCLOS III, *supra* note 2, art. 56, 21 I.L.M. at 1280. Article 56, entitled "Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone," provides in relevant part:

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

*Id.*

61. See UNCLOS III, *supra* note 2, art. 121, 21 I.L.M. at 1291. Article 121 provides:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

*Id.*

62. *Id.*

63. *Id.*



The 1982 Convention's debates on islands attempted, in large part, to differentiate features such as rocks and islands.<sup>64</sup> Possibilities of inequitable maritime jurisdiction generated by minute protuberances of seabed caused great concern.<sup>65</sup> UNCLOS III, however, only vaguely defines both islands and rocks.<sup>66</sup>

Article 121(3),<sup>67</sup> a new addition to the 1982 Convention, states that rocks unable to sustain human habitation or economic life shall not be entitled to an EEZ.<sup>68</sup> Notwithstanding,

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64. See, e.g., *Third United Nations Conference on the Law of the Sea*, U.N. GAOR 2d Comm., 2d Sess., 26th mtg., Vol. 2 at 204 (stating that according to Tunisia, island states should have similar rights as continental states and that difficult issue of EEZs for islets and islands necessitated additional study).

65. See, e.g., JAYEWARDENE, *supra* note 4, at 15 (noting primary objection that rocks, islets, and islands, no matter how small, could possibly generate EEZs given proper circumstances).

66. UNCLOS III, *supra* note 2, art. 121(1), (3), 21 I.L.M. at 1291. One maritime scholar claims that only natural formations qualify as islands. See DEREK W. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 1-7* (1979) (rejecting both artificial installations such as beacons, oil-platforms, and islands formed artificially by accumulation of sand or rubble as well as technical installations such as meteorological stations and installations used for exploiting seabed). Although this scholar's work was completed prior to the adoption of UNCLOS III, the actual definition of an island did not change from the earlier 1958 Conventions. Compare *Convention on the Territorial Sea and Contiguous Zone*, *supra* note 2, art. 10(1), 15 U.S.T. at 1609, 516 U.N.T.S. at 212 (defining island as "a naturally-formed area of land, surrounded by water, which is above water at high tide."), with UNCLOS III, *supra* note 2, art. 121(1), 21 I.L.M. at 1291 (defining island as "a naturally formed area of land, surrounded by water, which is above water at high tide."). Thus, one can assume that UNCLOS III adopted the rationale of the 1958 Conventions. See BOWETT, *supra*, at 4 (explaining relationship between 1958, 1960, and 1982 Conventions). The United States reasoned that allowing artificial islands individual maritime zones would encroach on the freedom of the high seas. See *id.* at 4 (noting United States' motion to insert the phrase "naturally-formed" before "area of land").

Other scholars define islands, islets, and rocks mathematically. KAPOOR & KERR, *supra* note 2, at 67-9. The International Hydrographic Bureau defines small islets as one to 10 square kilometers, isles as 10 to 100 square kilometers, and islands as 100 to 1,000,000 square kilometers. *Id.* at 68. Accordingly, rocks likely would be less than one square kilometer. *Id.* Another scholar categorized rocks as less than .001 square miles, islets between .001 square miles and one square miles, isles between one and 1,000 square miles, and islands as larger than 1,000 square miles. *Islands: Normal and Special Circumstances*, U.S. DEP'T OF STATE PUBLICATION 17 (1973).

67. UNCLOS III, *supra* note 2, 21 I.L.M. at 1291.

68. UNCLOS III, *supra* note 2, art. 121(3), 21 I.L.M. at 1291. The addition of rocks that can sustain human habitation or economic life to the island regime is significant because no such provision existed in the 1958 Conventions. See *Convention on the Territorial Sea and Contiguous Zone*, *supra* note 2, art. 10, 15 U.S.T. at 1609-10, 516 U.N.T.S. at 212 (stating only that islands are naturally-formed areas of land surrounded by water and entitled to territorial sea).

the 1982 Convention does not explicitly define human habitation or economic life.<sup>69</sup> One maritime scholar suggests that the absence of sweet water<sup>70</sup> might indicate uninhabitability.<sup>71</sup> The same scholar questions whether providing mainland assistance such as a desalination plant or other supplies to the rock would satisfy the criteria of Article 121(3).<sup>72</sup> Thus, one important question left unanswered by UNCLOS III is whether rocks need to provide human habitation or economic life independent of outside assistance to qualify for an EEZ.<sup>73</sup>

## 2. Territorial Acquisition

No unanimity exists within the international community regarding territorial-acquisition methods.<sup>74</sup> Customary international law, however, provides five traditionally-recognized modes.<sup>75</sup> These means play an important role in resolving sover-

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69. UNCLOS III, *supra* note 2, art. 121(3), 21 I.L.M. at 1291; *see e.g.*, Barry Hart Dubner, *The Spratly "Rocks" Dispute - A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L.J. 291, 303 (1995) (stating that Article 121(3) is new addition to island regime of UNCLOS III with ambiguous and vague language). In reference to Article 121(3), the ICJ concluded,

[w]hen the Law of the Sea Convention spelt out in Article 121(3) that rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf, it was perhaps giving expression to the concept that population and economic life are relevant to the enjoyment of exclusive economic zones and continental shelf entitlements. It was not rocks per se that were excluded from these rights but rocks which lacked the possibility of sustaining habitation or economic life, thus indicating the importance of these factors in attracting exclusive economic zone and continental shelf entitlements, in an appropriate case.

Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 269 (June 14).

70. *See e.g.*, 27 THE OXFORD ENGLISH DICTIONARY 392 (2d ed. 1989) (explaining that sweet-water or sweetwater, with hyphen or as one word, means "living in or consisting of fresh water" and that sweet water, as two words, means ["f]resh water").

71. 1 E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA 150 (Introductory Manual 1994).

72. *Id.*

73. *Id.*

74. Compare 1 OPPENHEIM'S INTERNATIONAL LAW 678-708 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM] (recognizing, defining, and discussing cession, occupation, accretion, subjugation, and prescription as methods of territorial acquisition), with 1 D.P. O'CONNELL, INTERNATIONAL LAW 405-43 (2d ed. 1970) (recognizing, defining, and discussing occupation, historic title rights created in derogation of international law through historical processes, prescription, accretion, annexation, cession, and debellatio as methods of territorial acquisition).

75. *See, e.g.*, OPPENHEIM, *supra* note 74, at 679 (defining and discussing cession, occupation, subjugation, prescription, and accretion as traditional means for acquiring

eignty disputes.<sup>76</sup>

Cession<sup>77</sup> of state territory is the peaceful transfer of territory by the owner-state to another state.<sup>78</sup> Agreement effectuates cession.<sup>79</sup> In addition, the ceding state must intend to relinquish and pass sovereignty and the receiving state must intend to accept it.<sup>80</sup> Agreements imposed by certain types of force, however, may be void due to Article 52 of the Vienna Convention on the Law of Treaties which nullifies treaties procured by the threat or use of force.<sup>81</sup>

Prescription<sup>82</sup> is the process of acquiring territory through a continuous and undisturbed exercise of sovereignty lasting long enough to create a general conviction that the possession con-

territory). Although accretion likely will not be implicated with regard to Liancourt, it is an "increase of land through new formations." *Id.* at 696. New formations may only modify or enlarge existing state territory. *Id.* Furthermore, accretion may be artificial or natural. *Id.* As regards the various modes that international law recognizes as valid means to create title to territory, one legal scholar suggests that they all have the following common feature: "the importance, both in the creation of title and of its maintenance, of actual effective control." R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 4 (1963).

76. See *e.g.*, Charney, *supra* note 9, at 728 (explaining that in addition to decisions of international adjudicatory bodies, methods of territorial acquisition such as occupation, conquest, and prescription substantially contribute to resolving territorial disputes).

77. See OPPENHEIM, *supra* note 74, at 679 (defining cession as "the transfer of sovereignty over state territory by the owner-state to another state."); see also O'CONNELL, *supra* note 74, at 436 (defining cession as "[t]he peaceful transfer of territory from one sovereign to another . . .").

78. OPPENHEIM, *supra* note 74, at 679; O'CONNELL, *supra*, note 74, at 436.

79. See, *e.g.*, OPPENHEIM, *supra* note 74, at 680 (discussing that cession can only be effected in agreements between either ceding and acquiring state or several states including ceding and cessionary states).

80. See O'CONNELL, *supra* note 74, at 436 (maintaining immateriality of conveyance's form so long as exists unimpeachable intent to convey and receive territory).

81. Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention]. Article 52, entitled "Coercion of a State by the Threat or Use of Force," provides that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." *Id.* Japan acceded to the Vienna Convention on July 2, 1981 and the Republic of Korea signed it on November 27, 1969 and ratified it on April 27, 1977. MULTILATERAL TREATIES *supra* note 2, at 869.

