# SOVEREIGNTY OVER THE LIANCOURT ROCKS: A COMPREHENSIVE OVERVIEW OF THE DISPUTE BETWEEN JAPAN AND THE REPUBLIC OF KOREA

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## ABSTRACT

The Liancourt Rocks dispute is one of a series of ongoing island disputes in East Asia. The dispute centres on two tiny rocks in the Sea of Japan that have been disputed between Japan and South Korea for centuries. Despite its long history, the dispute has not received much Western attention and has never been resolved.

This paper considers several aspects of the issue including the law of sovereignty and its application to this problem, the ability of North Korea to claim the Rocks as a successor of the Kingdom of Korea, the potential for the Rocks to generate extended maritime zones under the law of the sea and the possibility of using a condominium to share the resources of the region. In doing so, this paper seeks to provide a comprehensive overview of the dispute and provide practical proposals for its resolution.

This paper seeks to answer the question of how this dispute would be resolved at law. It is argued that South Korea would prevail over both Japan and North Korea, but that this would not generate the extended maritime zones envisaged by the parties. However, even utilising unconventional solutions like condominiums would not resolve the underlying problem which is ultimately a matter of national pride.

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## I INTRODUCTION

In the middle of the Sea of Japan are two tiny rocks at the centre of an ancient and ongoing dispute between Japan and South Korea. These Rocks have had various names over the centuries, including Matsushima and Takeshima in Japanese[1] or Seokdo, Dokdo and Tokdo in Korean.[2] For the purposes of neutrality, this paper will use the Western name of "Liancourt Rocks". The dispute over the Liancourt Rocks dates back to 512AD and has been complicated by war, colonisation, state succession and developments in international law. The insistence of sovereignty over these tiny rocks for so many centuries is somewhat surprising. The Rocks are volcanic, surrounded by sharp cliffs, with scarce vegetation and no drinking water.[3] They cannot sustain permanent human habitation. However the Rocks are surrounded by rich fishing waters and, potentially, hydrocarbons.[4] More importantly, the Liancourt Rocks are tied to Japanese-Korean history and nationhood.

This dispute is one of many throughout Asia. Western literature has focused on the better known examples such as the Paracel Islands, disputed by China, Taiwan and Vietnam, the Senkaku Islands, claimed by Japan, China and Taiwan, or the best known Spratly Islands which are the centre of a dispute between Taiwan, China, Vietnam, Philippines, Malaysia and Brunei. These disputes have sometimes escalated into conflict and have the potential to be the next flashpoint for war.[5]

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[1] Hideki Kajimura, 'The Question of Takeshima/Tokdo' (1997) 28(3) *Korea Observer* 423, 437.

[2] See, eg, Sung-jae Choi, 'The Politics of the Dokdo Issue' (2005) 5 *Journal of East Asian Studies* 465, 467; Choung Il Chee, *Legal Status of Dok Island in International Law* (Korean Association of International Law, 1997) 6-7.

[3] Kajimura, above n 1, 434.

[4] Raul (Pete) Pedrozo, 'Sovereignty Claims Over the Liancourt Rocks (Dokdo/Takeshima)' (2010) 28 *Chinese (Taiwan) Yearbook of International Law and Affairs* 78, 78; Jon M Van Dyke, 'Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary' (2007) 38 *Ocean Development and International Law* 157, 198; 'Profile: Dokdo/Takeshima Islands', *BBC News Asia* (Online), 10 August 2012, <http://www.bbc.com/news/world-asia-19207086>. Cf Thomas J Schoenbaum, 'Resolving Japan's Territorial and Maritime Disputes with its Neighbors – Problems and Opportunities' (2006) 57 *The Journal of Social Science* 197, 204; Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at June 2007), Masahiko Asada, 'Takeshima/Dok Do Island' [1].

[5] See Schoenbaum, above n 4, 197.

Although it is part of a wider problem, the Liancourt Rocks dispute has its own unique aspects. This paper seeks to answer the question of how this dispute would be resolved at law. It is argued that South Korea would prevail over both Japan and North Korea, but that this would not generate the extended maritime zones envisaged by the parties. However, even utilising unconventional solutions like condominiums would not resolve the underlying problem which is ultimately a matter of national pride. Chapters II and III will consider the first of these issues: the law of territorial acquisition and its application to Japan and South Korea's claims. Despite the dispute's long history it is the recent past which proves critical. Chapter IV will assess the role of North Korea, an oft forgotten claimant, concluding that North Korea's failure to assert a claim since becoming a State has precluded it from gaining sovereignty now. Chapter V will then consider the issue of maritime boundaries. Islands may generate extended maritime zones that significantly increase State sovereignty. In practicality, control of marine resources is what makes the Rocks valuable but this value is decreased because the Liancourt Rocks are not entitled to the full zones. Finally Chapter VI will consider a middle ground approach, that of condominium, to allow both States to share the resources surrounding the Rocks. Although this could be a practical solution, it would not resolve the underlying problems left by the legacy of the Second World War.

In writing these chapters I have often relied on the works of scholars who have reviewed, and often reproduced, those primary documents I could not obtain access to. Many sources are still not available outside the National Archives of Japan and Korea, and some of the wartime documents are still classified.[6] Therefore it is possible that, if this dispute were ever to go before an international tribunal, new evidence could be adduced which would change the outcome.

[6] See, eg, Kimie Hara, *Cold War Frontiers in the Asia-Pacific: Divided Territories in the San Francisco System* (Routledge, 2007) 32.

Ultimately, the many facets of this dispute can be resolved through international law but this will not resolve the core problems. These problems stem from the legacy of the Second World War and Japanese colonisation of Korea. In order to effectively end the dispute itself, the parties must come to terms with their past. At its core, the Liancourt Rocks dispute is not a dispute about sovereignty or resources. It is about Japanese acknowledgment of Korean nationhood and about making amends for past sins.

## II LAW OF SOVEREIGNTY

### A *Title to Territory*

Historically, territory was considered the personal property of the sovereign.[7] In international law there are five traditional modes of territorial acquisition, which have derived from private Roman law.[8] These are: occupation, accretion, cession, subjugation and prescription.[9] Occupation and accretion both involve acquiring title for the first time, while cession, subjugation and prescription involve acquiring title that once belonged to another State. On this basis the five modes are divided into two categories: original and derivative title.[10] There are also five corresponding ways of losing territory: cession, abandonment[11] (which corresponds to occupation), nature, subjugation and prescription.[12] There is also a sixth mode of loss, revolt.[13]

In modern law the focus has shifted to the acquisition of sovereignty over territory by the State, rather than personal ownership by the monarch.[14] Other developments in international law like self-determination and the prohibition

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[7] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1B, 679.

[8] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 679; James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012 ) 220; Randall Lessaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *European Journal of International Law* 25, 39.

[9] Crawford (ed), *Brownlie's Principles,* above n 8, 220; Watts and Jennings (eds), above n 7, 679-80, 686-8, 696, 698-9, 705-6, 708; Benjamin K Sibbett, 'Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea' (1998) 21 *Fordham International Law Journal* 1606, 1622; Phil Haas, 'Status and Sovereignty of the Liancourt Rocks: The Dispute between Japan and Korea' (2012) 15 *Gonzaga Journal of International Law* 2, 5; Van Dyke, 'Sovereignty over Dokdo', above n 4, 158; Schoenbaum, above n 4, 207-8; Seokwoo Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal' (2000) 16 *Connecticut Journal of International Law* 1, 1.

[10] However there is a difference of opinion about whether subjugation and prescription are derivative titles. Some scholars like Oppenheim define derivative title as title bestowed by the former sovereign. In this circumstance prescription and subjugation are considered original titles because they are acquired by the claiming State itself. See Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 679.

[11] This is sometimes separated into two types, renunciation and abandonment or dereliction: Seokwoo Lee, 'Intertemporal Law, Recent Judgments and Territorial Disputes in Asia' in Seong-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, 2009) 119, 123.

[12] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 716.

[13] Ibid.

[14] Ibid 679.

of the use of force have also displaced some aspects of traditional title.[15] In particular, tribunals have focused on effective occupation as the key feature of sovereignty. As a result, the five modes have been widely criticised as being obsolete and obscuring factual analysis.[16] However modern law has developed from these modes and many ancient titles are based upon these doctrines. Japan and South Korea can potentially base their claims to the Liancourt Rocks on all modes except accretion, the formation of territory by natural means.[17] Therefore understanding the other four modes is important to understand the dispute.

1 *Original Title*
*(a) Discovery*

Two old forms of title are immemorial possession and discovery. Today, neither is accepted as a sole basis for title. Immemorial possession[18] relies on historical fact and general opinion.[19] Tribunals recognise this ancient title, but require supporting evidence.[20] Discovery is linked to the concept of terra nullius, which is now out-dated because there is little unclaimed land left in the world.[21] Before the 18th century, discovery was considered sufficient to acquire sovereignty over territory.[22] However today it is widely accepted that discovery only afford an inchoate title.[23] An inchoate title may bar other

[15] Ibid.
[16] Ibid; Crawford (ed), *Brownlie's Principles,* above n 8, 221; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 1.
[17] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 696.
[18] Also known as possession since time immemorial.
[19] Crawford (ed), *Brownlie's Principles,* above n 8, 221.
[20] Ibid. See *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12*,* 42-3 ('*Western Sahara'*); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening) (Judgment)* [1992] ICJ Rep 351, 564-5 ('*El Salvador v Honduras)'*); *Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v Pakistan)* (1968) 50 ILR 2, 474-5 ('*Rann of Kutch'*); *Territorial Sovereignty and Scope of the Dispute* (*Eritrea v Yemen*) (*Award in the First Phase*) (Permanent Court of Arbitration, 9 October 1998), 35-45 ('*Eritrea-Yemen'*).
[21] Crawford (ed), *Brownlie's Principles,* above n 8, 223; Haas, above n 9, 5; Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 284. The Court also prefers title to terra nullius: Crawford (ed), *Brownlie's Principles*, above n 8, 217.
[22] Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 689.
[23] Ibid 690; *Island of Palmas (Netherlands v United States) (Award)* (1928) 2 RIAA 829, 829 ('*Island of Palmas'*); *Sovereignty over Clipperton Island (France v Mexico) (Award*) (1932) 26 *American Journal of International Law* 390, 393 ('*Clipperton Island'*); Crawford (ed), *Brownlie's Principles,* above n 8, 223.

States from occupying the territory[24] but it must be completed by the claimant State through effective occupation within a reasonable period of time.[25]

*(b) Effective Occupation*

Effective occupation is key to territorial acquisition. It has its roots in the seminal decision of *Island of Palmas*,[26] a 1928 arbitration between the Netherlands and USA before Max Huber. The case involved a sovereignty dispute over Palmas Island. The US argued that Palmas, by virtue of the principle of contiguity, had belonged to the Philippines, which in turn had been Spanish territory.[27] Spain had ceded the Philippines to the US in the *Treaty of Paris*. The Netherlands disputed this and argued that Palmas had been colonised on their behalf by the Dutch East India Company. This was followed by a period of uninterrupted and peaceful sovereignty over the island, as the Dutch established their control through treaties with the native chiefs.[28]

Huber rejected the USA's arguments and awarded sovereignty to the Netherlands.[29] He held that discovery only created an inchoate title that must be completed by effective occupation.[30] Importantly, Huber considered that a continuous and peaceful display of sovereignty was as good as a title.[31] He did not define what this required, but accepted that manifestations of territorial sovereignty could and would take different forms depending on the territory.[32] He also accepted that it could not be exercised 'at every moment on every point of a territory'[33] and held that the display of sovereignty could be a slow evolution.[34] He concluded that 'the actual continuous and peaceful display of

[24] *Island of Palmas* (1928) 2 RIAA 829, 829; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 690.
[25] *Island of Palmas* (1928) 2 RIAA 829, 846.
[26] *Island of Palmas* (1928) 2 RIAA 829.
[27] Ibid 837.
[28] Ibid 837-8. See also Sibbett, above n 9, 1625-6; Haas, above n 9, 6.
[29] *Island of Palmas* (1928) 2 RIAA 829, 871.
[30] Ibid 846. See also Sibbett, above n 9, 1627.
[31] *Island of Palmas* (1928) 2 RIAA 829, 839.
[32] Ibid 840.
[33] Ibid.
[34] Ibid 867.

State functions is in case of dispute the sound and natural criterium of territorial sovereignty.'[35]

Effective occupation has been the key to sovereignty ever since and subsequent cases have built upon Huber's dictum. The next key decision was the 1932 arbitration *Clipperton Island*[36] between France and Mexico. The arbitrator, Victor Emmanuel III, expanded upon the requirements for occupation stating that taking possession consisted of 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.'[37] He upheld Huber's finding that the exercise of sovereignty depended upon the characteristics of the territory.[38] Usually possession occurred when the State established an organisation capable of making laws respected in the territory.[39] However where territory was uninhabited, he believed that occupation was completed the moment the occupying State made its first appearance on the territory.[40]

The Permanent Court of International Justice ('PCIJ') decided upon the *Legal Status of Eastern Greenland*[41] just a year later in 1933. The dispute was between Norway and Denmark over the sovereignty of Eastern Greenland. Rather than relying on a traditional mode of acquisition, Denmark based its claim upon a 'peaceful and continuous display of State sovereignty.'[42] The PCIJ expanded upon the doctrine of effective occupation by imposing both a physical and mental element. The State must both intend to act as sovereign and actually exercise sovereign authority.[43] The Court noted that very little

[35] Ibid 840.
[36] *Clipperton Island* (1932) 26 *American Journal of International Law* 390.
[37] Ibid 393.
[38] Ibid 393-4.
[39] Ibid 394.
[40] Ibid.
[41] *Legal Status of Eastern Greenland (Denmark v Norway) (Judgment)* [1933] PCIJ (ser A/B) No 53 ('*Eastern Greenland'*).
[42] Ibid 27.
[43] Ibid 28; See also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment)* [2007] ICJ Rep 659, 712 ('*Caribbean Sea'*); *Western Sahara* [1975] ICJ Rep 12, 43; *Sovereignty over Pulau Ligitan*

evidence of actual exercise of authority is required (particularly in unsettled areas) provided no other State is able to establish a superior claim.[44]

The International Court of Justice ('ICJ') first considered territorial sovereignty in 1953 in *Minquiers and Ecrehos*.[45] France and the United Kingdom both claimed original title to the islands of Minquiers and Ecrehos: the UK by conquest and treaty confirmation and France by alleging that the English Kings held the islands in fee for French Kings.[46] The dispute had a long history dating back to the Middle Ages but the Court did not consider that either party was able to definitively prove original title. Instead the Court focused on recent history stating '[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 group.'[47] The Court therefore focused on recent effective occupation, rather than traditional title.