82. OPPENHEIM, *supra* note 74, at 706. As regards the often blurry distinction between occupation and prescription, one scholar notes that international tribunals do not always indicate the grounds upon which they proceed. R.Y. JENNINGS, *supra* note 75, at 23. Furthermore, the ultimate results of territorial disputes based on either prescription or occupation will often be synonymous because each acquisitional method is an "ultimate realization"[ of an existing effective possession and control." *Id.*

forms with international order.<sup>83</sup> No general rules govern the necessary length of time to substantiate a prescription claim.<sup>84</sup> If other states protest the acquiring state's activity, however, this type of action not only disturbs the exercise of sovereignty, but also disrupts international order.<sup>85</sup>

Subjugation,<sup>86</sup> often referred to as title by conquest,<sup>87</sup> is the act by which one state acquires territory by conquest followed by annexation.<sup>88</sup> Because victors often enforce cession agreements, subjugation is rare.<sup>89</sup> As previously stated, choosing to enforce a cession results in the possible application of Article 52 of the Vienna Convention on the Law of Treaties.<sup>90</sup>

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83. OPPENHEIM, *supra* note 74, at 706. One scholar argues:

There is no doubt that, in international practice, a state has been considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully, provided that the possessor has been in undisturbed possession for so long as to create the general conviction that the present condition of things is in conformity with international order.

*Id.*

84. *Id.*

85. *See id.* at 706-07 (arguing that protests and territorial claims disrupt requisite characteristics of prescription of undisturbed exercise of sovereignty and conviction that things conform with international order).

86. *See, e.g.,* OPPENHEIM, *supra* note 74, at 698 (defining subjugation as "acquisition of territory by conquest followed by annexation, and often called title by conquest, had to be accepted into the scheme of modes of acquisition of title to territorial sovereignty in the period when the making of war was recognised as a sovereign right, and war was not illegal."). One expert argues further that two conditions precedent must exist for a valid annexation. O'CONNELL, *supra* note 74, at 435. The first condition is the extinction of sovereignty, which means that the annexed state no longer has the capacity to act internationally. *Id.* The second condition is that,

*annexation follows conquest, and by conquest is meant the effective control of the conquered territory in such circumstances as to warrant the presumption that the control will be permanent. In other words, while there remains the reasonable possibility of the former sovereign recovering his territory annexation is not permitted by international law. . . . In effect this rule has come to mean that annexation is possible only after war has terminated.*

*Id.*

87. *See* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No.53, at 47 (Apr. 5) [hereinafter *Eastern Greenland*] (explaining that conquest only causes loss of sovereignty when there is war between two states and defeat of one state results in sovereignty passing from losing to victorious state).

88. O'CONNELL, *supra* note 74, at 435. *See id.* at 432-33 (providing complete discussion about distinction between conquest and annexation).

89. OPPENHEIM, *supra* note 74, at 699.

90. *See id.* (describing circumstances in which Article 52 would apply such as procuring treaties by use or threat of force); Vienna Convention, *supra* note 81, art. 52, at 344.

Occupation<sup>91</sup> is a state's intentional appropriation of sovereignty over territory treated as a *terra nullius*.<sup>92</sup> Acquiring states effectuate occupation by taking possession of, and establishing an administration over, the acquired territory.<sup>93</sup> To constitute a valid claim to territory based on occupation, occupation must be effective.<sup>94</sup>

### 3. Case Law and Arbitral Decisions

Japan and the Republic of Korea may resolve their dispute over Liancourt by any peaceful means they desire.<sup>95</sup> Yet resolving the dispute necessitates a comparison of the facts of this case with relevant existing precedent.<sup>96</sup> Several decisions by international adjudicatory bodies provide an analytical framework for

91. See, e.g., OPPENHEIM, *supra* note 74, at 686 (defining occupation as "the act of appropriation by a state by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state."); see generally O'CONNELL, *supra* note 74, at 408-09 (discussing historical origins of occupation from perspective of colonial expansion).

92. See, e.g., O'CONNELL, *supra* note 74, at 410-11 (giving example of international arbitration in which disputed territory was a *terra nullius* and thus susceptible to occupation). *Terra nullius* or *territorium nullius* is territory that does not belong to any state. See OPPENHEIM, *supra* note 74, at 687 (defining *terra nullius* as uninhabited or inhabited territory that does not belong to any state).

93. See OPPENHEIM, *supra* note 74, at 688 (noting agreement between theory and practice that occupation is effected by taking possession of and establishing administration over territory).

94. See *id.* (maintaining that possession and administration are essential to valid effective occupation). The ICJ makes clear that claims to sovereignty "based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, 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." *Eastern Greenland*, 1933 P.C.I.J. at 45-6. One scholar contends that administration requires the acquiring state to establish and exercise governmental functions over the territory. OPPENHEIM, *supra* note 74, at 688. Another scholar suggests that settlement and administration must be coupled with a presumption that the acquiring state would exclude others by force if necessary. O'CONNELL, *supra* note 74, at 409. In *Island of Palmas*, the PCA notes that "occupation, to constitute a claim to territorial sovereignty, must be effective" because territories without sovereigns became relatively few during the late 18th and 19th centuries. *Island of Palmas*, 2 R.I.A.A. at 846.

95. See UNCLOS III, *supra* note 2, arts 279-80, 21 I.L.M. at 1322 (setting forth obligation to settle disputes peacefully in accordance with Article 2, paragraph 3 of U.N. Charter and highlighting that UNCLOS III does not impair rights of parties to peacefully settle disputes by means of their own choice). The U.N. Charter states that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3.

96. See *Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hon.)*, 1992 I.C.J. 351, 564 (Sept. 11) [hereinafter *El Salvador*] (exemplifying concept of

reaching a resolution.<sup>97</sup>

#### a. Island of Palmas

*United States v. Netherlands*<sup>98</sup> (“*Island of Palmas*”) involved a dispute similar to *Liancourt*.<sup>99</sup> The sole issue in the dispute between the United States and the Netherlands was the ownership of Palmas, an island off the Philippine coast.<sup>100</sup> Commentators and scholars consider *Island of Palmas* one of the most comprehensive declarations on requirements states must meet when claiming sovereignty over an island.<sup>101</sup>

The United States based its title to Palmas on discovery and Spain’s subsequent cession of the Philippines to the United States pursuant to the Treaty of Paris.<sup>102</sup> At that time, Spain had sovereign rights over the Philippines, thus enabling the cession.<sup>103</sup> The United States contended that Palmas, by virtue of the principle of contiguity,<sup>104</sup> belonged to the Philippines.<sup>105</sup>

precedent by relying on earlier ICJ decision to conclude that evidence of possession of disputed territory may confirm title).

97. See, e.g., *Island of Palmas*, 2 R.I.A.A. at 838-40 (setting forth contemporary international law, such as intertemporal law and effective occupation, that is applicable to acquiring sovereignty over offshore territory).

98. *Island of Palmas*, 2 R.I.A.A. at 829.

99. *Id.*

100. *Island of Palmas*, 2 R.I.A.A. at 831. The United States referred to the island as the Island of Palmas. *Id.* at 835. The Netherlands, however, referred to the island as the Island of Miangas. *Id.* at 835-36.

101. See Brian K. Murphy, Comment, *Dangerous Ground: The Spratly Islands and International Law*, 1 OCEAN & COASTAL L.J. 187, 198 (1995) (contending that *Island of Palmas* is one of most comprehensive judicial statements on requirements for state to claim sovereignty over island); Charney, *supra* note 9, at 728 (recognizing that *Island of Palmas* is largely responsible for establishing basic contemporary international law on acquiring territorial sovereignty such as relativity of requisite manifestations of sovereignty, effective occupation, and intertemporal law).

102. *Id.* at 837; Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

103. *Island of Palmas*, 2 R.I.A.A. at 837. The United States argued that establishing facts showing an actual display of sovereignty over Palmas was unnecessary because of the cession agreement between Spain and the United States. *Id.*

104. *Id.* at 854. Addressing the contiguity claim, the PCA stated:

Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size).

*Id.*

105. *Id.* at 837.

The Netherlands, on the other hand, based its claim on the colonization of Palmas by the Dutch East India Company<sup>106</sup> and on the subsequent uninterrupted and peaceful exercise of sovereignty over Palmas.<sup>107</sup> The Netherlands further maintained that it, along with the Dutch East India Company, concluded a series of treaties with native princes making the Netherlands Palmas's feudal overlord.<sup>108</sup>

Prior to considering the claimants' arguments, the Permanent Court of Arbitration<sup>109</sup> ("PCA") outlined the applicable substantive law concerning the acquisition of territorial sovereignty.<sup>110</sup> Accordingly, the PCA stressed the importance of continuous and peaceful<sup>111</sup> displays of sovereignty.<sup>112</sup> Rejecting the United States' claims of discovery and contiguity, the PCA awarded Palmas to the Netherlands concluding that discovery, *per se*, is insufficient to establish sovereignty over an island.<sup>113</sup> Although granting that discovery gives a state inchoate title to a disputed territory, the PCA held that effective occupation com-

106. *Id.* at 858. Describing the Dutch East India Company, the PCA noted that "[f]rom the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies." *Id.*

107. *Id.* at 837-38.

108. *Id.* at 855-56.

109. See SIMPSON & FOX, *supra* note 21 at 1-24 (explaining establishment of Permanent Court of Arbitration ("PCA") and noting that it consists of list of arbiters available to settle disputes).

110. *Island of Palmas*, 2 R.I.A.A. at 838-40. Addressing the question of territorial disputes, the PCA suggested,

[i]f a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title—cession, conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

*Id.* at 838-39.

111. See *id.* at 839 (suggesting that peaceful, in this context, means peaceful displays of sovereignty vis-a-vis other states).

112. See *id.* at 838-40 (stating that peaceful and continuous displays of sovereignty are important elements in territorial disputes).

113. *Id.* at 870-71.

pletes inchoate title of the territory claimed to have been discovered.<sup>114</sup> The PCA found that in the absence of such completion, inchoate title cannot compete against the continuous and peaceful display of sovereignty by another state.<sup>115</sup> Moreover, the PCA noted that manifestations of sovereignty required to effectuate occupation will vary with the nature of the territory.<sup>116</sup>

In addition to outlining the rules of acquiring territorial sovereignty, the PCA promulgated the so-called intertemporal law<sup>117</sup> to determine what legal rules apply to particular disputes at particular times.<sup>118</sup> Intertemporal law maintains that prevailing legal standards, that existed at the time of the title's creation, will judge root of title, or the creation of sovereignty.<sup>119</sup> Yet, the continued validity of the title must comply with international law's continual evolution.<sup>120</sup>

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114. *Id.* at 846.

115. *Id.*

116. *Id.* at 840. The PCA commented as follows regarding the relativity of effective occupation:

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.

*Id.*

117. *Id.* at 845. The PCA defined intertemporal law as follows:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

*Id.*

118. *Id.*

119. *Id.*

120. *Id.* As regards the relationship between intertemporal law and Article 52 of the Vienna Convention, the International Law Commission ("ILC") "considered that there is no question of the Article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law." Report of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. (No.9) at 74-75, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* 61 AM. J. INT'L L. 253, 408 (1967) [hereinafter ILC Report]. As previously noted, Article 52 concerns the conditions for the conclusion of a legally valid treaty. Vienna Convention, *supra* note 75, art. 52, at 344. "An evolution of the law governing the conditions for the carrying out of a legal act does not



## b. Clipperton Island

The arbiter in the *Clipperton Island Arbitration*<sup>121</sup> (“*Clipperton*”) applied the rules for acquiring territorial sovereignty set forth in *Island of Palmas* when Mexico and France reconciled their ownership disagreement regarding Clipperton, an unpopulated island in the Pacific Ocean.<sup>122</sup> Mexico claimed that Spain originally discovered Clipperton and that Clipperton, therefore, belonged to Mexico as the successor of the Spanish state.<sup>123</sup> France argued that it obtained title in November, 1858 as a result of a French Navy Lieutenant’s discovery of Clipperton and subsequent proclamation, declaration, and notification of the French consulate and Hawaiian government.<sup>124</sup>

The arbiter found no decisive proof that Spain discovered Clipperton.<sup>125</sup> In fact, the arbiter concluded that even if one assumes that Spain discovered Clipperton, Mexico has not supported its discovery claims with the requisite manifestations of sovereignty.<sup>126</sup> Consequently, the arbiter found Clipperton to be

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operate to deprive of validity a legal act already accomplished in conformity with the law previously in force.” ILC Report, *supra*, at 409. Thus, Article 52 does not deprive of validity, *ab initio*, treaties procured by coercion prior to the establishment of contemporary law regarding the threat or use of force. *Id.*

As regards the operative date for the modern law prohibiting the coercion of treaties by the use or threat of force, the ILC determined that Article 52 applies to all treaties concluded since the U.N. Charter entered into force on October 24, 1945. *Id.* Most international lawyers believe that Article 2, paragraph 4, along with other U.N. Charter provisions, “authoritatively declares the modern customary law regarding the threat or use of force.” *Id.*; see U.N. CHARTER, art. 2, para. 4 (providing that “[a]ll 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 other manner inconsistent with the Purposes of the United Nations.”). Yet, the ILC did not feel inclined to specify an operative date in the past beyond the temporal indication given by reference in Article 52 to “the principles of the Charter of the United Nations.” ILC Report, *supra* at 409.

121. *Clipperton Island Arbitration (Mex. v. Fr.)*, 2 R.I.A.A. 1105 (Jan. 28, 1931), reprinted in 26 AM. J. INT’L L. 390 (1932) [hereinafter *Clipperton*].

122. *Id.*

123. See *id.* at 392 (setting forth that Mexico’s claim that Spanish Navy discovered Clipperton, also known as Passion, Medano, or Medanos Island and that Bull of Alexander VII enforced law that gave Clipperton originally to Spain and then to Mexico in 1836).

124. *Id.* at 391.

125. *Id.* at 392-93.

126. See *id.* at 393 (concluding that Mexico failed to support its discovery claim with manifestations of sovereignty, long-standing conviction that Clipperton was Mexican territory was not dispositive).

a *terra nullius*<sup>127</sup> when France staked its original claim.<sup>128</sup> Therefore, as in *Island of Palmas*,<sup>129</sup> the question became whether either claimant had completed its discovery and ownership claims by actual manifestations of sovereignty.<sup>130</sup>

The arbiter noted that between 1858 and 1887, neither France nor any other power could recall any definitive acts of sovereignty.<sup>131</sup> In November, 1897, however, French surveillance uncovered three people collecting guano for a United States' company.<sup>132</sup> Moreover, Mexico dispatched a gun-boat to the island in December, 1897.<sup>133</sup> As a result, Mexican officers and marines forced the Americans to replace the hoisted U.S. flag with the Mexican flag.<sup>134</sup>

The arbiter concluded that because Mexico engaged in only the mere symbolic act of hoisting its flag, it failed to display the requisite peaceful and continuous acts of sovereignty.<sup>135</sup> In granting Clipperton to France, the arbiter found that France manifested such sovereignty on the basis of a formal proclamation of sovereignty, a formal protest to Mexico's assertions of sovereignty, a brief naval landing on Clipperton, and subsequent

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127. See OPPENHEIM, *supra* note 74, at 687 (defining *terra nullius* as uninhabited or inhabited territory that does not belong to any state).

128. *Clipperton*, 26 AM. J. INT'L L. at 393.

129. *Island of Palmas*, 2 R.I.A.A. at 829.

130. *Clipperton*, 26 AM. J. INT'L L. at 393.

131. *Id.* at 391.

132. *See id.* at 392 (explaining that France questioned United States which responded that it had no intention of claiming any rights to Clipperton).

133. *See id.* (setting forth that Mexico sent a gun-boat to Clipperton in response to unfounded reports that England desired Clipperton).

134. *Id.*

135. *See id.* at 393 (pointing out that actual taking of possession is a condition of effective occupation). The arbiter stated,

[t]his 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. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

*Id.* at 393-94.

grant of guano.<sup>136</sup> The limited amount of sovereignty manifestations required in *Clipperton* substantiates the PCA's statement in *Island of Palmas* that the degree of sovereign acts required to establish sovereignty varies according to circumstances such as time, place, and inhabitability of territory.<sup>137</sup> Furthermore, both *Island of Palmas* and *Clipperton* illustrate that in the case of uninhabited areas, little is required by way of displaying actual physical authority over the territory to effectuate possession.<sup>138</sup>

### c. Minquiers

*France v. United Kingdom*<sup>139</sup> ("Minquiers") involved a dispute concerning the islets and rocks of the Minquiers and Ecrehos groups in the English Channel.<sup>140</sup> Each claimant maintained that it had original title to the disputed territory and that it had confirmed its title by effective possession.<sup>141</sup> The United Kingdom asserted title by conquest and subsequent confirmation of title on the basis of treaties concluded between England and France.<sup>142</sup> The United Kingdom contended that it substantiated its claims to original title with continuous displays of sovereignty over the disputed territory.<sup>143</sup> France also claimed original title, contending that English Kings held the disputed territory in fee of French Kings.<sup>144</sup> France furthered its assertion by claiming

136. *Id.* at 391-92.