The ICJ adheres to Huber's dictum that effectiveness depends upon the circumstances.[48] Although it has never defined effectiveness, it has set down criteria. First, an act must be an exercise of jurisdiction over the disputed territory.[49] It must be carried out by the State itself[50] or by authorised

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*and Pulau Sipadan (Indonesia v Malaysia) (Judgment)* [2002] ICJ Rep 625, 682 ('*Ligitan and Sipadan'*); Crawford (ed), *Brownlie's Principles,* above n 8, 226.

[44] *Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 28.

[45] *Minquiers and Ecrehos (France v United Kingdom) (Judgment)* [1953] ICJ Rep 47 ('*Minquiers and Ecrehos'*).

[46] Ibid 53. See also Sibbett, above n 9, 1630.

[47] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 57. See also Jon M Van Dyke, 'Disputes over Islands and Maritime Boundaries in East Asia' in Seong-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, 2009) 39, 47; Kentaro Serita, 'Some Legal Aspects of Territorial Disputes over Islands' in Seong-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, 2009) 137, 142; *El Salvador v Honduras* [1992] ICJ Rep 351*,* 565; *Eritrea-Yemen (Phase 1)* (Permanent Court of Arbitration, 9 October 1998) 126.

[48] *Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 45-6; *Ligitan and Sipadan* [2002] ICJ Rep 625, 682, 685; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Merits)* [2001] ICJ Rep 40, 99-100 ('*Qatar and Bahrain'*); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12, 36-7 (*'Pedra Branca'*); *Clipperton Island* (1932) 26 *American Journal of International Law* 390, 393-4.

[49] *Ligitan and Sipadan* [2002] ICJ Rep 625, 682-3; *Caribbean Sea* [2007] ICJ Rep 659*,* 713.

[50] See, eg, *Minquiers and Ecrehos* [1953] ICJ Rep 47, 65, 69.

individuals.[51] Private acts to appropriate territory may also be ratified by the State.[52] The PCIJ stated in *Eastern Greenland* that 'legislation is one of the most obvious forms of sovereign power.'[53] It is one of three types of evidence that the ICJ identified in *Minquiers and Ecrehos* along with jurisdiction and local administration.[54] Of these categories, the ICJ was satisfied that the UK exercised powers of legislation, criminal jurisdiction, taxation and administration through the grant of fishing licenses over Minquiers and Ecrehos.[55] In ambiguous cases, the ICJ relies on less fundamental matters.[56] The Court will also consider competing claims and weigh titles against each other.[57] Even a less than perfect title holds out against those with weaker claims. There is no need to notify other States to validate the occupation.[58]

These principles were clearly demonstrated in *Ligitan and Sipadan*,[59] a dispute between Indonesia and Malaysia over the islands of Ligitan and Sipadan. The islands were historically uninhabited, although both had lighthouses.[60] Malaysia later developed Sipadan into a tourist resort.[61] The ICJ first considered arguments regarding historical title, but concluded that these did not establish sovereignty.[62] The Court then turned to evidence of effective occupation and stated that this should be considered even if it did not co-exist

[51] *Ligitan and Sipadan* [2002] ICJ Rep 625, 683; *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045, 1105 ('*Kasikili/Sedudu*').
[52] Crawford (ed), *Brownlie's Principles,* above n 8, 226; *Qatar and Bahrain* [2001] ICJ Rep 40, 100; *Ligitan and Sipadan* [2002] ICJ Rep 625, 683.
[53] *Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 48.
[54] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 64-5; Young-Min Youn, Sung-Ho Park and Yun-Cheol Lee, 'A Critical Survey of the Channel Islands Dispute between the UK and France: A Comparative Study of the Minquiers-Ecrehos Case and the Dokdo Problem' (2009) located at < www.kimlaw.or.kr/modules/board/download.php?seq=1925>, 168.
[55] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 64-5. See also Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 7.
[56] Crawford (ed), *Brownlie's Principles,* above n 8, 217.
[57] *Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 45-6; *Western Sahara* [1975] ICJ Rep 12, 43, 49; *Caribbean Sea* [2007] ICJ Rep 659, 712; *Ligitan and Sipadan* [2002] ICJ Rep 625, 682; *Qatar and Bahrain* [2001] ICJ Rep 40, 100; *Pedra Branca* [2008] ICJ Rep 12, 32; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 691; Crawford (ed), *Brownlie's Principles,* above n 8, 223.
[58] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 688.
[59] *Ligitan and Sipadan* [2002] ICJ Rep 625.
[60] Ibid 634, 681. See generally, Van Dyke, 'Disputes over Islands', above n 47, 48.
[61] *Ligitan and Sipadan* [2002] ICJ Rep 625, 634.
[62] Ibid 655-6, 661, 665, 668-9, 676, 678.

with title.[63] The level of effectiveness required was lower because the islands were thinly populated.[64] The Court found it significant that Indonesia had never protested Malaysia's construction of lighthouses on the islands and that the islands were not included on Indonesian maps.[65] Therefore, on the basis of effective occupation, the islands were awarded to Malaysia.[66]

2 *Derivative Title*
*(a) Prescription*

A State may lose title as a result of effective occupation by another State, known as prescription. Prescription is defined as the acquisition of sovereignty over territory through the exercise of continuous and undisturbed sovereignty for sufficient time to establish to the international community that sovereignty has been acquired.[67] The requirements for prescription are similar to effective occupation. First, the new claimant must possess the territory on the basis of sovereignty.[68] Possession must be public, peaceful, uninterrupted and persistent.[69] Adverse possession is key[70] but there are no rules regarding the necessary length of time or circumstances.[71] The critical factor is acquiescence by the sovereign State.[72] If other States protest and maintain competing claims to the territory, then possession cannot be undisturbed.[73]

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[63] Ibid 678. See also *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ Rep 554, 586-7 ('*Burkina Faso v Mali'*); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment)* [2002] ICJ Rep 303, 353 ('*Cameroon v Nigeria'*).
[64] *Ligitan and Sipadan* [2002] ICJ Rep 625, 682.
[65] Ibid 665-8, 685-6.
[66] Ibid 686.
[67] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 706. See also Sibbett, above n 9, 1624; Haas, above n 9; Shaw, *International Law*, above n 21, 284; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 12-3.
[68] Crawford (ed), *Brownlie's Principles,* above n 8, 231; *Kasikili/Sedudu* [1999] ICJ Rep 1045, 1103-4; *Pedra Branca* [2008] ICJ Rep 12, 122 (Judges Simma and Abraham).
[69] Crawford (ed), *Brownlie's Principles,* above n 8, 231; *Kasikili/Sedudu* [1999] ICJ Rep 1045, 1103-4; *Pedra Branca* [2008] ICJ Rep 12, 122 (Judges Simma and Abraham).
[70] Crawford (ed), *Brownlie's Principles,* above n 8, 231.
[71] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 706. This is in contrast to private law. For example in Western Australia, title through adverse possession can be acquired after 12 years.
[72] Crawford (ed), *Brownlie's Principles,* above n 8, 232; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 13.
[73] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 706-7; Van Dyke, 'Sovereignty over Dokdo', above n 4, 185-9; *Chamizal Arbitration (Mexico v USA) (Award)* (1911) 11 RIAA 309, 328. See also *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ

As a mode of acquisition, prescription is subject to some qualifications. The ICJ held in *Burkina Faso v Mali*[74] that preference should be given to legal title.[75] This is partly because abandonment of territory is not to be presumed but should be clearly demonstrated, without any doubt, by the conduct of the parties.[76] However a failure to protest can lead to an assumption of acquiescence and the passing of title through prescription. In *Pedra Branca*[77] the ICJ said 'silence may also speak, but only if the conduct of the other State calls for a response.'[78] However the Court has not set down the exact requirements for effective protest. From the Court's statement in *Pedra Branca* it appears that protests should be made a timely intervals, and be repeated to avoid possession becoming undisturbed.[79] Attempting to bring a claim before an international tribunal is also an important aspect of protest.[80]

Prescription was key in the *Pedra Branca* dispute between Malaysia and Singapore. The ICJ first considered original title and determined that it had been held by the Sultanate of Johor.[81] The disputed islands were isolated and there were no rival claims, so very little was needed to establish sovereignty.[82] Jurisdiction had been exercised by the Orang Laut (Sea Gypsies) who formed an integral part of the island economy.[83] Next, the Court considered recent effective occupation. Malaysia, as successor to the Sultanate of Johor, was presumed to continue the title unless it was abandoned. However Britain, and later Singapore, had exercised jurisdiction over Pedra Branca since 1844.[84] Between the 1920s-1990s, Singapore exercised jurisdiction by investigating

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Rep 6, 32 ('*Temple of Preah Vihear'*); *Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment)* [1994] ICJ Rep 6, 35-6 ('*Libya v Chad'*).
[74] *Burkina Faso v Mali* [1986] ICJ Rep 554.
[75] Ibid 586-7. See also *Island of Palmas* (1928) 2 RIAA 829, 867; *Cameroon v Nigeria* [2002] ICJ Rep 303*,* 353; Crawford (ed), *Brownlie's Principles,* above n 8, 232-3.
[76] Crawford (ed), *Brownlie's Principles,* above n 8, 233; *Pedra Branca* [2008] ICJ Rep 12, 50-1.
[77] *Pedra Branca* [2008] ICJ Rep 12.
[78] Ibid 51; Crawford (ed), *Brownlie's Principles,* above n 8, 232-3.
[79] Van Dyke, 'Sovereignty over Dokdo', above n 4, 188.
[80] Ibid.
[81] *Pedra Branca* [2008] ICJ Rep 12, 31-40.
[82] Ibid 35-7.
[83] Ibid 37-9.
[84] Ibid 50-60.

shipwrecks, controlling visits to the island and flying the Singaporean ensign.[85] Malaysia had never protested these actions and in fact had included Pedra Branca as Singaporean territory in reports and maps from the 1950s, 60s and 70s.[86] As a result of Malaysia's failure to respond to Singapore's acts of sovereignty, Malaysia was deemed to have acquiesced and title to Pedra Branca passed to Singapore.[87]

*(b) Subjugation*

Subjugation is an old form of title based on conquest and annexation.[88] To establish it, conquest must have been followed by annexation.[89] As a mode of acquisition, it has effectively been displaced by the prohibition of the use of force.[90] However it is still used to support historic titles.[91]

*(c) Cession*

The final mode of acquisition is cession, where territory is transferred from the sovereign State to another State, who becomes the new sovereign.[92] All States have a right to cede their territory, and may merge into another by

[85] Ibid 82-9.
[86] Ibid 87, 93-5. See also *Frontier Dispute (Benin v Niger) (Judgment)* [2005] ICJ Rep 90, 119-20.
[87] *Pedra Branca* [2008] ICJ Rep 12, 96, 101. There were also two other features in dispute in this case, that of Middle Rocks and South Ledge. Middle Rocks remained with Malaysia as the successor to the Sultanate: at 99. South Ledge was considered a low-tide elevation and belonged to the State in whose territorial waters it was located, in this case Malaysia: at 101.
[88] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 698; Sibbett, above n 9, 1623; Haas, above n 9, 5; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 10.
[89] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 699; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 11.
[90] See *The Covenant of the League of Nations* art 10; *General Treaty for the Renunciation of War,* opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929) art 1 ('*Kellogg Briand Pact*'); *Charter of the United Nations* art 2 ('*UN Charter'); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* GA Res 25/2625, UNGAOR, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/Res/25/2625 (24 October 1970).
[91] Schoenbaum, above n 4, 212. See also Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 705; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 10.
[92] Crawford (ed), *Brownlie's Principles,* above n 8, 266; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 679; Haas, above n 9, 5; Sibbett, above n 9, 1622-3; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 8.

ceding their entire territory.[93] Both States must intend to pass sovereignty; another State can acquire governmental powers without sovereignty, which will not result in cession.[94] Cession can only be affected by agreement, usually in the form of a treaty.[95] It often forms part of a treaty of peace imposed by a victor.[96] Cession usually comes into effect on the date that the treaty enters into force, without the need for any actual transfer of territory.[97]

### B *Contiguity*

Although States can exercise sovereignty over territory far from the mainland, geography is a relevant factor in territorial disputes. In the case of islands, the principle of contiguity, the proximity and relationship of the island to another territory, is important.[98] Contiguity is not a form of title. Huber expressly rejected the USA's contiguity arguments in *Island of Palmas* saying that the principle had 'no foundation in international law'[99] and would lead to arbitrary results.[100] Subsequent cases have shown a willingness to consider the principle. In *Minquiers and Ecrehos* the ICJ determined that the Minquiers group were a dependency of the Channel Islands and subject to the same authority.[101] Similar rulings and arguments were made in *El Salvador/Honduras*[102] and *Pedra Branca*[103] respectively. In the *Caribbean*

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[93] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 680; Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 10.
[94] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 680; *United States of America v Ushi Shiroma* (1954) 21 ILR 82, 84-6; *Puccini v Commissioner-General of the Government of the Territory of Trieste* (1961) 40 ILR 43, 45.
[95] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 680. See Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition', above n 9, 8.
[96] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 681.
[97] Crawford (ed), *Brownlie's Principles,* above n 8, 266-7.
[98] Van Dyke, 'Sovereignty over Dokdo', above n 4, 193.
[99] *Island of Palmas* (1928) 2 RIAA 829, 869.
[100] Ibid 855.
[101] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 67, 70-1; Van Dyke, 'Sovereignty over Dokdo', above n 4, 193.
[102] *El Salvador v Honduras* [1992] ICJ Rep 351, 570, 579. See also Van Dyke, 'Sovereignty over Dokdo', above n 4, 194; Kaiyan Homi Kaikobad, 'Problem of Contiguity, Natural Unity, and Ancient Original Title to Islands with Special Reference to Dokdo', in Seokwoo Lee and Hee Eun Lee, *Dokdo: Historical Appraisal and International Justice* (Martinus Nijhoff Publishers, 2011) 123, 147-8.
[103] *Pedra Branca* [2008] ICJ Rep 12, 97, 99-101. See also Kaikobad, above n 102, 147; *Eritrea-Yemen (Phase 1)* (Permanent Court of Arbitration, 9 October 1998) 120, 127-8, 132, 143-6; Van Dyke, 'Sovereignty over Dokdo', above n 4, 194; Kaikobad, above n 102, 134; *Qatar and Bahrain* [2001] ICJ Rep 40, 189-90 (Judges Ranejva and Koroma).

*Sea*[104] the ICJ considered proximity evidence but held that it was not determinative of title.[105] This was demonstrated in *Pedra Branca* when the ICJ awarded title to Pedra Branca to Singapore despite the island being closer to Malaysia.[106]

### C *Intertemporal Law & Critical Date*

Sovereignty disputes often have long histories and may take years to get to international adjudication. For these reasons there are two other important concepts to consider: the intertemporal law and critical date. Intertemporal law refers to the principle that the law which existed at the time title was allegedly acquired must be used to judge the acquisition.[107] In *Island of Palmas* Huber stated that 'a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'[108] The principle has led some scholars to question whether historical disputes in Asia can be judged in light of international law, which developed in a European context.[109] However the ICJ decisions in *Ligitan and Sipadan* and *Pedra Branca* indicate that they are.

Just as the law develops over time, so do the factual circumstances surrounding the dispute. The facts must be considered up to the "critical date" when the dispute arose or the issues were 'definitely joined.'[110] A dispute arises when there is a conflict between parties over law, fact or interests[111] and

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[104] *Caribbean Sea* [2007] ICJ Rep 659.
[105] Ibid 708-9. See also Kaikobad, above n 102, 153.
[106] Pedrozo, above n 4, 85.
[107] *Island of Palmas* (1928) 2 RIAA 829, 845; Crawford (ed), *Brownlie's Principles,* above n 8, 218; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: General Principles and Sources of Law' (1953) 30 *British Yearbook of International Law* 1, 5; Philip C Jessup, 'The Palmas Island Arbitration' (1928) 22 *American Journal of International Law* 735, 739-40.
[108] *Island of Palmas* (1928) 2 RIAA 829, 845.
[109] Lee, 'Intertemporal Law', above n 11, 125-6.
[110] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 69; Van Dyke, 'Sovereignty over Dokdo', above n 4, 163.
[111] *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 11; *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 27; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ

the claims positively oppose each other.[112] Choosing the critical date is important because the dispute may arise long before the case is settled. Acts that occur after the critical date are generally inadmissible in order to avoid a party gaining advantage by avoiding or delaying settlement.[113] Instead a State must demonstrate that they had acquired sovereignty by the critical date.[114] However the Court may still consider evidence that occurs after the date if those acts are 'a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.'[115] In *Island of Palmas*, Huber took account of acts occurring after the critical date on the basis that those acts threw light on the preceding period.[116]

Selecting the critical date is a question of substance within the tribunal's jurisdiction.[117] The ICJ is reluctant to select a date that would render considerable evidence inadmissible.[118] In *Minquiers and Ecrehos* the ICJ accepted the British argument that the critical date was the date that the parties concluded the special agreement to submit the dispute to the Court.[119] In *Eastern Greenland*, the PCIJ selected the date that Norway formally announced its occupation of Eastern Greenland, which was only two days before the parties agreed to submit the dispute to the Court.[120]

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Rep 90, 99-100 ('*East Timor'*); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1998] ICJ Rep 12, 27; Crawford (ed), *Brownlie's Principles,* above n 8, 694.

[112] *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 328; Crawford (ed), *Brownlie's Principles,* above n 8, 694. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*Advisory Opinion) (First Phase)* [1950] ICJ Rep 65, 74.

[113] Crawford (ed), *Brownlie's Principles,* above n 8, 219; Van Dyke, 'Sovereignty over Dokdo', above n 4, 163; *Minquiers and Ecrehos* [1953] ICJ Rep 47, 69.

[114] *Island of Palmas* (1928) 2 RIAA 829, 839. See also *Western Sahara* [1975] ICJ Rep 12, 38.

[115] *Ligitan and Sipadan* [2002] ICJ Rep 625, 682; *Argentine-Chile Frontier Case (Palena) (Award)* (1966) 38 ILR 10, 79-80; Van Dyke, 'Sovereignty over Dokdo', above n 4, 164.

[116] *Island of Palmas* (1928) 2 RIAA 829, 866; Van Dyke, 'Sovereignty over Dokdo', above n 4, 164.

[117] Crawford (ed), *Brownlie's Principles,* above n 8, 219; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 711.

[118] Van Dyke, 'Sovereignty over Dokdo', above n 4, 163; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 711.

[119] *Minquiers and Ecrehos* [1953] ICJ Rep 47, 59-60; Van Dyke, 'Sovereignty over Dokdo', above n 4, 163.

[120] *Eastern Greenland* [1933] PCIJ (ser A/B) No 53, 45; Van Dyke, 'Sovereignty over Dokdo', above n 4, 163.

The critical date is an important factor in the Liancourt Rocks dispute, as discussed in Chapter III.[121]

[121] See below, Chapter III, pg 35-7 for discussion of the critical date in this dispute.

## III SOVEREIGNTY OVER THE LIANCOURT ROCKS

Japan and South Korea are the two primary claimants to the Liancourt Rocks. This chapter will assess their claims against the background of international law as outlined in the previous chapter.

### A *Claims to Title*

#### 1 *Historic Title*

##### *(a) Discovery: 512 AD to 1667*

Japan and South Korea both claimed original title over the Liancourt Rocks. South Korea's claim is the oldest, dating back to 512AD. At the time, Korea comprised of three kingdoms, Goguryeo, Baekje and Silla, and a fourth confederation, Gaya.[122] According to Korea's oldest text, *Samguk Sagi*, a government official of Silla subjugated the Usanguk on Ulleungdo.[123] South Korea argues that the Liancourt Rocks were a dependency of Ulleungdo and were subjugated too.[124] However many old Korean documents and maps, including a 1454 survey of Silla Kingdom, only mention Ulleungdo.[125] To overcome these deficiencies, South Korea relies on the principle of contiguity.[126]

Later documents refer to both the Liancourt Rocks and Ulleungdo. A record from 930AD reflects that both islands were occupied by the Usanguk, a tributary state of the Goryeo Kingdom.[127] Another record from 1432 also references the Liancourt Rocks.[128] South Korea also relies on a number of

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[122] Korea Culture and Information Services, *History,* Korea.Net <http://www.korea.net/AboutKorea/Korea-at-a-Glance/History>.
[123] Choi, above n 2, 466; Van Dyke, 'Sovereignty over Dokdo', above n 4, 165; Pedrozo, above n 4, 84. See also Kaikobad, above n 102, 158; Chee, above n 2, 3; Haas, above n 9, 9; Kajimura, above n 1, 442.
[124] Choi, above n 2, 466; Van Dyke, 'Sovereignty over Dokdo', above n 4, 165; Schoenbaum, above n 4, 233. See also Sibbett, above n 9, 1637.
[125] Van Dyke, 'Sovereignty over Dokdo', above n 4, 165; Pedrozo, above n 4, 86; Kajimura, above n 1, 443.
[126] Discussed below at pp 33-4.
[127] By the mid 6th century the Silla Kingdom had gained control of the Gaya Confederation. It later subjugated Baejke (in 660) and Goguryeo (in 668). In 918AD this developed into the Goryeo Dynasty: See Korea Culture and Information Services, *History*, above n 122.
[128] Pedrozo, above n 4, 85.

records[129] referring to "Usando", which South Korea claims is another name for the Liancourt Rocks, derived from the Usanguk.[130]

By the 1400s Japan and Korea had begun to clash over the use of Ulleungdo (and the Liancourt Rocks, which were used as a stopover). Korean fishermen had been targeted by Japanese pirates. In 1416 the Joseon Dynasty[131] issued a travel ban and prohibition of settlement on Ulleungdo for the dual purpose of protecting Korean nationals and preventing them from evading taxes and military service.[132] Despite the ban, Koreans continued to travel to Ulleungdo. Korean records continued to reference the islands as an area of administrative control,[133] which included sending inspectors to Ulleungdo every three years to enforce the ban there.[134]

Japan's earliest claim dates to the mid 17th century. Records from private Japanese collections show that Japanese nationals had visited the islands frequently from the early 17th century, using the Liancourt Rocks as a stopover en route to Ulleungdo.[135] The first official Japanese record referencing the Rocks is a report from 1667 of an observational trip to Oki Islands.[136] The report stated the two islands, Ulleungdo and Liancourt Rocks,

[129] *History of Goryeo* (1451); *Revised Edition of the Augmented Survey of the Geography of Korea* (1530); *Reference Compilation of Documents of Korea* (1770); *Book of Ten Thousand Techniques of Governance* (1808). See Korea Culture and Information Services, *Korean Government's Official Position on Dokdo* (2 February 2012) Korea.net <http://www.korea.net/Government/Current-Affairs/National-Affairs/view?affairId=83&subId=233&articleId=1012>.

[130] Korea Culture and Information Services, *Korean Government's Official Position on Dokdo,* above n 129; Van Dyke, 'Sovereignty over Dokdo', above n 4, 165; Schoenbaum, above n 4, 233.

[131] The Joseon Dynasty was also called the *Choson* Dynasty. It was formed in 1392 after overthrowing Goryeo. King Sejong the Great, its fourth monarch, ruled from 1418-1450. The Joseon Dynasty was ended in 1910 after Japanese annexation. See Korea Culture and Information Services, *History*, above n 122; Pedrozo, above n 4, 84.

[132] Van Dyke, 'Sovereignty over Dokdo', above n 4, 165; Chee, above n 2, 6; Kajimura, above n 1, 444.

[133] Van Dyke, 'Sovereignty over Dokdo', above n 4, 166.

[134] Ibid 166; Chee, above n 2, 7; Pedrozo, above n 4, 89.

[135] Van Dyke, 'Sovereignty over Dokdo', above n 4, 166

[136] The document's name is *Records on Observations in Oki* (1667). See Ibid 167-8; Pedrozo, above n 4, 79; Kajimura, above n 1, 447.

were both uninhabited, both noted that Oki Islands were the northwestern limit of Japan.[137]

In 1618 the Japanese Tokugawa Shogunate[138] granted permission to two merchants named Kinkichi Ohya and Ichibei Murakawa to travel to Ulleungdo to engage in commercial activities.[139] The families sought to establish a fishing monopoly in the area. They used the Liancourt Rocks as a docking point and fishing ground on the way to Ulleungdo.[140]

*(b) The Takeshima Affair: 1693-1696*

These clashes culminated in the Takeshima Affair of 1693.[141] The Ohya and Murayama families encountered numerous Koreans fishing at Ulleungdo in violation of the vacant island policy. To protect their fishing monopoly, the families sought to stop the Koreans. They took two Korean fishermen, Ahn Yong-bok and Park Eo-doon, back to Japan.[142] This prompted Japan to begin negotiations with Korea over fishing rights around Ulleungdo. Negotiations initially focused on fishing rights, but later developed into a sovereignty dispute over Ulleungdo and the Liancourt Rocks.[143] Negotiations ended in 1696 when Japanese issued a travel ban on Ulleungdo.[144] This decision effectively surrendered any Japanese claim to title over Ulleungdo to Korea.

The impact of this decision is unclear. Japan claims that the ban did not apply to the Liancourt Rocks and that Japan never surrendered their claims to the

[137] Van Dyke, 'Sovereignty over Dokdo', above n 4, 166. See also Kaikobad, above n 102, 159.
[138] The Tokugawa Shogunate was the last feudal government in Japan, which existed between 1603-1868. The head of government was called the "Shogun" and each Shogun was a member of the Tokugawa family clan.
[139] Pedrozo, above n 4, 79; Schoenbaum, above n 4, 233; Kajimura, above n 1, 447.
[140] Pedrozo, above n 4, 79. See also Kajimura, above n 1, 447-9.
[141] Although Takeshima is now the Japanese name for the Liancourt Rocks, in the 1600s it was used to refer to Ulleungdo. Matsushima was the Japanese name for the Rocks.
[142] Masaharu Yanagihara, 'Japan' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 475, 484. See also Choi, above n 2, 466; Kaikobad, above n 102, 160.
[143] Yanagihara, above n 142, 484.
[144] Ibid 484. See also Pedrozo, above n 4, 87; Chee, above n 2, 6; Schoenbaum, above n 4, 233; Pedrozo, above n 4, 79; Choi, above n 2, 466; Van Dyke, 'Sovereignty over Dokdo', above n 4, 166.