137. *See Island of Palmas*, 2 R.I.A.A. at 840 (explaining relativity of affirmative acts required to manifest sovereignty).

138. *See O'CONNELL*, *supra* note 74, at 411 (stating in reference to *Island of Palmas* and *Clipperton* that with uninhabited territories little physical control over territory is required to establish sovereign presence); *see also Eastern Greenland*, 1933 P.C.I.J. at 46 (noting that tribunal is often satisfied with little actual exercise of sovereign rights provided that other state cannot establish superior claim and, very often, when claims to sovereignty are over thinly populated or unsettled countries).

139. *Minquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17) [hereinafter *Minquiers*].

140. *Id.*

141. *Id.* at 53; *see O'CONNELL*, *supra* note 74, at 412 (noting that ownership afforded victor exclusive fishing rights).

142. *See Minquiers*, 1953 I.C.J. at 53-54 (listing treaties concluded between United Kingdom and France to include 1217 Treaty of Lambeth, 1259 Treaty of Paris, 1360 Treaty of Calais, and 1420 Treaty of Troyes).

143. *See id.* at 50, 65, 69 (finding that as regards Ecrehos and Minquiers, United Kingdom produced evidence establishing regulation of contracts of sale, administration of criminal proceedings, and erection and maintenance of habitable housing).

144. *See id.* at 56 (noting France's argument that French Court ordered King John of England to forfeit all land held in fee of King of France including Minquiers and Ecrehos).

that it had effectively possessed all the islets and rocks of the Minquiers and Ecrehos groups.<sup>145</sup>

Adjudging both Minquiers and Ecrehos to the United Kingdom, the ICJ refused to resolve historical, evidentiary differences.<sup>146</sup> Instead, the ICJ focused on the importance of affirmative acts of sovereignty to replace the alleged original title.<sup>147</sup> The ICJ, for example, attached particular value to acts related to the exercise of jurisdiction, local administration, and legislation.<sup>148</sup>

#### d. El Salvador

In *El Salvador/Honduras*<sup>149</sup> ("*El Salvador*"), the ICJ had to decide who owned the islands of Meanguera and Meanguerita.<sup>150</sup> The ICJ concluded that evidence based on the principle of *uti possidetis juris*<sup>151</sup> was too fragmentary and ambiguous to be con-

145. See *id.* at 51, 70 (setting forth French assertion that France maintained lights and buoys for more than 75 years on Minquiers without objection from the United Kingdom, that its Prime Minister and Air Minister traveled to Minquiers to inspect buoying, that Frenchman erected and occupied house on Minquiers, and that France began hydro-electric projects in Minquiers region).

146. *Id.* at 56. Regarding the problem of using historical claims and records to help resolve the dispute, the ICJ, alluding to intertemporal law, stated:

For the purpose of deciding the present case it is, in the opinion of the Court, not necessary to solve these historical controversies. The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement.

*Id.*

147. *Id.* at 57. Finding evidence of possession dispositive, the ICJ stated, ["w]hat is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups." *Id.*

148. *Id.* at 65.

149. *El Salvador*, 1992 I.C.J. at 351.

150. *Id.* Although questions arose as to the number of disputed islands, the ICJ concluded that it would only address the islands of El Tigre, Meanguera, and Meanguerita. *Id.* at 553-56.

151. *Id.* at 563. The term *uti possidetis juris* originated in Roman law as a writ of recognition and sanction from the state in order to protect occupants of public land even though they could not sustain an action for title or ownership because they could not show original title. *Libyan*, 1994 I.C.J. at 83. The writ served as the occupant's title. *Id.* The legal principle became, "Whichever party has possession of the house in question, without violence, clandestinely or permission in respect of the adversary, the vio-

clusory.<sup>152</sup> *El Salvador* differed from *Island of Palmas* and *Clipperton* because the disputed territory was not a *terra nullius*.<sup>153</sup> Nevertheless, and as it did in *Island of Palmas* and *Clipperton*, the ICJ proceeded on the premise that the only way to confirm the principle of *uti possidetis juris* was to consider relevant manifestations of sovereignty.<sup>154</sup>

Although the ICJ awarded one island to Honduras,<sup>155</sup> it awarded Meanguera and Meanguerita to El Salvador.<sup>156</sup> The ICJ paid particular attention to the long-standing El Salvadoran presence on Meanguera, noting an established El Salvadoran administration.<sup>157</sup> Furthermore, the ICJ found that with the exception of one event,<sup>158</sup> there was no record of any Honduran pro-

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lent disturbance of his possession [is] prohibited.’” *Id.* Simply put, the principle reads, “‘*uti possidetis, ita possideatis*’” or “‘as you possess, so may you possess.’” *Id.*

Two schools of thought have developed with regard to the interpretation of this principle. *Id.* at 85. One view is that *uti possidetis* means “merely a juridical line or constructive occupation - *uti possidetis juris* or ‘de jure.’” *Id.* A second, less lenient view is that “the principle must be based on a rightful and actual occupation of the territory - *uti possidetis de facto*.” *Id.*

152. *El Salvador*, 1992 I.C.J. at 563.

153. *Id.* at 564.

154. *Id.* at 566. The following statement by the ICJ indicates its reliance on *Minquiers* for the proposition that evidence of possession might possibly confirm claims of historic title:

“The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.” When it [ICJ in *Minquiers*] stated that “What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups,” it was not assimilating the islands to *terra nullius*, but examining evidence of possession as confirmatory of title.

*Id.* at 564-65 (citation omitted).

155. *See id.* at 566-70 (concluding that island of El Tigre belonged to Honduras based on historical events and Honduras’s effective occupation of El Tigre for more than 100 years).

156. *Id.* at 570-79. The inhabited island of Meanguera and the uninhabited island of Meanguerita lie in the Gulf of Fonseca and the ICJ treated them as a singular unit because neither Honduras nor El Salvador argued otherwise. *See id.* at 570 (noting that Meanguerita’s small size, its contiguity to Meanguera, and its uninhabited nature “allow its characterization as a ‘dependency’ of Meanguera”).

157. *See id.* at 572-75 (highlighting that Justice of Peace and military appointments, issuance of licenses, elections, taxation, judicial proceedings, postal and public health services, public works, education, and registries of birth, death, and land all evidenced long-standing El Salvadoran presence on Meanguera).

158. *See id.* at 574-77 (concluding that first recorded Honduran protest against El Salvadoran activities on Meanguera occurred on January 23, 1991 when Foreign Minister of Honduras disapproved of El Salvador’s elections because dispute was currently before ICJ and modification of positions undermined juridical situation of dispute).

test against El Salvador's activities on Meanguera.<sup>159</sup> Hence, the ICJ concluded that Honduras assented to El Salvadoran sovereignty.<sup>160</sup>

## II. JAPAN'S AND THE REPUBLIC OF KOREA'S COMPETING CLAIMS TO LIANCOURT

Japan's claims to Liancourt are mainly based on historical documentation<sup>161</sup> and international law<sup>162</sup> as evidenced by twentieth-century agreements with Korea,<sup>163</sup> formal declarations of ownership,<sup>164</sup> and protests to the Republic of Korea's activities concerning Liancourt.<sup>165</sup> Conversely, the Republic of Korea argues that it originally discovered Liancourt<sup>166</sup> and continues to administer<sup>167</sup> and maintain a presence thereon.<sup>168</sup> Moreover, the Republic of Korea argues that following its liberation from Japan's colonial rule,<sup>169</sup> Japan returned Liancourt as a result of

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159. *Id.* at 572, 574.

160. *See id.* at 577 (finding that because of preceding manifestations of El Salvador's sovereignty, Honduran protest came too late and Honduras's conduct, vis-a-vis El Salvador's acts of sovereignty, revealed a tacit consent to El Salvador's presence on island).

161. *See Takeshima*, *supra* note 14 (stating Japan's contention that it possesses numerous documents leading up to the 19th century that provide solid foundation for its historical claim to Liancourt).

162. *See supra* notes 45-160 and accompanying text (outlining various components of international law such as UNCLOS III and decisions of international adjudicatory bodies).

163. *See, e.g.*, Hori, *supra* note 14, at 511-25 (explaining Japan's initial interest in Liancourt during Russo-Japanese war for military purposes and subsequent incorporation of Liancourt into Shimane Prefecture by Japanese bureaucrats).

164. *See, e.g.*, Clive Schofield, *International Disputes in East Asia Escalate*, 11/1/96 *JANE'S INTELLIGENCE REV.* 517 (1996), available in WESTLAW, Allnewsplus Database (outlining steps Japan has taken, because of its decision to avoid use of force, to establish its claim to Liancourt such as sending Japanese ships to disputed area).