Rocks.[145] Korea, believing the Rocks to be an appendage of Ulleungdo, argue that the concession included the Rocks which were never used as a sole destination for Japanese travellers.[146] South Korea claims that Japan provided Ahn Yong-bok with written confirmation that both Ulleungdo *and* the Liancourt Rocks were Korean territory.[147] Japan denies this allegation and South Korea has never been able to produce the document.[148] South Korea explains this by saying that it was confiscated by the Lord of Tsushima,[149] but there is no contemporary evidence of this.[150]

*(c) The Vacant Island: 1700 to 1905*

Several Japanese maps produced in the 1700s do not include the Liancourt Rocks as Japanese territory. A map from 1778 includes the Liancourt Rocks but does not list them as Japanese territory.[151] A 1785 map by prominent scholar Hayashi Shihei listed both the Liancourt Rocks and Ulleungdo as Korean territory.[152] Other maps, including official maps, from the late 1700s to 1921 support this.[153] By contrast, Korean maps from the same period do include the Liancourt Rocks as Korean territory.[154]

Japanese interest in the Liancourt Rocks increased after 1868,[155] when Japan abandoned its policy of seclusion and took a greater interest in international affairs as it sought to modernise.[156] In 1869 the Japanese government sent a team to Korea tasked with discovering how Ulleungdo and the Liancourt

[145] Kaikobad, above n 102, 161; Choi, above n 2, 466.
[146] Pedrozo, above n 4, 87.
[147] Ibid. See also Kaikobad, above n 102, 161.
[148] Pedrozo, above n 4, 87.
[149] Tsushima was the administrative region of Japan that Ahn Yong-bok and Park Eo-doon were taken too. See Ibid.
[150] Ibid.
[151] Van Dyke, 'Sovereignty over Dokdo', above n 4, 166.
[152] Ibid 166-7.
[153] Ibid 167, 174; Kaikobad, above n 102, 159.
[154] Pedrozo, above n 4, 88.
[155] 1868 was an important year in Japanese history. In 1868 the Tokugawa Shogunate was abolished and the Emperor restored in what was known as the Meiji Restoration: Choi, above n 2, 467.
[156] See Ibid; Van Dyke, 'Sovereignty over Dokdo', above n 4, 166; Seokwoo Lee, 'The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia' (2002) 11 *Pacific Rim Law and Policy Journal* 63, 65.

Rocks became Korean territories. The team reported back in 1870, confirming that they were both Korean territory.[157] Based on this report, the Dajokan[158] rejected requests from Japanese nationals for commercial rights to Ulleungdo, confirming that both Ulleungdo and the Liancourt Rocks were not Japanese territory.[159]

In 1899 there were incidents of Japanese infringement upon Ulleungdo.[160] This prompted Korea to issue the Imperial Ordinance No 41 in 1900, incorporating Ulleungdo into Uldo County.[161] The Ordinance did not specifically refer to the Liancourt Rocks, but to Ulleungdo, Jukdo and Seokdo.[162] South Korea argues that Seokdo, which translates to "Rock Islands", is the Liancourt Rocks.[163]

Both parties have evidence of historical links to the Liancourt Rocks but this evidence is ambiguous and relies on a connection between the Rocks and Ulleungdo.[164] However, given the Rocks are isolated and uninhabited, very little is needed to establish sovereignty over them.[165] Neither party is likely to succeed in establishing title on the basis of these historical acts alone. Korea's first title is based on subjugation, but the conquest does not appear to have been followed by annexation of the Rocks themselves, as is required at international law.[166] Korea may also have an earlier claim to discovery but there is no evidence of effective occupation and therefore the inchoate title is incomplete.[167] Korean administration covered Ulleungdo, but did not necessarily stretch to the Liancourt Rocks. The Korean fishermen who

[157] Choi, above n 2, 467; Van Dyke, 'Sovereignty over Dokdo', above n 4, 174.
[158] Japanese Council of State, then the highest national decision making body.
[159] Choi, above n 2, 467; Van Dyke, 'Sovereignty over Dokdo', above n 4, 174.
[160] Choi, above n 2, 467; Van Dyke, 'Sovereignty over Dokdo', above n 4, 175.
[161] Sibbett, above n 9, 88; Pedrozo, above n 4, 88; Choi, above n 2, 467; Van Dyke, 'Sovereignty over Dokdo', above n 4, 175.
[162] Chee, above n 2, 10. See also Kajimura, above n 1, 456.
[163] Choi, above n 2, 467; Chee, above n 2, 9; Van Dyke, 'Sovereignty over Dokdo', above n 4, 175. See also Schoenbaum, above n 4, 235; Kajimura, above n 1, 456.
[164] See below, pp 33-4 for discussion of South Korea's claim to contiguity.
[165] See Chapter II, pp 6-10 for discussion of the law of effective occupation.
[166] See Chapter II, p 12 for discussion of the law of subjugation.
[167] See Chapter II, pp 5-6, for discussion of the law of discovery.

travelled to the Rocks were not official State agents and for many years operated against Korean law by breaching the vacant island policy.[168]

Japanese fishermen did have official support, but this was focused on Ulleungdo. The Liancourt Rocks were only used as a stopover. In 1696 Ulleungdo became decisively Korean territory but there is no evidence that this extended to the Liancourt Rocks. The Takeshima Affair does not provide conclusive evidence for either party. Afterwards, Japan appears to have had little interest in the Rocks. Japanese maps did not include it as Japanese territory and official statements indicate it was considered Korean territory. Like Indonesia in *Ligitan and Sipadan*, this is likely to be significant evidence against Japan.[169]

The strongest evidence of original title is Korea's 1900 incorporation, but this also has problems. First, it does not specifically refer to the Liancourt Rocks, although it is easy to accept that "Seokdo" is one of the many names for them. Second, and most importantly, it does not appear to have been enforced through actual effective occupation. This is partly due to the context, as Korea faced increasing pressure from Japan.[170] However on its own, the 1900 incorporation is not conclusive enough to found a valid title.

2 *Impact of War*
*(a) Annexation: 1904-1945*

Japan occupied the Liancourt Rocks in 1904 as a military base during the Russo-Japanese War.[171] By this time, Japan had modernised considerably and was beginning to emerge as a major power on the international stage. This was aptly demonstrated when Japan defeated Russia and secured Japanese

[168] See Chapter II, pp 8-9 for discussion of the law of private acts to acquire territory.
[169] See Chapter II, pp 9-10.
[170] See eg Van Dyke, 'Sovereignty over Dokdo', above n 4, 169-72.
[171] Ibid, 175; Pedrozo, above n 4, 89; Chee, above n 2, 2; Sibbett, above n 9, 1635-6; Haas, above n 9, 9.

interests in Korea.[172] Afterwards Japan began to increase its control in Korea, installing Japanese advisers in the Korean government to control government policy.[173] This resulted in the 1904 *Japanese-Korean Protectorate Treaty* that rendered Korea subject to Japan.[174]

In 1905 Japan issued Public Notice No 40 incorporating the Liancourt Rocks into Shimane Prefecture.[175] Although it was standard practice to notify other States this type of occupation, Japan did not make any international notification.[176] However there is no requirement to do so at international law.[177] Korea did not protest. In fact, the Korean government did not become aware of the incorporation until 1906.[178] By then Korea was in no position to protest because its government was effectively controlled by Japanese advisers, who were tacitly supported by the Western powers.[179] This left Korea with very few avenues to issue any diplomatic protests.

Japan initially claimed that the Liancourt Rocks were terra nullius in 1905 and therefore susceptible to effective occupation.[180] However Japan later claimed that Japanese sovereignty had been established over the Rocks in the 17th century, and that the 1905 incorporation was simply a re-affirmation of that

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[172] See Van Dyke, 'Sovereignty over Dokdo', above n 4, 168-173, 176; Kajimura, above n 1, 457; *Treaty of Portsmouth,* Russia-Japan, signed 5 September 1905 archived at Brigham Young University Library <http://wwi.lib.byu.edu/index.php/Treaty_of_Portsmouth>, art II.
[173] Van Dyke, 'Sovereignty over Dokdo', above n 4, 173-4. See also Schoenbaum, above n 4, 236; Kajimura, above n 1, 457, 459.
[174] *Agreement between Japan and Korea*, Korea-Japan, signed 22 August 1904, reprinted in (1907) 1(2) *American Journal of International Law (Supplement: Official Documents)* 218, 218-9 ('*1904 Korea-Japan Agreement'*); *Agreement between Japan and Corea by which Japan assumed Charge of Foreign Relations of Corea*, Japan-Korea, signed 17 November 1905, reprinted in (1907) 1(2) *American Journal of International Law (Supplement: Official Documents)* 221, 221-2 ('*Protectorate Treaty'*); Van Dyke, 'Sovereignty over Dokdo', above n 4, 173; Chee, above n 2, 24-5.
[175] Haas, above n 9, 9-10; Sibbett, above n 9, 1635; Schoenbaum, above n 4, 234; Choi, above n 2, 467; Lee, 'San Francisco Peace Treaty', above n 156, 93.
[176] Van Dyke, 'Sovereignty over Dokdo', above n 4, 176. See Schoenbaum, above n 4, 234; Kajimura, above n 1, 458.
[177] See Chapter II, p 9.
[178] Van Dyke, 'Sovereignty over Dokdo', above n 4, 176; Kajimura, above n 1, 458. See Schoenbaum, above n 4, 234.
[179] See Van Dyke, 'Sovereignty over Dokdo', above n 4, 176-9.
[180] Ibid, 167; Chee, above n 2, 3; Haas, above n 9, 9; Lee, 'San Francisco Peace Treaty' , above n 156, 66. See also Kajimura, above n 1, 460.

claim.[181] This change in stance led Professor Van Dyke to argue that Japan would be estopped from claiming sovereignty earlier than 1905.[182] Estoppel is a general principle of international law [183] but its applications is not uniform.[184] Estoppel requires that an authorised, voluntary, and unambiguous statement of fact was made and relied on by another State to its detriment, or to the advantage of the party who made the statement.[185] However in this case there is no evidence that Korea has relied on these Japanese statements, as both States were already pursuing separate claims. As such there is no reason why Japan could not re-frame their arguments.[186]

Japan controlled the Liancourt Rocks from 1905 onwards. During this time they were responsible for levying taxes and issuing fishing licenses,[187] but made no attempts to formally integrate the Rocks into Japanese territory.[188] In 1910 Japan formally annexed Korea.[189] From 1910 to 1945 Korea was subjected to harsh Japanese rule which has marred relations between the two and resulted in the Liancourt Rocks dispute becoming an emotional issue.[190]

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[181] Ministry of Foreign Affairs of Japan, *Takeshima Issue* (4 April 2014) Ministry of Foreign Affairs of Japan < http://www.mofa.go.jp/region/asia-paci/takeshima/position.html>; Van Dyke, 'Sovereignty over Dokdo', above n 4, 167. See also Kajimura, above n 1, 460.
[182] Van Dyke, 'Sovereignty over Dokdo', above n 4, 167.
[183] Crawford (ed), *Brownlie's Principles,* above n 8, 420; *Temple of Preah Vihear* [1962] ICJ Rep 6, 62-5 (Judge Fitzmaurice); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246, 305 ('*Gulf of Maine*').
[184] Crawford (ed), *Brownlie's Principles,* above n 8, 421; *Temple of Preah Vihear* [1962] ICJ Rep 6, 39 (Judge Alfaro), 143 (Judge Spender).
[185] Crawford (ed), *Brownlie's Principles,* above n 8, 420; D W Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Yearbook of International Law* 176, 202.
[186] Ie Japanese sovereignty was established in the 17th century and the 1905 incorporation was a re-affirmation of this, or alternatively, the Rocks were terra nullius and the 1905 incorporation was sufficient to establish Japanese sovereignty.
[187] Haas, above n 9, 10; Asada, above n 4, [8]; Chee, above n 2, 14. They also registered it in the State Land Register as State property: Asada at [8]; Pedrozo, above n 4, 80.
[188] Haas, above n 9, 10; Chee, above n 2, 14.
[189] *Treaty Annexing Korea to Japan,* Korea-Japan, signed 29 August 1910, reprinted in (1910) 4(4) *American Journal of International Law (Supplement: Official Documents)* 282, 282-3 ('*Treaty of Annexation*'); Chee, above n 2, 25-6. See also Sibbett, above n 9, 1635.
[190] Seokwoo Lee and Hee Eun Lee, 'Overview – Dokdo: Historical Appraisal and International Justice' in Seokwoo Lee and Hee Eun Lee, *Dokdo: Historical Appraisal and International Justice* (Martinus Nijhoff Publishers, 2011) 1, 9; Choi, above n 2, 471. See Sibbett, above n 9, 1613-5; Haas, above n 9, 2; Lee, 'San Francisco Peace Treaty', above n 156, 65.

*(b) Post War: 1945-1951*
*(i) Wartime Planning*

In 1939 World War Two broke out in Europe and later extended to the Pacific in 1941 following Japanese attacks on Hong Kong and Pearl Harbour. During the war Japan pursued an aggressive policy of expansion that saw it invade several Asian countries. By the end of the war Japanese forces had been pushed back to the four main islands of Japan: Hokkaido, Honshu, Shikoku and Kyushu.