165. *Id.*

166. *See, e.g.*, Shin, *supra* note 14, at 333 (setting forth records such as "Annals of the Kings of Silla" that state that Tokdo became Korean territory in 512 A.D.).

167. *See Kajimura*, *supra* note 14, at 464-65 (mentioning pre-1954 establishment of Korean civilian garrison on Liancourt and 1954 replacement by permanent Korean police guards).

168. *See S. Korea Resumes Construction on Disputed Island*, REUTERS WORLD SERVICE, Apr. 29, 1996, BC Cycle (reporting that in addition to South Korean police guarding Liancourt since 1954, 34 maritime police and two civilians, all South Koreans, live on Liancourt).

169. *See BRIDGES*, *supra* note 22, at 6-9 (summarizing events giving rise to and occurring during Japan's 1910 to 1945 colonial rule such as Japanese attitudes of western expansionism and subsequent "Japanisation" of Korea).

bilateral and multilateral treaties.<sup>170</sup>

### A. Japan's Claim

The earliest Japanese records documenting the existence and Japanese ownership of Liancourt are from 1650.<sup>171</sup> Japan asserts that numerous other pre-nineteenth century documents provide a sound basis for its historical claim to Liancourt.<sup>172</sup> Moreover, Japanese fisherman used Liancourt during the seventeenth<sup>173</sup> and nineteenth centuries.<sup>174</sup> In addition, Japanese hunted sea lions on Liancourt during the early-twentieth century.<sup>175</sup>

Japan also contends to have occupied Liancourt during the Seven Years'<sup>176</sup> War and Russo-Japanese<sup>177</sup> War for strategic purposes.<sup>178</sup> Following the Russo-Japanese War, Japan annexed Ko-

170. See Paik Choong-hyun, *Japan Renews Spurious Claim to Tokto Islets*, Feb. 16, 1996 (visited Feb. 1, 1998) <<http://korea.emb.washington.dc.us/Kois/News/Backgrounder/bg140.html#Concern>> (also on file with the *Fordham International Law Journal*) (pointing to 1943 Cairo Declaration pledge that Japan would forfeit all islands it seized, occupied, or took by force; 1945 Potsdam Declaration limiting Japanese sovereignty to three specific islands not including Liancourt; Supreme Commander of Allied Powers directive number 677 that specifically excluded Liancourt; and 1951 Treaty of Peace with Japan in which Japan renounced all claims to Korea).

171. See *id.* (indicating that Tokugawa Shogunate granted Liancourt to Ohyas and Murakawas of Houki-Han which is known today as Tottori Prefecture).

172. *Takeshima*, *supra* note 14.

173. Hori, *supra* note 14, at 486.

174. *Japan and South Korea: Remember the Noses*, *ECONOMIST*, Feb. 17, 1996, at 35.

175. Hori, *supra* note 14, at 507.

176. See *e.g.*, 10 *THE NEW ENCYCLOPAEDIA BRITANNICA* 259-60 (15th ed. 1994) (explaining that 1904-05 Russo-Japanese War concerned conflict between Russia and Japan for dominance in Manchuria and Korea and noting that Japan's victory forced Russia to abandon its expansionist policies in Far East).

177. See *e.g.*, *id.* at 666-67 (describing 1756-63 conflict between France, Austria, Saxony, Sweden, and Russia on one side, and Prussia, Hanover, and Great Britain on other side as regards not only Austrian Habsburgs attempts to win back territory from Prussia, but also colonial struggles between Great Britain and France for control of North America and India and noting that Seven Years' War is often called French and Indian War).

178. See Hori, *supra* note 14, at 511 (noting that Japan's government found Liancourt valuable from war execution viewpoint). Korea signed a Protocol of Alliance with Japan on February 23, 1904 that allowed Japan to expropriate territory needed for military purposes and guaranteed Korean independence. *Id.* Accordingly, Japan constructed a watchtower on Liancourt that was completed on August 19, 1905. *Id.* at 513-14. The watchtower, however, was removed after the Russo-Japanese War. See Shin, *supra* note 14, at 354 (noting that following alleged Japanese incorporation of Liancourt into Shimane Prefecture in 1905, watchtower constructed by Japanese navy was removed).

rea in a series of agreements made between 1905 and 1910.<sup>179</sup> During this period, Japan specifically reaffirmed its claim to Liancourt by officially incorporating Liancourt into the Shimane Prefecture.<sup>180</sup> As part of the annexation, Japan contends that all

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179. CHOI, *supra* note 36, at 117-19. The most significant treaties aiding Japan in its annexation of Korea include the November 17, 1905 agreement that transferred control of Korean external relations to Japan, the July 24, 1907 agreement in which the Korean Administration was transferred to Japan, and the August 22, 1910 agreement and subsequent effectuation of the complete and total Japanese annexation of Korea. *Id.* Japan's takeover of Korea, however, was met by tremendous Korean resistance including the Samil Uprising of 1919, the June 10, 1926 Mansei Incident, and 1929 Kwangju Students Incident. *Id.* at 85. Despite Korea's opposition, the superpowers chose not to intercede in Japanese-Korean affairs. *See id.* at 45 (explaining that out of Great Britain, Russia, and United States, not one objected to Japan's absorption of Korea). According to one scholar, Great Britain endorsed Japan's influence in Korea as a check on Russia and as a protection of Great Britain's commercial and territorial interests in the East. *Id.* This scholar further asserts that Russia consented to Japan's control of Korea "as her war indemnity," and that the United States' position as an arbitrator between Russia and Japan motivated its choice not to intercede. *Id.*

180. *See id.* (noting 1905 cabinet decision and subsequent Shimane Prefecture proclamation to incorporate Liancourt); *see also* Kajimura, *supra* note 14, at 456-61 (pointing out January 28, 1905 cabinet decision and February 22, 1905 Shimane Prefecture Notice 40 that Liancourt belonged to Japan). Another Japanese opinion of the 1905 incorporation of Liancourt into the Shimane Prefecture holds that Liancourt was a *terra nullius* and therefore subject to occupation. *See* Hori, *supra* note 14, at 524 (concluding that Japan justifies its 1905 incorporation of Liancourt as either reconfirmation of title held since early modern times or as occupying *terra nullius*); *see also* My-Young Ahn, *South Koreans Upset at Japanese Claim to Remote Island*, DEUTSCHE PRESSE-AGENTUR, Dec. 10, 1996, available in WESTLAW, Allnewsplus Database (noting that Japan bases its claim to Liancourt on Shimane Prefecture Notice 40 issued on February 22, 1905 which stated that Liancourt was *terra nullius* and declared Liancourt part of Shimane Prefecture). The Shimane Prefecture is a Japanese Prefecture on Honshu, the main Japanese island. *Japan in Fresh Dispute with South Korea over Mini-Island*, DEUTSCHE PRESSE-AGENTUR, Feb. 9, 1996, available in WESTLAW, Allnewsplus Database. In response to Korean assertions that the 1905 incorporation was an imperialistic act of aggression by Japan, Japan counters that the Korean assertions are unfounded, cannot be tolerated, and are denunciative of Japan as a sovereign state. Kajimura, *supra* note 14, at 456-57. Japan did not inform Korea of the incorporation until March 1906. *Id.* at 458.

The Republic of Korea has a two-fold response to Japan's claim of incorporating Liancourt into the Shimane Prefecture in 1905. Lee, *supra* note 25, at 352-53. The Republic of Korea asserts that historical documentation proves that Liancourt belonged to Korea prior to Japan's alleged 1905 incorporation, thereby refuting Japan's contentions that Liancourt was a *terra nullius*. *Id.* Further, the Republic of Korea contends that Japan knew that Korea exercised sovereignty over Liancourt and, therefore, Japan's failure to notify Korea immediately of its professed acquisition violated international law and practice. *Id.* Yet, a recent news service notes that the 1905 incorporation occurred while Japan already had control of Korea's external affairs as part of the annexation process. *Japan Ready to go to World Court to Solve Island Dispute with South Korea*, AGENCE FRANCE PRESSE, Feb. 22, 1996 available in WESTLAW, Allnewsplus Database.