As the war drew to a close, the Allies began planning the post-war world. This included allocating occupied and disputed territories to different States. Territory allocation was to be based upon the principles outlined in the Atlantic Charter,[191] which stipulated that there was to be no territorial aggrandisement or territorial change against the wishes of the people concerned.[192] In 1943 the Allies adopted the Cairo Declaration,[193] which stated that Japan was to be 'expelled from all other territories which she has taken by violence and greed.'[194] The Cairo Declaration specifically referred to the 'enslavement of Korea'[195] but did not mention specific territories like the Liancourt Rocks. Korean territories were not mentioned in the 1945 Yalta Protocol[196] either, which had included a list of territories to be passed from Japan to Russia.[197] The Cairo Declaration formed the basis for the 1945 Potsdam Declaration[198] which provided that 'Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu and Shikoku and such

[191] *Atlantic Charter,* USA -UK, signed 14 August 1941 ('*Atlantic Charter'*).
[192] Ibid, 1st and 2nd Principles. These principles were in line with those contained in earlier documents like *The Covenant of the League of Nations* art 10 and the *Kellogg-Briand Pact* art I.
[193] *Communiqué of the First Cairo Conference*, USA -China-UK, released 1 December 1943, 1943 For. Rel. (Conferences at Cairo and Tehran) 448 ('*Cairo Declaration'*).
[194] Ibid [3].
[195] "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": Ibid [3].
[196] *Protocol of Proceedings of Crimea Conference,* USA-UK –USSR, signed 11 February 1945 ('*Yalta Protocol*').
[197] Ibid, 'Agreement Regarding Japan'; Pedrozo, above n 4, 90.
[198] *Terms for Japanese Surrender,* US-China-UK, 3 UST 1204 (signed and entered into force 26 July 1945) ('*Potsdam Declaration*').

minor islands as we determine.'[199] It did not state which minor islands were to be included.

*(ii) SCAPINs*

The Pacific War ended on 15 August 1945. Japan formally surrendered on 2 September 1945 and accepted the terms of the Potsdam and Cairo Declarations.[200] Japanese territory was occupied by Allied forces, as was Korea. General Douglas MacArthur, the Supreme Commander for the Allied Powers ('SCAP') was placed in control of the occupation. SCAP removed the Liancourt Rocks from Japanese control and placed them within the Japanese based US Sixth Army's Occupation Zone instead of the Korean based XXIV Corps Zone.[201] SCAP issued Instruction Notes (known as 'SCAPINs') to govern Allied occupation policy. Three of these are relevant to the Liancourt Rocks dispute.

The first is SCAPIN 677,[202] issued on 20 January 1946. Article 3 provided that, for the purposes of the directive, Japan was defined to include the four main islands of Japan and approximately 1,000 smaller adjacent islands *excluding* the Liancourt Rocks.[203] However Article 6 provided that nothing in the document was to be considered an indication of Allied policy regarding the determination of the minor islands referred to in the Potsdam Declaration.[204]

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[199] Ibid art 8.
[200] *Surrender by Japan,* 3 UST 1251 (signed and entered into force 2 September 1945) ('*Instrument of Surrender'*).
[201] Pedrozo, above n 4, 81.
[202] General Headquarters of the Supreme Commander for the Allied Powers, *Instruction Note 677: Governmental and Administrative Separation of Certain Outlying Areas from Japan,* issued 20 January 1946 ('SCAPIN 677').
[203] Ibid [3].
[204] Ibid [6]. This was US recognition that determining questions of international sovereignty was beyond SCAP's authority: Lee, 'San Francisco Peace Treaty', above n 156, 105.

The second note was SCAPIN 1033,[205] issued on 22 June 1946 concerning Japanese fishing areas. Article 3 repeated the definition of Japanese territory from SCAPIN 677.[206] It went on to provide that Japanese vessels and personnel were not to approach more than 12 miles to the Liancourt Rocks and were not to have any contact with the island.[207] However it also provided that it was not an indication of Allied policy.[208]

The final important note was SCAPIN 1778,[209] issued on 16 September 1947. This designated the Liancourt Rocks as a US bombing range and required the US to notify the Japanese government before conducting operations there.[210] However the deaths of several Koreans in the area prompted protests from the Commanding General of US Armed Forces in Korea and led to the range being closed.[211] It was eventually reopened with the Korean government's permission.[212]

*(iii) The Peace Treaty*

The most important post-war document in this dispute is the *San Francisco Peace Treaty*, signed in September 1951.[213] The Treaty formally ended the Pacific War and was the result of a long drafting history influenced by Cold War politics. The first draft was produced in March 1947.[214] This draft, along with those produced in August 1947, November 1947, January 1948, October 1949 and November 1949 all listed the Liancourt Rocks as Korean territory.[215]

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[205] General Headquarters of the Supreme Commander for the Allied Powers, *Instruction Note 1033: Area Authorized for Japanese Fishing and Whaling,* issued 22 June 1946 ('SCAPIN 1033').
[206] Ibid [3].
[207] Ibid [3b].
[208] Ibid [5].
[209] General Headquarters of the Supreme Commander for the Allied Powers, *Instruction Note 1778: Liancourt Rocks Bombing Range,* issued 16 September 1947 ('SCAPIN 1778').
[210] Ibid [1]-[2].
[211] Pedrozo, above n 4, 82.
[212] Ibid 82-3.
[213] Korea was not invited to the Peace Conference because it had never technically been at war with Japan: Hara, above n 6, 46.
[214] Ibid 26; Lee, 'San Francisco Peace Treaty' above n 156, 129.
[215] Hara, above n 6, 26-30; Lee, 'San Francisco Peace Treaty' above n 156, 129.

The establishment of a communist regime in North Korea in 1949 changed US perspectives. Committed to resisting communism, the US saw Japan as a bulwark against communism in Asia.[216] The US feared that a harsh peace could leave Japan susceptible to communist influence.[217] This led to a change of attitude towards Japan's claim to the Liancourt Rocks.[218] In 1949, William J Sebald, the US Political Adviser to SCAP wrote that 'Japan's claim to these islands is old and appears valid. Security considerations might conceivably envisage weather and radar stations thereon'.[219] This contradicted earlier US studies by the State-War-Navy Coordination Committee in 1946, which had concluded that the Liancourt Rocks were historically Korean territory.[220] The next draft was produced in December 1949 in light of Sebald's commentary.[221] Article 3 of this new draft listed the Liancourt Rocks as Japanese territory for the first time.[222]

The December 1949 draft was the last to mention the Liancourt Rocks. The allocation of territory had divided the Allies. For example, in respect of the Liancourt Rocks, the Commonwealth generally supported Korea[223] while the US supported Japan. John Foster Dulles, who became responsible for drafting the Treaty in 1950,[224] sought to expedite the process by simplifying the Treaty.[225] His first draft, in August 1950, did not provide any specific territorial delimitation.[226] The next draft, written in March 1951, included a renunciation of Korea, Formosa (Taiwan), Antarctica and the Kuriles,[227] but

[216] Hara, above n 6, 32.
[217] Ibid. See also Lee, 'San Francisco Peace Treaty', above n 156, 130-1.
[218] It was conceivable that all of Korea may someday fall to communism, and if this occurred the US wished to minimise the number of territories that went with it: Hara, above n 6, 32
[219] Ibid 31; Lee, 'San Francisco Peace Treaty', above n 156, 130.
[220] State-War-Navy Coordinating Committee, *Policy Concerning Trusteeship and other Methods of Disposition of the Mandated and other Outlying and Minor Islands Formerly Controlled by Japan* (SWNCC 59/1 Copy No 80, published 24 June 1946) [9(3)].
[221] Hara, above n 6, 33.
[222] Ibid; Lee, 'San Francisco Peace Treaty', above n 156, 131-2.
[223] Including Australia, Canada, New Zealand and the United Kingdom. See Pedrozo, above n 4, 83, 91.
[224] Hara, above n 6, 34.
[225] Ibid. See also Lee, 'San Francisco Peace Treaty', above n 156, 132.
[226] Hara, above n 6, 34-5.
[227] These were claimed by the USSR.

made no mention of the Liancourt Rocks.[228] After British negotiations, it was finally agreed to list Quelpart, Port Hamilton and Dagelet as Korean territory.[229] The Liancourt Rocks were not included.

The Korean government was shown a draft of the treaty prepared in June 1951. In response, Korea requested that the Liancourt Rocks be listed as Korean territory.[230] Dulles indicated that he was willing to do so[231] but the final US answer was given by Dean Rusk, the Assistant Secretary of State for Far Eastern Affairs.[232] Rusk wrote to the South Korean ambassador in August 1951 and stated that:

> As regards the island of Dokdo, otherwise known as Takeshima or Liancourt Rocks, this normally uninhabited rock formation was according to our information never treated as part of Korea and, since about 1905, has been under the jurisdiction of the Oki Islands Branch Office of Shimane prefecture of Japan. This island does not appear ever before to have been claimed by Korea.[233]

Rusk's response contradicted previous US studies and drafts, but it effectively ended the treaty debate. The final Treaty provided in Article 2 that Japan recognised Korean independence and renounced 'all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.'[234] It did not mention the Liancourt Rocks.

*(iv) Final Result*

Japan's strongest claim to the Liancourt Rocks occurred in 1905 following its incorporation into the Shimane Prefecture but it is of little help to Japan's case at international law. The incorporation occurred at a time when Japan was expanding its control in Asia and after Korea had become subject to Japanese

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[228] Hara, above n 6, 38.
[229] Ibid 41-2.
[230] Ibid 43; Lee, 'San Francisco Peace Treaty', above n 156, 140.
[231] Hara, above n 6, 43; Lee, 'San Francisco Peace Treaty', above n 156, 141.
[232] Hara, above n 6, 43.
[233] Ibid 44. See also Asada, above n 4, [15]; Pedrozo, above n 4, 84; Lee, 'San Francisco Peace Treaty', above n 156, 143-4.
[234] *Treaty of Peace with Japan,* signed 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952) art 2(a) ('*San Francisco Peace Treaty'*).

influence. As a result, Korea was in no position to effectively protest the incorporation. Just five years later Japan annexed Korea itself. Japan's continued aggression and expansion eventually resulted in the Pacific War.

Given Korea was effectively non-existent as a State between 1905-1945, Japan's effective occupation of the Liancourt Rocks during this period means very little. However this does not mean that the Liancourt Rocks were part of the territory stripped from Japan at the end of the war. It may or may not be considered territory taken 'by violence and greed.' It may also be considered a 'minor island' as mentioned in the Potsdam Declaration. These wartime documents are ambiguous.

The drafting history of the *San Francisco Peace Treaty* does lend weight to South Korea's claims. The final decision not to include the Liancourt Rocks, in the context of the Cold War, is not a definitive determination in Japan's favour. However equally those drafts which listed the Rocks as Korean territory were just that – drafts. These drafts, like the SCAPINs, were simply reflections of changing Allied policy at the end of a messy world war. They do not establish Korea's claims or destroy Japan's. However the documents, combined with evidence of continued Korean presence on the Rocks (demonstrated by the Koreans killed from US bombing in the region) do lend support to South Korea. Ultimately, the Allies were unable to agree on the Liancourt Rocks issue and left it intentionally ambiguous. This ambiguity helps and hinders both parties.

3 *Modern Day*

The modern dispute began in 1952 after the first South Korean President, Syngman Rhee, drew the 'Peace Line' in the Sea of Japan.[235] The Peace Line declared South Korean sovereignty over the area, including the Liancourt

[235] This line has a variety of names, including the "Syngman Rhee Peace Line". Sibbett, above n 9, 1615; Schoenbaum, above n 4, 233; Haas, above n 9, 3; Choi, above n 2, 468; Lee, 'San Francisco Peace Treaty', above n 156, 93-4; Kajimura, above n 1, 463; Van Dyke, 'Sovereignty over Dokdo', above n 4, 189.

Rocks.[236] Japan protested this proclamation.[237] South Korea did not immediately move to occupy the Rocks. At the time, South Korea was in the midst of the Korean War, which ended in 1953. Japan also made no moves to occupy the Rocks during this time.