Korean territory became Japanese.<sup>181</sup> One international-law scholar maintains that the Japanese annexation of Korea consisted of a peaceful, voluntary, negotiated merging of both countries.<sup>182</sup>

Japan interprets the San Francisco Peace Treaty of 1951<sup>183</sup> as a more recent acknowledgment of Japan's sovereignty over Liancourt.<sup>184</sup> Furthermore, Japan's confidence in its position surfaced when it threatened to refer the dispute to the ICJ in September 1954.<sup>185</sup> Since then, Japan habitually sends an annual notice to the Republic of Korea to remind Seoul of Japan's continued claim to Liancourt.<sup>186</sup> Japan also regularly sends Maritime Safety Agency vessels to the disputed area in order to display the Japanese flag.<sup>187</sup> Currently, the official Japanese position is to work towards a peaceful settlement with the Republic of Korea.<sup>188</sup>

### B. *The Republic of Korea's Claim*

The earliest written Korean documentation states that Liancourt became part of Korea in 512 A.D.<sup>189</sup> Korean experts

181. CHOI, *supra* note 36, at 135-39. Article I of the 1910 Annexation Treaty reads: "His Majesty the Emperor of Korea makes complete and permanent cession to his Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea." *Id.* at 137. Article II reads: "His Majesty the Emperor of Japan accepts the cession mentioned in the preceding Article and consents to the complete annexation of Korea to the Empire of Japan." *Id.*

182. See OPPENHEIM, *supra* note 74, at 681-82 (citing examples of cessions based on voluntary mergers such as Duchy of Courland ceding its territory to Russia in 1795 and Free Town of Mulhouse merging into France in 1798).

183. Treaty of Peace with Japan, *supra* note 40, at 3169, 136 U.N.T.S. at 45.

184. *Id.* The Treaty of Peace with Japan, signed at San Francisco on September 8, 1951, was an attempt by the Allied Powers and Japan to resolve outstanding questions from World War II. *Id.* at 3171, 136 U.N.T.S. at 46. The second chapter covers problems relating to territory. *Id.* art. 2-4, at 3172-74, 136 U.N.T.S. at 48-52. Article 2(a) reads: "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet." *Id.* art. 2(a), at 3172, 136 U.N.T.S. at 48. Because there is no specific reference to Liancourt, Japan claims it never returned Liancourt to Korea. See Kajimura, *supra* note 14, at 461-62 (designating islands as Chejudo, Komundo, and Ullungdo as opposed to Quelpart, Port Hamilton, and Dagelet and noting Japan's argument that because Treaty did not specifically mention Liancourt, it was excluded from Korean territory).

185. *Takeshima*, *supra* note 14.

186. Schofield, *supra* note 164.

187. *Id.*

188. *Id.*

189. See, e.g., Shin, *supra* note 14, at 333 (describing that written records on Liancourt are found in Samguk sagi or "History of the Three Kingdoms").

claim that numerous eighth-century historical records prove that Liancourt was not only part of the Choson Dynasty<sup>190</sup> of Korea, but also a part of Choson's predecessors, the Silla and Koryo Kingdoms.<sup>191</sup> In addition, the Republic of Korea asserts that numerous maps verify its title to both Liancourt<sup>192</sup> and its larger neighbor, the island of Ullungdo, of which the Republic of Korea argues Liancourt is an appendage.<sup>193</sup> Koreans argue that they have continually protested Japanese activity in the disputed area.<sup>194</sup> Although Ullungdo was continually inhabited, Liancourt appears to have remained uninhabited.<sup>195</sup>

The Republic of Korea maintains that following World War II, Japan returned Liancourt as a result of the 1943 Cairo Declaration<sup>196</sup> and 1945 Potsdam Proclamation<sup>197</sup> which ended Japa-

190. *See id.* 334-37 (explaining role Choson dynasty government played in administering Liancourt and neighboring island Ullungdo). For example, the Chosen dynasty government evacuated Korean nationals because of a threat by Japanese pirates, instigated and maintained a vacant island policy under which both Ullungdo and Liancourt remained uninhabited, and published a geographic compilation of Korea. *Id.*

191. *See id.* at 333-34 (noting written records documenting Liancourt as Korean territory traced to Kings of Silla and mentioning increase in Japanese pirates toward end of Koryo).

192. *See Lee, supra* note 25, at 392 (setting forth that 1678-1752 Tongguk chido (Map of Korea), 1821-46 Choson chondo (Complete Map of Korea), and Haejwa chondo map of 1822 indicate exact location of Liancourt to side of Ullungdo).

193. *See id.* (explaining that Liancourt is islet appendant to Ullungdo).

194. *See id.* at 342 (relating 17th-century incident in which Koreans chased Japanese fishermen from Liancourt because Korea prohibited Japanese from living on the island).

195. *See id.* at 348-50 (detailing Ullungdo population as of March 1897 to consist of 662 males and 472 females dwelling in 397 houses in 12 villages).

196. The Cairo Declaration, Dep't St. Bull., Dec. 4, 1943, at 393, 3 Bevens 858. At the 1943 Cairo Conference, the United States, China, and Great Britain pledged that Korea would become free and independent of Japan:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose 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 . . . . Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

*Id.*

197. The Potsdam Proclamation Defining Terms for Japanese Surrender, Dep't St. Bull., July 29, 1945, at 137, 3 Bevens 1204. The Potsdam Declaration reaffirmed the multilateral pledge made at Cairo: "The terms of the Cairo Declaration shall be carried out and Japanese Sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyoshu, Shikoku and such minor islands as we determine." *Id.* at 1205(8). Shortly there-

nese rule of Korea.<sup>198</sup> Shortly thereafter, argues the Republic of Korea, the Allied Powers issued Supreme Command for Allied Powers Instruction Numbers 677<sup>199</sup> ("SCAPIN No. 677") and 1033<sup>200</sup> ("SCAPIN No. 1033") which exclude Liancourt from Japanese jurisdiction and proscribe Japanese activity in the disputed area.<sup>201</sup>

Subsequent to Japan's relinquishment of control over Ko-

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after, Korea was officially liberated from Japan's 36-year rule. *CHOI, supra* note 36, at 120.

198. *Id.* The Republic of Korea contends that the period prior to Korea's liberation at the close of World War II, and specifically the period prior to the 1910 Annexation Treaty, evidenced Japan's insatiable imperialistic appetite. See Bradley Martin & Yoshiko Matsushita, *Politics Behind Japan Sea Claim*, *ASIA TIMES*, Feb. 16, 1996, at 1 (noting Republic of Korea's argument that Japan manipulated Korea's government several years prior to 1910); see also Robert Guest, *Korea Furious After Japan Lays Claim to Fishing Isles*, *DAILY TELEGRAPH*, Feb. 15, 1996, available in WESTLAW, Allnewsplus Database (stating that Japan overtook Liancourt during period in which Japan held royal Korean family hostage). The Republic of Korea further argues that Japan imposed itself on Korea by force. HILARY CONROY, *THE JAPANESE SEIZURE OF KOREA 1868-1910: A STUDY OF REALISM AND IDEALISM IN INTERNATIONAL RELATIONS* 347 (1960). Referencing the February 26, 1876 Treaty of Peace and Friendship between Japan and Korea, one scholar maintains that "Korea was compelled to sign the treaties under threat of war." *CHOI, supra* note 36, at 10. Referring to Japanese negotiations with the Korean foreign ministry, this scholar continues, "[t]he Japanese used every kind of reasoning, offered . . . bribes, cajoled . . . and threatened to kill them if they refused to yield." *Id.* at 47. Another bold statement reveals "that the single factor which brought about the fall of the Korean nation was the use of ruthless, inhumane, and unjustifiable methods by the Japanese to accomplish their objectives in Korea." *Id.* at 82.

The same scholar argues the United States did not intervene because it was acting as an arbitrator between Japan and Russia. *Id.* at 45. Referencing Russia and Great Britain, the author states, "Russia consented to Japan's domination of Korea as her war indemnity, and Great Britain welcomed the advance of the influence of Japan so as to checkmate Russian influence and protect her commercial, as well as territorial, interests in the East." *Id.* Furthermore, Japan signed a convention with Russia pledging non-intervention in each other's spheres of influence. *Id.* at 74.

199. Government and Administrative Separation of Certain Outlying Areas from Japan: Supreme Command for Allied Powers Instruction No. 677, Jan. 29, 1946 (limiting Japan's territory to islands of Hokkaido, Honshu, Kyushu, Shigoku, and about 1,000 smaller islands). Clause 5 specifically excluded Ullungdo, Liancourt, and Chejudo. *Id.*

200. Memorandum Concerning the Establishment of the MacArthur Line: Supreme Command for Allied Powers Instruction No. 1033, June 22, 1946 (prohibiting Japanese ships from coming within 12 nautical miles of Liancourt).

201. *Id.* Japan's counter argument to SCAPIN No. 677 and 1033 is that they are not final dispositions of Liancourt. Kajimura, *supra* note 14, at 461-62 (addressing Japan's reliance on 1951 San Francisco Peace Treaty and noting that because Treaty did not specifically include Japanese renunciation of Liancourt, it remained Japanese territory).

rea, Liancourt housed its first Korean inhabitants.<sup>202</sup> Since then, there has been a continual Korean presence on Liancourt of at least one or two fishing families and a permanent coastguard.<sup>203</sup> The Republic of Korea has also taken numerous steps to develop the disputed area.<sup>204</sup>

In late 1995, the Republic of Korea began building harbor facilities as authorized by the Korean Maritime and Port Administration.<sup>205</sup> In addition, the Republic of Korea announced plans in early 1996 to install a water treatment plant on Liancourt to convert sea water into potable water.<sup>206</sup> In March 1996, the Republic of Korea lifted an existing ban on tourism in the disputed area.<sup>207</sup> Moreover, as part of a project to upgrade navigational aid facilities, South Korean officials set aside US\$86,000 to refurbish a South Korean lighthouse on Liancourt.<sup>208</sup> The refurbishment is intended to enhance the range of the lighthouse from seventeen to more than twenty-six nautical miles.<sup>209</sup> Currently, the Republic of Korea's official position is that Liancourt is inherently Korean and may therefore not become the subject of a territorial dispute.<sup>210</sup>

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202. See GUEST, *supra* note 198 (stating that Liancourt's first inhabitants, all Koreans, arrived in mid-20th century).

203. *Id.*

204. See, e.g., *South Korea Builds Harbor Facilities on Disputed Island*, AGENCE FRANCE PRESSE, Feb. 8, 1996, available in WESTLAW, Allnewsplus Database (reporting that Republic of Korea's constructed and continues to maintain harbor facilities on Liancourt).

205. See *S. Korea Resumes Construction on Disputed Island*, *supra* note 158 (reporting estimated harbor facilities investment around US\$19.74 million).

206. See Shim Sung-won, *S. Korea Risks New Island Flare-up Over Water Plant*, REUTERS FIN. SERVICE, Feb. 22, 1996 (reporting South Korean plans to install water treatment plan on Liancourt that can transform five tons of water per day, enough for 50 people).

207. See *South Korea Allows First Group of Tourists to Disputed Islets*, AGENCE FRANCE PRESSE, Mar. 12, 1996, available in WESTLAW, Allnewsplus Database (reporting ferry carrying 700 tourists to Liancourt).

208. See *South Korea to Boost Range of Lighthouse on Disputed Islets*, AGENCE FRANCE PRESSE, Dec. 12, 1996, available in WESTLAW, Allnewsplus Database (outlining South Korean lighthouse reinforcement plans).

209. See *id.* (reciting South Korean plans to boost lighthouse range).

210. Lee, *supra* note 25, at 390.

III. *THE REPUBLIC OF KOREA ESTABLISHES A SUPERIOR  
CLAIM TO LIANCOURT THAN DOES JAPAN AND  
SHOULD THEREFORE BECOME  
LIANCOURT'S SOVEREIGN*

To achieve the maximum jurisdictional sovereignty the 1982 Convention affords, the claimants must first establish sovereignty over Liancourt according to internationally-recognized standards.<sup>211</sup> Thereafter, the dispute will likely concern Liancourt's characterization as an island, or a rock capable of sustaining human habitation or economic life under Article 121.<sup>212</sup> If the victor can meet Article 121's criteria, then Liancourt can readily generate individual maritime zones.<sup>213</sup>

A. *According to Public International Law, the Republic of Korea Has a Stronger Claim to Liancourt Than Does Japan*

Considering the evidence presented, the Republic of Korea establishes a stronger claim to Liancourt because it has manifested greater affirmative acts of sovereignty on and around the disputed area than has Japan. Arguments that Korea acquired Liancourt as a result of a particular method of territorial acquisition, however, will be limited. Yet, the Republic of Korea will ably defeat any similar Japanese arguments. In addition, the Republic of Korea may struggle to prove that Liancourt is an appendage of Ullungdo. Therefore, considering Liancourt's ambiguous past, the dispute will likely turn on which country has demonstrated ownership by manifesting relevant, affirmative acts of sovereignty as in *Island of Palmas*, *Clipperton*, *Minquiers*, and *El Salvador*.

1. Cession

Despite Japan's reliance on the 1910 Annexation Agreement by which it argues that all Korean territory became Japanese,<sup>214</sup> it is questionable whether Korea intended to relinquish

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211. See *supra* notes 51-160 and accompanying text (detailing UNCLOS III, territorial acquisition principles, and international adjudicatory body decisions).

212. See *supra* notes 61-73 and accompanying text (setting forth UNCLOS III's island regime according to Article 121).

213. UNCLOS III, *supra* note 2, art. 121, 21 I.L.M. at 1291.

214. See *supra* notes 179-81 and accompanying text (setting forth Japan's argument that Korea agreed to relinquish itself to Japanese rule).

title and pass sovereignty as is required for a valid cession.<sup>215</sup> Indeed, Korea resisted the 1905-10 annexation period with uprising, protest, and a continual struggle to regain independence.<sup>216</sup> Moreover, Korea's resistance defeats any Japanese claim that Liancourt was the subject of a peaceful transfer of territory, an additional cession requirement.<sup>217</sup> Finally, any contention that Korea voluntarily merged into Japan as a result of peaceful negotiations is simply untenable when historical scholarship is considered documenting Japan's imperialistic takeover tactics.<sup>218</sup> Therefore, Japanese arguments based on cession will fail.

## 2. Prescription

Japan and the Republic of Korea will have difficulty advancing any legitimate prescription claims. Indeed, Korea continually protested Japan's annexational rule.<sup>219</sup> Conversely, Japan continually protests, both formally and informally, the Republic of Korea's presence on Liancourt.<sup>220</sup> Such protests undermine prescription's requirement of an undisturbed exercise of sovereignty and general conviction that things are in conformity with international order.<sup>221</sup> Yet the superpowers'<sup>222</sup> failure to object to Japan's dominant influence in Korea during the several decades prior to the conclusion of World War II indicates the international community's endorsement of, or acquiescence to, Japan's colonial rule.<sup>223</sup> The international community's recognition tends to illustrate conformity with international order.<sup>224</sup>

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215. See *supra* notes 77-81 and accompanying text (defining and setting forth requirements of cession such as intentional relinquishing and receiving of sovereignty).

216. See *supra* note 179 (noting Korean resistance to Japanese imperialism).

217. See *supra* notes 77-81 and accompanying text (defining and setting forth cession requirements such as peaceful transfer of sovereignty from one state to another).

218. See *supra* note 198 (outlining historical background and Japanese-Korean relations prior to annexation period).

219. See *supra* note 179 (listing several Korean protests through 36-year annexation period).

220. See *supra* notes 186-87 and accompanying text (noting Japanese protests since mid-20th century).

221. See *supra* notes 82-85 and accompanying text (discussing requirements for internationally-recognized prescription claims).

222. See CHOI, *supra* note 36, at 45 (listing superpowers as Great Britain, Russia, and United States).

223. See *supra* note 179 (setting forth one scholar's explanation of superpowers' choice not to intervene in Korean-Japanese affairs).

224. See *supra* notes 82-85 and accompanying text (outlining process of prescription as means of territorial acquisition).

Furthermore, international-community recognition strengthens a Japanese claim of prescription in light of its continuous exercise of sovereignty during the thirty-six-year annexation period.<sup>225</sup> Japan, however, cannot demonstrate that its sovereignty remained undisturbed by Korean protest. Thus, neither Japan nor the Republic of Korea will prove to have acquired Liancourt via prescription.

### 3. Subjugation

Japan has a strong argument that it acquired Liancourt by subjugation.<sup>226</sup> Indeed, to establish sovereignty based on subjugation, a formal annexation must follow conquest.<sup>227</sup> Although subjugation has always been rare,<sup>228</sup> an international adjudicatory body might consider it because the law existing when the applicable facts arose applies when judging root of title.<sup>229</sup>

If the Republic of Korea is able to prove that Japan forced Korea to cede Liancourt to Japan, however, such an act would be cession rather than subjugation.<sup>230</sup> Hence, a Japanese claim based on subjugation would likely fail because a valid cession requires the intentional relinquishment and acceptance of sovereignty.<sup>231</sup> Relinquishing sovereignty is clearly unintentional if its transfer is compelled or coerced.

### 4. Occupation

Any Japanese claim to sovereignty based on occupation will be fraught with difficulty because occupation presumes that the occupied territory does not already belong to a state.<sup>232</sup> Liancourt's history defies this presumption because it appears to

225. See *supra* notes 179-81, 196-201 and accompanying text (describing Japan's annexation claim in 1910 and noting Korea liberation following World War II).

226. See *supra* notes 86-90 and accompanying text (defining subjugation as method to acquire territory).

227. See *id.* (outlining requirements for internationally-recognized subjugation).

228. See *id.* (explaining rarity of subjugation because victors of conquest and annexation often enforce cession agreements).