The next development occurred in 1954. In May 1954 nationals of both countries travelled to the Rocks under military protection to plant their national flag and stake their country's claim.[238] In August 1954 South Korea took the next step to establish effective occupation by building a lighthouse on the Rocks.[239] This met with immediate Japanese protest and prompted Japan to propose submitting the dispute to the ICJ.[240] Korea rejected the proposal, claiming that there was no dispute because the Liancourt Rocks were inherently Korean territory.[241]

Between 1952 and 1960 there were further diplomatic exchanges regarding the Liancourt Rocks. Japan sent a total of 24 notices to South Korea, which South Korea responded to with a further 18 notices.[242] Both States had an opportunity to resolve the dispute in 1965 with the conclusion of the *Basic Treaty*[243] which normalised Japanese-South Korean relations. During negotiations for the *Basic Treaty*, Japan had attempted to make the Liancourt Rocks an official agenda item but South Korea refused because they

[236] Van Dyke, 'Sovereignty over Dokdo', above n 4, 189; Lee, 'San Francisco Peace Treaty', above n 156, 94.
[237] Van Dyke, 'Sovereignty over Dokdo', above n 4, 189; Choi, above n 2, 468; Schoenbaum, above n 4, 233; Lee, 'San Francisco Peace Treaty', above n 156, 94.
[238] Van Dyke, 'Sovereignty over Dokdo', above n 4, 189.
[239] Ibid.
[240] Ibid. Asada, above n 4, [3]. Subsequent attempts by Japan to send the dispute before the ICJ have also been refused: Schoenbaum, above n 4, 205; Ministry of Foreign Affairs of Japan, 'Proposal to the Government of the Republic of Korea to Institute Proceedings before the International Court of Justice by a Special Agreement' (Press Release, 21 August 2012) <http://www.mofa.go.jp/announce/announce/2012/8/0821_01.html>; Ministry of Foreign Affairs of Japan, 'Statement by the Minister for Foreign Affairs of Japan on the Refusal by the Government of the Republic of Korea of the Government of Japan's Proposal on the Institution of Proceedings before the International Court of Justice by a Special Agreement' (Press Release, 30 August 2012) <http://www.mofa.go.jp/announce/announce/2012/8/0830_02.html>.
[241] Van Dyke, 'Sovereignty over Dokdo', above n 4, 190. See also Kajimura, above n 1, 429.
[242] Van Dyke, 'Sovereignty over Dokdo', above n 4, 190; Kajimura, above n 1, 430.
[243] *Treaty on Basic Relations,* Japan-Republic of Korea, signed 22 June 1965, 583 UNTS 33 (entered into force 18 December 1965) ('*Basic Treaty*').

maintained that the Rocks were Korean territory.[244] South Korea argues that the failure to include the Liancourt Rocks in the *Basic Treaty* ended the dispute. The Rocks were not mentioned in the official records, but are included in the negotiators' private records.[245]

Since 1965, the Liancourt Rocks have been a point of ongoing contention between Japan and South Korea. In 1966 South Korea conducted military exercises in the region, prompting Japanese protests.[246] In 2004 South Korea sparked Japanese outrage by issuing a postage stamp depicting the Liancourt Rocks.[247] Japanese records and maps continue to list the Liancourt Rocks as Japanese territory.[248] The Shimane Prefecture has taken several steps to symbolise their authority over the Rocks. They designated 22 February 2005, the anniversary of the 1905 incorporation, as 'Takeshima Day' to reaffirm Japanese sovereignty.[249] This led to passionate protests in South Korea.[250] The Shimane Prefecture has allowed citizens to transfer their residency registration to the Liancourt Rocks and has granted mining rights over the area to Japanese citizens.[251] Japan also sends Marine Safety Agency vessels to the area to reaffirm their claims.[252] There have been a number of maritime clashes between fishermen and scientific research groups in the area.[253] Both States have websites devoted to the issue.[254]

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[244] Van Dyke, 'Sovereignty over Dokdo', above n 4, 190; Kajimura, above n 1, 431 n 3.
[245] Kajimura, above n 1, 431.
[246] Van Dyke, 'Sovereignty over Dokdo', above n 4, 190.
[247] Ibid 190-1; Choi, above n 2, 468.
[248] Van Dyke, 'Sovereignty over Dokdo', above n 4, 190-1.
[249] Choi, above n 2, 475; Haas, above n 9, 2.
[250] Haas, above n 9, 2.
[251] This is purely symbolic, because Japan does not have a presence on the Rocks. See Choi, above n 2, 475; Kajimura, above n 1, 435.
[252] Haas, above n 9, 9; Sibbett, above n 9, 1636; Van Dyke, 'Sovereignty over Dokdo', above n 4, 191.
[253] Atsuko Kanehara, 'A Possible Practical Solution for the Dispute over the Dokdo/Takeshima Islands from the Perspective of the Law of the Sea' in Seokwoo Lee and Hee Eun Lee, *Dokdo: Historical Appraisal and International Justice* (Martinus Nijhoff Publishers, 2011) 71, 71-2, 84-5. See also Choi, above n 2, 469-473.
[254] Korea: Ministry of Foreign Affairs (Republic of Korea), *Dokdo,* Ministry of Foreign Affairs (Republic of Korea) <http://dokdo.mofa.go.kr/eng/index.jsp>; Japan: Ministry of Foreign Affairs of Japan, *Takeshima Issue* (4 April 2014), Ministry of Foreign Affairs of Japan <http://www.mofa.go.jp/region/asia-paci/takeshima/position.html>.

In the meantime South Korea has built upon the Liancourt Rocks. Since 1954 South Korea has built a wharf, police garrison and desalination plant to compensate for the lack of fresh water.[255] In 1965 Jongduck Choi became the first South Korean to live on the Rocks.[256] Today, South Korea maintains a small transient population on the Rocks.[257] This includes one family, approximately 40-47 coast guards, 5 lighthouse managers and 2 staff members of the Dokdo Management Office.[258]

Just as the ICJ held in *Minquiers and Ecrehos*, recent history will be decisive in the Liancourt Rocks dispute.[259] The historic title is ambiguous but since 1952 there is clear evidence of effective occupation by South Korea. Since South Korea emerged as a State it has taken steps to solidify its title to the Liancourt Rocks. Japan missed the opportunity to take the first step. It has protested South Korean activity, but not forcefully even when South Korea's actions demanded a strong answer.[260] Japan has prioritised its relationship with South Korea over its claim to the Liancourt Rocks. In light of its ambiguous claim to title and lack of effective control, this decision may have cost Japan its opportunity to successfully claim sovereignty.

### B *Contiguity*

South Korea's claims often rely on the principle of contiguity. South Korea argues that Ulleungdo and the Liancourt Rocks form a single unit and therefore acts pertaining to Ulleungdo also apply to the Rocks.[261] Japan seeks to separate the two, claiming that only Ulleungdo was surrendered in 1696, not the Liancourt Rocks.[262]

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[255] Sibbett, above n 9, 1639, 1644; Haas, above n 9, 3.
[256] Ministry of Foreign Affairs (Republic of Korea), *Residents and Visitors*, Ministry of Foreign Affairs (Republic of Korea) <http://dokdo.mofa.go.kr/eng/introduce/residence.jsp>.
[257] Van Dyke, 'Disputes over Islands', above n 47, 46.
[258] Ministry of Foreign Affairs (Republic of Korea), *Residents and Visitors*, above n 256. See also Ibid 46; Sibbett, above n 9, 1639.
[259] See Chapter II, p 8.
[260] See Chapter II, pp 10-2 regarding law of prescription and protest.
[261] Kajimura, above n 1, 436; Kaikobad, above n 102, 157. See also Haas, above n 9, 10; Sibbett, above n 9, 1637; Lee, 'San Francisco Peace Treaty', above n 156, 95; Pedrozo, above n 4, 85; Chee, above n 2, 28.
[262] See Kajimura, above n 1, 436; Kaikobad, above n 102, 157.

Historically there is evidence that both States considered the Liancourt Rocks to be an appendage of Ulleungdo. In 1667 Japanese observational report on Oki Island refers to the proximity between the two islands and the fact that the Rocks are visible from Ulleungdo on a clear day.[263] A French national working for the Pusan Customs Office in Korea reported that there were two big islands appendant to Ulleungdo.[264] Two official Japanese documents from 1870 and 1877 link the Liancourt Rocks and Ulleungdo.[265]

Geographically there are close ties. The Liancourt Rocks are only 87km from Ulleungdo, whereas they are 157km from Oki Island.[266] Ulleungdo and the Liancourt Rocks are both part of the Paektu volcanic range, situated in the deepest part of the Sea of Japan.[267] The Rocks are located on the Yamato Rise and are separated from Ulleungdo by the Tusima Basin.[268] The Liancourt Rocks do not share these similarities with the Oki Islands. These geographic ties are reflected in human activity. The Liancourt Rocks were never a sole destination for travellers, but rather a stopover for Ulleungdo.

Contiguity does not found a title but it can support South Korea's claims, especially given the ambiguity surrounding traditional title.[269] As a small, isolated, uninhabited rock the Liancourt Rocks could easily be considered an appendage to Ulleungdo, its closest neighbour and a larger, inhabited island. This is supported by the geographic similarities and historical connection between the two. Contiguity will help overcome the defects of the earlier title claims and tip the balance further in favour of South Korea.

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[263] Translated extract reproduced in Van Dyke, 'Sovereignty over Dokdo', above n 4, 166. See also Kaikobad, above n 102, 125; Kajimura, above n 1, 438-9.
[264] Kaikobad, above n 102, 160.
[265] An 1870 report by the Japanese Foreign Ministry and the Dajokan Directive of 1877: Ibid 161-2.
[266] Ibid 125; Van Dyke, 'Sovereignty over Dokdo', above n 4, 157.
[267] Kaikobad, above n 102, 168; Kajimura, above n 1, 437.
[268] Kaikobad, above n 102, 168.
[269] See Chapter II, pp 13-4 for discussion of the principle of contiguity.

### C *The Critical Date*

The critical date could be an important factor in the Liancourt Rocks dispute because of its long history. If a date is chosen, all acts occurring afterwards may be inadmissible.[270] There has been an active dispute over the Rocks since at least 1696 (the Takeshima Affair) but this leaves out a lot of important history, including the explicit claims to sovereignty made in 1900 and 1905. There are a few potential critical dates: 1905, after Japan's incorporation; 1952, after the proclamation of the Peace Line; 1954, when Japan proposed sending the dispute to the ICJ; or a date yet to be determined if and when the dispute is finally submitted to a Court or tribunal.

Japan and Korea's claims clearly opposed each other in 1905 when Japan incorporated the Liancourt Rocks into Shimane Prefecture. This directly contradicted Korea's 1900 incorporation. However 1905 is not a suitable date because of the surrounding context. As the Korean government was unable to effectively protest this action, selecting 1905 would unfairly disadvantage South Korea. It would also ignore the impact of World War Two, of which the 1905 incorporation could be seen as an early part. As a result 1905 is not a suitable critical date.

The modern dispute began in 1952 after South Korea proclaimed the Peace Line. Japan immediately protested this, making it clear that there was a dispute in the modern era. Importantly, this affirmed South Korea's intention to pursue Korea's ancient claim. 1952 is a highly possible date, but excludes consideration of events in 1954 when Japan proposed sending the dispute to the ICJ. Japanese protests in 1952 did not indicate any intention to formally pursue the dispute, but the 1954 proposal did. As such, 1952 is not suitable.

1954 is the most likely critical date. It marked the first modern evidence of effective possession, when South Korea built the lighthouse. The foundation

[270] See Chapter II, pp 14-6 for discussion of the law of the critical date.

of the dispute became clear when South Korea rejected Japan's ICJ proposal. South Korea argued that there was no dispute because the Rocks were inherently Korean territory, but the very existence of Japanese claims over such a long history proves otherwise. In 1954 there was a clear dispute to be resolved.

The key problem with 1954 is that it potentially excludes the considerable developments that have occurred since. The ICJ is reluctant to hamper its discretion to consider later events, and it is the later events which are the key to resolving the dispute. South Korean actions after 1954 solidify Korea's claims to title. Delaying settlement for this reason was exactly why the critical date was developed. Nonetheless the Court could still consider evidence after 1954. South Korea had begun the process of building upon the Rocks in 1954 so subsequent acts to strengthen this can be considered a continuation of these initial works. In response, Japan would be able to lead evidence of its continued protests. Therefore using 1954 as the critical date would not necessarily prevent the Court from considering these developments.

Two developments may be excluded if 1954 is the critical date. These are the 1965 *Basic Treaty* and the 1999 *United Nations Convention on the Law of the Sea* (*'UNCLOS'*).[271] The *Basic Treaty* throws light on Japanese and South Korean actions in the modern era by providing a framework for their relationship. It evidences their priorities and the context in which Japan has made only muted protests. The Court may therefore be able to consider it in light of Huber's statement in *Island of Palmas* to throw light on an earlier period.[272] *UNCLOS* meanwhile has expanded the dispute but has not affected the critical question of sovereignty because sovereignty over waters follows sovereignty over the land.[273]

[271] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').
[272] See Chapter II, p 15.
[273] See Chapter V, (starting p 273) for discussion of *UNCLOS* and its impact on this dispute.

Given the dispute's long history, the Court is unlikely to focus on any specific date. Instead the Court will likely consider the dispute in context, taking account of its history and any developments up until the time of submission to the Court. It is impossible to know when that will be. Later events may change the nature of the dispute – and the critical date – again. However of the dates currently marked in the Liancourt Rocks dispute, 1954 is the logical date. Japan's proposal to submit the dispute to the ICJ marked the first time that there was a clearly defined dispute to resolve. 1954 would allow the Court to consider the actions of both parties in the modern era, but within context. It would protect the interests of both parties by allowing them to present their evidence, qualified by the fact that in 1954 both knew there was a dispute to be answered.

## D *Conclusion*

The Liancourt Rocks have a long and complicated history. Given their nature as isolated, uninhabited rocks, very little is necessary to establish effective control. Despite this, title through many centuries has been ambiguous. Many historical records do not refer to the Liancourt Rocks, or refer to them by different names. Discovery and conquest were not followed by effective occupation or annexation by either party. Interest in the Rocks was primarily fuelled by fishermen and not pursued by governments. The advent of war prevented Korea from pushing her 1900 claim and has marred Japan's 1905 incorporation. It renders the long, stable Japanese rule between 1905-1945 meaningless. After the war, the Allies faced a unique opportunity to resolve the dispute but failed to grasp the chance, prioritising security concerns over territorial stability.

Recent history is critical. Since South Korea emerged after World War Two it has actively pursued its claim. Japan has been one step behind every step of the way. Japanese protests have been continual, but muted. In order to achieve agreements like the *Basic Treaty* and those in fishing rights, Japan has dropped the Liancourt Rocks from its agenda. Given South Korea's intensifying control over the Rocks, these protests are not sufficient to sustain

Japan's claim, especially as it is ambiguous at best. The combination of historic links, proximity and modern day control trip the balance in South Korea's favour. In the act of measuring the titles against each other, South Korea would ultimately come out on top.