229. See *supra* notes 117-20 and accompanying text (detailing intertemporal law set forth in *Island of Palmas*).

230. See *supra* notes 86-90 (noting that victors of conquests followed by annexations often enforce cession agreements).

231. See *supra* notes 77-81 and accompanying text (setting forth requirements for internationally-recognized cession).

232. See *supra* notes 91-94 and accompanying text (explaining that valid occupation presumes acquisition of *terra nullius*).

have initially belonged to Korea.<sup>233</sup> Indeed, Japan's assertion of sovereignty, based on a series of agreements with Korea prior to and including the 1910 Annexation Agreement, negates any discovery-based ownership claims Japan might have because it concedes a lack of initial ownership.<sup>234</sup>

If the Republic of Korea can demonstrate that Korea had original title based on discovery, then it has a greater chance of establishing a completed inchoate title by effective occupation as set out in *Island of Palmas*.<sup>235</sup> Under the standard to effectuate occupation over thinly-populated or uninhabited areas established by *Island of Palmas* and *Clipperton*, the Republic of Korea's manifestations of sovereignty should prove sufficient because little is required.<sup>236</sup>

In *Island of Palmas*, the PCA noted that continual and peaceful displays of sovereignty could substantiate or complete inchoate title.<sup>237</sup> A strict reading of such a rule appears fatal to Japanese claims.<sup>238</sup> Japan's presence on Liancourt occurred during times of unrest, namely during the Russo-Japanese War, Seven Years' War, and subsequent annexation of Korea.<sup>239</sup> Moreover, Japan's occupation of Liancourt was not continual.<sup>240</sup> Specifically, there is no indication of an actual Japanese presence on Liancourt since the 1945 Potsdam Treaty.<sup>241</sup>

## 5. Affirmative Acts of Sovereignty

From the evidence presented, the Republic of Korea has an enormous advantage because it effectively possesses

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233. See *supra* notes 161-210 and accompanying text (detailing Japan's and Republic of Korea's assorted claims to Liancourt).

234. See *supra* notes 171-88 and accompanying text (explaining Japan's claim to Liancourt).

235. See *supra* notes 98-120 and accompanying text (discussing PCA decision in *Island of Palmas*).

236. See *supra* notes 98-138 and accompanying text (detailing *Island of Palmas* and *Clipperton* and setting forth contemporary requirements for acquiring sovereignty over islands).

237. See *supra* note 114 and accompanying text (explaining that inchoate title may be completed by affirmative acts of sovereignty).

238. See *supra* notes 171-88 and accompanying text (setting forth Japan's attempts to display affirmative acts of sovereignty).

239. See *supra* notes 173-82 and accompanying text (summarizing time periods in which Japan maintained presence on Liancourt).

240. *Id.*

241. *Id.*



Liancourt.<sup>242</sup> Not only has the Republic of Korea constructed a wharf, established a coastguard, refurbished a lighthouse, and administered a continual fishing family, but also plans for desalination plants and increased human habitation.<sup>243</sup> Many territorial disputes referred to international adjudicatory bodies highlight establishing sovereignty through affirmative actions,<sup>244</sup> particularly when dealing with a *terra nullius*.<sup>245</sup> Even when the disputed territory is never considered a *terra nullius*, however, effective possession seems to prove dispositive.<sup>246</sup>

Japan may claim that formal protests such as displaying the Japanese flag in and dispatching Japanese ships to the disputed area are sufficient acts of sovereignty.<sup>247</sup> An adjudicatory body, however, might find such acts insufficient. Recall that Mexico attempted to substantiate its sovereignty over Clipperton by hoisting a Mexican flag and dispatching a gun-boat to defend the island from a threatened United Kingdom takeover.<sup>248</sup> Nonetheless, the arbiter found these acts insufficient to establish sovereignty.<sup>249</sup> To distinguish *Clipperton*, Japan should note the continuity of its efforts as compared to Mexico's limited activity.

## 6. Ullungdo and Liancourt as a Single Entity

The Republic of Korea's claim will also be strengthened if it is able to prove its contention that Liancourt has consistently been treated as an appendage of Ullungdo.<sup>250</sup> In *El Salvador*, the ICJ treated the uninhabited island of Meanguerita and the inhabited island of Meanguera as a single insular unit.<sup>251</sup> Compar-

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242. See *supra* notes 204-09 and accompanying text (detailing steps Republic of Korea has taken to develop Liancourt).

243. *Id.*

244. See *supra* notes 95-160 and accompanying text (discussing international adjudicatory bodies' decisions in *Island of Palmas*, *Clipperton*, *Minquiers*, and *El Salvador*).

245. See *supra* note 92 (defining *terra nullius*).

246. See *supra* notes 139-60 and accompanying text (highlighting importance of affirmative acts of sovereignty in *Minquiers* and *El Salvador*).

247. See *supra* notes 185-87 and accompanying text (noting Japan's modern-day attempts to publicize its claim to Liancourt).

248. See *supra* notes 121-38 and accompanying text (detailing *Clipperton* and highlighting Mexican attempts to establish sovereignty over disputed territory).

249. See *supra* note 136 and accompanying text (setting forth French manifestations of sovereignty).

250. See *supra* notes 192-95 and accompanying text (describing Republic of Korea's argument that Liancourt is an appendage to Ullungdo).

251. See *supra* note 156 (setting forth ICJ's conclusion that Meanguera and

ing the relationship between Meanguera and Meanguerita with that of Minquiers and the Channel Islands in *Minquiers*, the ICJ wrote of Meanguerita's dependency on Meanguera, noting Meanguerita's small size, its contiguity to Meanguera, and its lack of inhabitants.<sup>252</sup> According to the Republic of Korea, these characteristics adequately describe Liancourt's relationship to its neighboring island Ullungdo.<sup>253</sup> Japan, however, in an effort to distinguish *El Salvador*, should note that because neither party to the dispute treated the islands as separate entities, the ICJ was reluctant to make the distinction.<sup>254</sup> In addition, *Island of Palmas* casts doubt on the assertion that contiguity alone proves ownership.<sup>255</sup>

### B. *Liancourt Will Not Qualify as an Island Under Article 121*

It does not appear as if Liancourt will qualify for the maximum maritime zones the 1982 Convention and Article 121 bestow.<sup>256</sup> To do so, Liancourt's sovereign will have to demonstrate that Liancourt is either an island or a rock capable of sustaining human habitation or economic life.<sup>257</sup> Due to the inability of the international community to agree on a specific definition of sustaining human habitation or economic life, such a demonstration will be a formidable task.<sup>258</sup>

Currently, no official clarification of Article 121(3)'s ambiguities exists.<sup>259</sup> Liancourt's sovereign should argue that outside assistance from the coastal state to meet the required standards is not expressly prohibited by the 1982 Convention and should, therefore, be allowed.<sup>260</sup> Moreover, because the 1982 Convention does not specify the required level of human habitation or

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Meanguerita be treated as one unit because neither El Salvador nor Honduras argued otherwise and noting Meanguerita's dependence on Meanguera).

252. *Id.*

253. *See supra* notes 192-95 and accompanying text (noting Republic of Korea's argument that Liancourt is appendage of Ullungdo).

254. *See supra* note 156 and accompanying text (noting ICJ finding that neither El Salvador nor Honduras distinguished Meanguera from Meanguerita).

255. *Island of Palmas*, 2 R.I.A.A. at 854.

256. *See supra* notes 14, 66 and accompanying text (setting forth size of Liancourt and various numerical definitions of rocks, isles, and islands).

257. *See supra* note 61 (setting forth UNCLOS III's island regime provisions).

258. *See supra* notes 61-73 (explaining difficulties associated with interpreting Article 121(3)).

259. *Id.*

260. *See supra* note 61 (setting forth provisions of UNCLOS III island regime).

economic life, the victor should argue that Liancourt continually has supported fishermen and a coastguard, indicating at least some level of human habitation and economic development.<sup>261</sup>

### CONCLUSION

The Republic of Korea has a stronger claim to Liancourt than does Japan. Japan's claims rest largely on various agreements with Korea, thus implying that Liancourt originally belonged to Korea. Accordingly, assuming Korea did originally own Liancourt and if the Republic of Korea can prove that it completed its original title by subsequent manifestations of sovereignty, an international adjudicatory body or other third party should find in its favor. Such a finding will undoubtedly prove a decisive victory for the Republic of Korea. Notwithstanding, the Republic of Korea will likely fail in its attempts to prove Liancourt deserving of additional maritime jurisdiction under Article 121.

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261. See *supra* notes 161-210 and accompanying text (discussing Japanese and Korean claims that Liancourt has sustained various levels of human habitation and economic life).