## IV NORTH KOREA

The Liancourt Rocks dispute has focussed on Japan and South Korea as the two claimants to the Rocks but there is a third potential claimant: North Korea. North Korea's ability to claim the Liancourt Rocks is affected by several factors including their history, statehood and ability to intervene in the current dispute.

### A *History of Two Koreas*

#### 1 *One War to Another*

In 1910, Korea ceased to operate as an independent State in international law following its annexation by Japan.[274] When World War Two ended in 1945, securing Korean independence was one of the key United Nations ('UN') goals.[275] However for military reasons, Korea was divided into spheres of influence along the 38th parallel.[276] Japanese forces north of the line surrendered to Soviet forces while those in the south surrendered to the Americans.[277] This arrangement was meant to be temporary, but difficulties soon arose in reunifying the Korean Peninsula. At the Moscow Conference in 1945, the USA, UK and USSR agreed to establish a US-USSR Joint Commission tasked with negotiating a short-term trusteeship (of less than five

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[274] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1A, 206, 210; D P O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967), vol 1, 36; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 466; *Treaty of Annexation;* Hara, above n 6, 17. See also *Protectorate Treaty; 1904 Korea-Japan Agreement*.

[275] Jennings and Watts (eds), *Oppenheim*, vol 1A, above n 274, 134; *The Problem of the Independence of Korea,* GA Res 112 (III), UN GAOR, 1st Comm, 2nd sess, 112th plen mtg, Agenda Item 60, UN Doc A/Res/112(II) (14 November 1947) ('*Resolution 112*'); *Complaint of Aggression upon the Republic of Korea,* SC Res 82, UN SCOR, 473rd mtg, UN Doc S/Res/82 (25 June 1950) ('*Resolution 82'*); *The Problem of the Independence of Korea,* GA Res 293 (IV), UN GAOR, Ad Hoc Pol Com, 4th sess, 233rd plen mtg, Agenda Item 22, UN Doc A/Res 293(IV) (21 October 1949) ('*Resolution 293*'); *The Korean Question,* GA Res 811(IX), UN GAOR, 1st Comm, 9th sess, 510th plen mtg, Agenda Item 17a, UN Doc A/Res/811(IX) (11 December 1954) '*Resolution 811'*); *Question of Korea,* GA Res 2668(XXV), 1st Comm, 25th sess, 1919th plen mtg, Agenda Item 98, UN Doc A/Res/2668(XXV) (7 December 1970) ('*Resolution 2668*').

[276] Crawford, *Creation of States*, above n 274, 467; Hara, above n 6, 20.

[277] Joint Chiefs of Staff, *General Order No 1*, SWNCC21/8 (issued 17 August 1945) 1b, 1e; Crawford, *Creation of States*, above n 274, 467.

years) over Korea and establishing a provisional Korean government.[278] However negotiations to reunite Korea failed and led the USA to refer the problem to the UN General Assembly in 1947.[279]

In November 1947 the UN agreed to establish a Temporary Commission on Korea and adopted a resolution recognising the 'urgent and rightful claims to independence of the people of Korea.'[280] To achieve this, the UN voted to conduct general elections under UN observation and establish a unified government on the basis of those elections.[281] The USSR objected and refused to allow access to North Korea. As a result, elections were limited to the South and the Republic of Korea ('ROK') was established on 15 August 1948.[282] In response the Democratic People's Republic of Korea ('DPRK') was established in the north on 9 September 1948.[283] Its government posts were filled with Soviet trained communists and the new "State" was recognised by the USSR and its satellites.[284] In December, the UN formally recognised the ROK as the only elected and lawful government in Korea with effective control and jurisdiction over the south.[285]

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[278] *Communiqué on the Moscow Conference of the Three Foreign Ministers, signed at Moscow on 27 December 1945, and Report of the Meeting of the Ministers of Foreign Affairs of the Union of the Soviet Socialist Republics, the United States of America and the United Kingdom, dated 26 December 1945, Together Constituting an Agreement Relating to the Preparation of Peace Treaties and to Certain Other Problems*, USSR-UK-USA, signed 26-7 December 1945, 20 UNTS 272 (entered into force 27 December 1945) Part III; Hara, above n 6, 21; Crawford, *Creation of States*, above n 274, 467.
[279] Hara, above n 6, 21; Crawford, *Creation of States*, above n 274, 467.
[280] *Resolution 112*, UN Doc A/Res/112(II); Crawford, *Creation of States*, above n 274, 467.
[281] *Resolution 112*, UN Doc A/Res/112(II); Hara, above n 6, 21.
[282] Hara, above n 6, 21. See also Crawford, *Creation of States,* above n 274, 467; 'The Problem of the Independence of Korea' (1948-9) *The Yearbook of the United Nations* 287, 287-9; 'The Question of Korea' (1950) *The Yearbook of the United Nations* 220, 256.
[283] Hara, above n 6, 22.
[284] Ibid; Jennings and Watts (eds), *Oppenheim*, vol 1A, above n 274, 134.
[285] Hara, above n 6, 22; *The Problem of the Independence of Korea,* GA Res 195(III), UN GAOR, 1st Comm, 3rd sess, 187th plen mtg, Agenda Item 16, UN Doc A/Res/195(III) (12 December 1948) ('*Resolution 195'*). See also *Resolution 82,* UN Doc S/Res/82; *Resolution 293,* UN Doc A/Res 293(IV); *The Problem of the Independence of Korea,* GA Res 376(V), 1st comm, 5th sess, 294th plen mtg, Agenda Item 24, UN Doc A/Res/376(V) (7 October 1950) ('*Resolution 376*'); 'The Problem of the Independence of Korea', above n 282, 292.

Following the establishment of two Korean governments, both the USSR and USA withdrew their military forces.[286] However events quickly escalated and on 25 June 1950, North Korean forces crossed the 38th parallel and invaded South Korea, beginning the Korean War.[287] The UN Security Council[288] authorised a substantial NATO force to assist South Korea.[289] Within three months NATO had achieved their objective by expelling all North Korean forces from the South, but they continued across the 38th parallel in hope of reuniting Korea.[290] This prompted China to intervene militarily, to push NATO back across the 38th parallel.[291] There, fighting came to a deadlock and ceasefire talks began in 1951.[292] In 1953 the UN and North Korea finally signed a Military Armistice Agreement.[293] South Korea was not a signatory.[294] The Armistice was not a peace treaty – it did not end the war, it simply paused it. It established a ceasefire line roughly approximate to the 38th parallel and created a Demilitarised Zone around it.[295] This solidified the divide between North and South Korea.

### 2 *Modern Day*

During the Korean War another event occurred which further complicated the legal situation in Korea. Japan had maintained its claim to sovereignty over

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[286] Hara, above n 6, 22. This was in line with *Resolution 112*, UN Doc A/Res/112(II) which called for the withdrawal of all occupying forces. See also *Resolution 293,* UN Doc A/Res 293(IV).
[287] Crawford, *Creation of States*, above n 274, 468; Hara, above n 6, 22.
[288] The USSR was absent from this vote. It was boycotting the Security Council to protest the Security Council's refusal to transfer China's seat to the newly formed communist government of the People's Republic of China.
[289] Hara, above n 6, 22; Crawford, *Creation of States*, above n 274, 468. See also *Resolution 82,* UN Doc S/Res/82; *Complaint of Aggression upon the Republic of Korea,* SC Res 83, UN SCOR, 474th mtg, UN Doc No S/Res/83 (27 June 1950) ('*Resolution 83*'); *Resolution 376*, UN Doc A/Res/376(V); 'The Question of Korea' (1950), above n 282, 222-3, 256-7.
[290] Hara, above n 6, 22-3; *Resolution 376*, UN Doc A/Res/376(V).
[291] Hara, above n 6, 23.
[292] Ibid.
[293] Ibid, 47; Crawford, *Creation of States*, above n 274, 468; 'The Question of Korea' (1953) *The Yearbook of the United Nations* 109, Annex 1, 136-46.
[294] Crawford, *Creation of States,* above n 274, 468.
[295] *Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea,* 4 UST 234 (signed and entered into force 27 July 1953); 'The Question of Korea' (1953), above n 293, Annex 1, Arts 1, 2; Crawford, *Creation of States*, above n 274, 468.

Korea from 1910 through to 1945 but did not formally renounce it until 1951, in the *San Francisco Peace Treaty*. In the Treaty, Japan renounced it claims to Korea and recognised Korean independence.[296] The difficulty was that no such entity existed in 1951: it had ceased to exist in 1910, when Japan annexed Korea. The Treaty did not make any reference to two Koreas or even two governments, making it unclear who Japan renounced sovereignty in favour of.

Over time, the differences between the two Koreas became more apparent.[297] Reality forced a change in status. The land border between the two Koreas, which had been unofficial along the 38th parallel since 1945, was consolidated into a full international boundary.[298] The United Nations Command declared a maritime border in the West Sea known as the Northern Limit Line,[299] but no border was declared in the Sea of Japan. Both Koreas were granted UN membership in 1991,[300] after their applications had been continuously rejected since 1949.[301]

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[296] *San Francisco Peace Treaty* art 2; *Cairo Declaration*.
[297] 'The Question of Korea' (1973) *The Yearbook of the United Nations* 151, 151, 155.
[298] Crawford, *Creation of States,* above n 274, 471.
[299] Terence Roehrig, 'Korean Dispute Over the Northern Limit Line: Security, Economics, or International Law?' (2008) *Maryland Series in Contemporary Asian Studies* 1, 2.
[300] *Admission of the Democratic People's Republic of Korea and the Republic of Korea to Membership in the United Nations,* GA Res 46/1, UN GAOR, 46th sess, 1st plen mtg, Agenda Item 20, UN Doc A/Res/46/1 (17 September 1991) ('*Resolution 46*'); Crawford, *Creation of States*, above n 274, 471; Jennings and Watts (eds), *Oppenheim*, vol 1A, above n 274, 134.
[301] *Admission of New Members,* GA Res 296(IV), UN GAOR, Ad Hoc Pol Com, 4th sess, 252nd plen mtg, Agenda Item 17, UN Doc A/Res/296(IV)A-K (22 November 1949) ('*Resolution 296*'); *Admission of New Members to the United Nations,* GA Res 114(XII), UN GAOR, SPC, 12th sess, 709th plen mtg, Agenda Item 25, UN Doc A/Res/1144(XII)A (25 October 1957) ('*Resolution 114'*); *Admission of New Members to the United Nations*, GA Res 1017(XI), UN GAOR, SPC, 4th sess, 663rd plen mtg, Agenda Item 25, UN Doc A/Res/1017(XI)A (28 February 1957) ('*Resolution 1017'*); Crawford, *Creation of States*, above n 274, 467. North and South Korea first applied for UN membership in 1949 but were both unsuccessful. The UN refused to consider North Korea's application and South Korea's was vetoed by the USSR for reasons other than those listed in Article 4 of the Charter. This was contrary to the ICJ's ruling in *Conditions of Admission of a State to Membership in the United Nations (Article4 0f the Charter) (Advisory Opinion)* [1948] ICJ Rep 57*,* where the ICJ had held that membership could only be refused on the basis of Article 4: at 65. This led the UNGA to seek an advisory opinion from the ICJ about whether the General Assembly could admit a state without a Security Council recommendation. Unfortunately for South Korea, the ICJ decided in *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4 that they could not: at 10. The USSR continued to veto South Korea's application throughout the 1950s. See also 'The Problem of the Independence of Korea', above n 282, 394.

### B *Creation of States*

The *San Francisco Peace Treaty* gave rise to numerous questions regarding the status of "Korea" at international law. Japan had renounced its claim to "Korea" but no such entity had existed since 1910. From 1945 onwards, Korea had been divided but this reality had been ignored in the Treaty. Had North Korea seceded from Japan or Korea? Did two governments exist in one State or were they two States?[302] It is clear that North and South Korea became separate States or some point, but the date is unclear. There are a few potential dates: 1945 when North and South were first divided; 1948 when two separate governments emerged; 1951 when Japan renounced its sovereignty claim; 1972 when North Korea achieved more widespread recognition; or 1991 when both States became UN members. The preferable date is 1948, when North Korea fully satisfied all the indicia of statehood. This date is important because North Korea has not actively pursued a claim to the Liancourt Rocks since then.

There are five indicia of statehood: the existence of a permanent population; a defined territory; a government; the capacity to enter into relations with other States;[303] and independence.[304] There are also other factors that play an important role, particularly recognition.[305] Permanent population is not in issue here, but the other indicia are more controversial and should be considered in turn.

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[302] See Crawford, *Creation of States*, above n 274, 468-70.
[303] *Convention on the Rights and Duties of States,* signed 26 December 1933, 49 Stat 3097 (entered into force 26 December 1934) art 1 ('*Montevideo Convention*'); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 592 (Judge Cancado Trindade); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep 595, 662 (Judge Kreća) ('*Genocide'*); *Arbitration Commission of the Conference on Yugoslavia (Opinion 1)* (1991) 92 ILR 162, 165; Crawford, *Creation of States,* above n 274, 45-6.
[304] Crawford (ed), *Brownlie's Principles,* above n 8, 129; Shaw, *International Law*, above n 21, 211; *Island of Palmas* (1928) 2 RIAA 829, 848; *Austro-German Customs Union (Advisory Opinion*) [1931] PCIJ (ser A/B) No 41, 57-8 (Judge Anzilotti) ('*Austro-German*'); *Genocide* [1996] ICJ Rep 595, 662 (Judge Kreća); Thomas Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1998) 37 *Columbia Journal of Transnational Law* 403, 438, 451.
[305] Shaw, *International Law,* above n 21, 446, 449; *Arbitration Commission of the Conference on Yugoslavia (Opinion 8*) (1991) 92 ILR 199, 201; *Genocide* [1996] ICJ Rep 595, 686 (Judge Kreća).

1 *Defined Territory*

The first contentious element is defined territory. Statehood implies exclusive control over territory.[306] In *Island of Palmas*, Huber said that 'territorial sovereignty…involves the exclusive right to display the activities of a State.'[307] However a State may exist despite external claims to its territory, even claims to its entire territory.[308] Territorial boundaries do not need to be exactly defined.[309] The separation between North and South Korea began in 1945 as a military solution by the USA and USSR, without any intention to create separate States. The division led to the creation of two separate governments in 1948, each with exclusive control over their portion. The boundaries were delimited in 1953, after the conclusion of the Armistice Agreement. North and South Korea both maintain claims to the entire Korean peninsula[310] but this does not affect their statehood. Therefore North Korea could claim to satisfy the indicia of defined territory in 1948 when the DPRK assumed control in the north.

2 *Government and Capacity to Enter into Relations*

The second indicium, government, is tied to territory because territorial sovereignty relates to governing power over territory.[311] This requirement is

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[306] Crawford, *Creation of States*, above n 274, 48. See also Shaw, *International Law*, above n 21, 199-200.
[307] *Island of Palmas* (1928) 2 RIAA 829, 839; Crawford, *Creation of States*, above n 274, 46.
[308] Crawford, *Creation of States*, above n 274, 48-9. See *Monastery at St Naoum (Albanian Frontier) (Advisory Opinion* [1924] PCIJ (ser B) No 9, 8-10, 16 ('*St Naoum'*); *Polish-Czechoslovakian Frontier (Question of Jaworzina) (Advisory Opinion)* [1923] PCIJ (ser B) No 8, 20-1 ('*Jaworzina'*).
[309] Crawford, *Creation of States*, above n 274; 49-50; *St Naoum* [1924] PCIJ (ser B) No 9, 10; *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 32 ('*North Sea'*); *Deutsche Continental GasGesselschaft v Polish State* (1929) 5 ILR 11, 14-5; *Genocide* [1996] ICJ Rep 595, 664 (Judge Kreća).
[310] Article 3 of the ROK Constitution claims the entire territory of the Korean Peninsula, while Article 1 of the DPRK Constitution claims to represent the interests of all Koreans. However the initial 1948 DPRK Constitution did lay a territorial claim to Seoul as its capital instead of Pyongyang: Damien P Horrigan, 'Territorial Claims by Divided Nations: Applying the Irish Experience to Korea' (2006) 10 *Gonzaga Journal of International Law* 227, 239-42; *Constitution of the Republic of Korea* (ROK), adopted 12 July 1948, amended 29 October 1987 art 3; *Constitution of the Democratic People's Republic of Korea* (DPRK), adopted 27 December 1972, amended 5 September 1998 art 1.
[311] Crawford, *Creation of States,* above n 274, 56.

not stringently enforced,[312] as is evidenced by the 1960 Republic of Congo.[313] There are two key considerations: whether a government has the right or title to exercise authority and whether they actually exercise it.[314] This requires that the government be in general control of the area to the exclusion of other entities and that there is some degree of maintenance of law and order and the establishment of basic institutions.[315] The concept of government is also strongly tied to the third indicium of capacity,[316] which is more a consequence of statehood than a requirement for it.[317] It essentially requires that a State have an organised system of government with the authority to represent and legally bind the State in its relations with other States.[318]

North Korea satisfied the government requirement in 1948 after the DPRK was established. This government was initially supported by the USSR, who withdrew from North Korea shortly after its establishment. Even the UN recognised that the DPRK, not the ROK, controlled the northern peninsula. In these early years, the DPRK had little involvement with other States due to limited recognition however it acted on behalf of North Korea in 1948 (when it unsuccessfully applied for UN membership), in 1950 (when it authorised the invasion of South Korea) and in 1953 (when it signed the Armistice Agreement). These examples demonstrate that the DPRK also had the capacity to enter into relations, at earliest in 1948, and at the latest by 1953.

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[312] Ibid 56-7.
[313] The Republic of Congo became a State in 1960 despite the existence of secessionary movements, rival government factions and a lack of independence with the continued presence of foreign military. See Ibid; David Raic, *Statehood and the Law of Self Determination* (Kluwer Law International, 2002), 64-5.
[314] Crawford, *Creation of States*, above n 274, 57-9; Raic, above n 313, 65. See also *Somalia v Woodhouse Drake SA* [1993] QB 54, 67-8 (Hobhouse J); *Government of the Republic of Spain v SS 'Arantzazu Mendi'* [1939] AC 256, 267 (Lord Russell) ('*Arantzazu Mendi'*).
[315] Crawford, *Creation of States,* above n 274, 59. See also *Genocide* [1996] ICJ Rep 595, 666 (Judge Kreća); *Somalia v Woodhouse Drake SA* [1993] QB 54, 66 (Hobhouse J); *Arantzazu Mendi* [1939] AC 256, [1939] AC 256, 264-5 (Lord Atkin).
[316] It has been described as a conflation between government and independence: Crawford, *Creation of States*, above n 274, 62.
[317] Ibid 61. See also *Genocide* [1996] ICJ Rep 595, 662 (Judge Kreća).
[318] Raic, above n 313, 74.

3 *Independence*

The final element, independence, is the central criterion of statehood.[319] Huber defined it as '[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[320] Independence has two parts: first that a State exists as a separate entity within reasonably coherent frontiers; and second, that it is not subject to the authority of any other State.[321] North Korea satisfied the first part in 1948 for the reasons outlined above.[322] The second part is more problematic, due to the continuing involvement and claims of the USSR and Japan.

From its creation, North Korea was a Soviet sphere of influence. The USSR blocked UN involvement in the North, trained the North Korean leaders and helped establish the DPRK. The Soviet bloc recognised the North Korean State and lent military aid during the Korean War. States are permitted to restrict their independence without compromising their statehood.[323] The USSR withdrew from North Korea in 1948 and its intervention during the Korean War can be seen as military assistance, not a restriction on independence. Therefore the DPRK satisfied independence from the USSR in 1948.

However it is questionable whether the DPRK was independent from Japan in 1948. Japan technically maintained its claims to Korea until 1951. Despite this, the majority of the UN were willing to recognise and admit South Korea as a member State in 1948.[324] By accepting signing the Terms of Surrender in

[319] Crawford, *Creation of States*, above n 274, 62.
[320] *Island of Palmas* (1928) 2 RIAA 829, 838; See also Ibid.
[321] *Austro-German* [1931] PCIJ (ser A/B) No 41, 57-8 (Judge Anzilotti); Crawford, *Creation of States*, above n 274, 66.
[322] See pp 44-5.
[323] *SS "Wimbledon" (UK, France, Italy and Japan v Germany) (Judgment)* [1932] PCIJ (ser A) No 1, 25; Shaw, *International Law*, above n 21, 211; Raic, above n 313, 75; *Austro-German* [1931] PCIJ (ser A/B) No 41, 77 (Judges Adatci, Kellogg, Baron Rolin-Jaequemyns, Hurst, Shücking, van Eysinga and Wang).
[324] Hara, above n 6, 22; *Resolution 195*, UN Doc A/Res/195(III). See also *Resolution 82,* UN Doc S/Res/82; *Resolution 293,* UN Doc A/Res 293(IV); *Resolution 376*, UN Doc

1945, which incorporated the Cairo Declaration, Japan effectively renounced its claims to Korea in 1945.[325] Therefore in substance North Korea achieved independence in 1948.

4 *Recognition*

Another important factor in determining statehood is recognition, although it is controversial.[326] There are two main theories: the declaratory theory, that statehood is based upon factual circumstances that other States can choose to accept or ignore;[327] and the constitutive theory, which holds that the rights and duties of statehood derive from recognition.[328] Neither accurately reflects modern practice.[329] Membership of organisations like the UN[330] is evidence of widespread recognition and statehood.[331] However although non-recognition does make it difficult to operate as a State in international affairs, it does not make statehood impossible.[332]

When the DPRK was established in 1948 it was only recognised by the Soviet bloc. Its application for UN membership was not even considered. However UN membership involves more than just statehood: it is open to peace-loving States willing and able to carry out the obligations contained in the *UN Charter*.[333] North Korea received more widespread recognition in 1973 when it became a member of the World Trade Organisation ('WTO')[334] and was

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A/Res/376(V); 'The Problem of the Independence of Korea', above n 282, 292. However South Korea's application was ultimately unsuccessful due to Soviet opposition.

[325] *Instrument of Surrender* [1]; *Potsdam Declaration* [8]; *Cairo Declaration* [3]; See Chee, above n 2, 56.

[326] See eg Shaw, *International Law,* above n 21, 207, 445-6.

[327] Ibid 446-7; Crawford, *Creation of States,* above n 274, 4; *Montevideo Convention* arts 3, 6.

[328] Crawford, *Creation of States*, above n 274, 4.

[329] Ibid 5; Shaw, *International Law*, above n 21, 446.

[330] *UN Charter* art 4 limits UN membership to States. There is a similar provision for the World Trade Organisation, although this is open to States or separate customs territories: see *Marrakesh Agreement Establishing the World Trade Organisation,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art XII ('*Marrakesh Agreement'*).

[331] Crawford, *Creation of States*, above n 274, 27.

[332] Ibid 28.

[333] *UN Charter* art 4.

[334] Crawford, *Creation of States*, above n 274, 471; *Marrakesh Agreement* art XII.

granted observer status at the UN.[335] It was also recognised by Iceland, Denmark, Finland and Sweden.[336] In 1991, both North and South Korea finally became UN members, with widespread recognition. The limited recognition throughout the 1940s-80s must be seen in the context of the Cold War, where many communist countries were not recognised by Western States.[337] In this context, recognition cannot be afforded much weight: it was withheld for political reasons, not due to considerations of statehood. Limited recognition in 1948 did not prevent North Korea from becoming a State, just from fully exercising its rights and duties on an international stage.

In conclusion, North Korea satisfied the indicia of statehood in 1948. From then on North Korea, as the DPRK was a State at international law. The failure to widely recognise this fact was influenced by Cold War politics and a hope for Korean reunification. However by the end of the Cold War, changed circumstances forced the international community to face reality and recognise both Korean States.

### C *State Succession*

North Korea's relationship to the old Korea and South Korea is governed by a complex, controversial and often confusing area of law known as state succession and continuity.[338] The two are distinct, but related ideas. State succession occurs when there is a definitive replacement of one State by another.[339] It can only occur when a different State comes into existence: if the same State continues to exist in a different form, then that is an example of continuity. [340] In some circumstances, like when a federal State is

[335] Crawford, *Creation of States,* above n 274, 471.
[336] Jennings and Watts (eds), *Oppenheim,* vol 1A, above n 274, 134 n 17.
[337] A famous example was the People's Republic of China, which was established in 1949. The UK recognised the PRC in 1950 but the US continued to recognise Taiwan instead. The PRC did not obtain China's seat at the UN until 1971 and with this came more widespread recognition by the Western bloc.
[338] See O'Connell, *State Succession,* vol 1, above n 274, 4; Jennings and Watts (eds), *Oppenheim*, vol 1A, above n 274, 210.
[339] Crawford (ed), *Brownlie's Principles,* above n 8, 423. See also O'Connell, *State Succession,* vol 1*,* above n 274, 3.
[340] Crawford (ed), *Brownlie's Principles*, above n 8, 426-7.

dismembered, one State may be a continuation while the others are successors.[341] Relevant factors to determine these circumstances include a State's own claim to continuity and recognition by other States.[342] There are two types of succession that may occur in various ways. Total succession occurs when one State completely replaces another on a territory, for example through merger or dismemberment.[343] Partial succession occurs when only part of a territory separates through revolt, independence, cession or federation.[344]

Whenever succession occurs questions arise regarding ownership of property, archives, debts, rights and treaties. The wave of state successions in the aftermath of World War Two led the International Law Commission to attempt to codify the law into two treaties: the 1978 *Vienna Convention on the Succession of States in Respect of Treaties* and the 1983 *Vienna Convention on the Succession of States in Respect of State Property, Archives and Debt*.[345] Both Conventions have been extensively criticised and are not widely ratified.[346] Despite this they have been used to resolve disputes.[347]

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[341] An example of this is when the USSR dissolved. Russia was accepted as the continuation and retained the USSR's UN seat while the other States were considered successors and had to apply for new membership: see Ibid 427. Another example occurred after the partition of British India into India and Pakistan, India was considered the continuation while Pakistan became a successor State: see O'Connell, *State Succession,* vol 1, above n 274, 7-8.

[342] Crawford (ed), *Brownlie's Principles,* above n 8, 427. There is little evidence available to judge whether North and South Korea are continuous States of the old Korea or new States. As Korea never had UN membership, both North and South Korea were admitted to the UN as new States in 1991. Both States claim to be the only legitimate Korean government. However in terms of international recognition, it is more likely that South Korea would be considered the continuing State while North Korea would be a successor State, given the significant ideological change that led to the establishment of North Korea. However this distinction makes little difference to the present dispute because the deciding factor is not history but modern acts.

[343] Jennings and Watts (eds), *Oppenheim*, vol 1A, above n 274, 209; O'Connell, *State Succession,* vol 1, above n 274, 4-5.

[344] Jennings and Watts (eds), *Oppenheim,* vol 1A, above n 274, 209; O'Connell, *State Succession,* vol 1, above n 274, 4-5.

[345] *Vienna Convention on Succession of States in Respect of Treaties,* opened for signature 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996); *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,* opened for signature 8 April 1983, 2 *Official Records of the United Nations Conference on Succession of States in Respect of State Property Archives and Debts* 1 (not yet in force); Crawford (ed), *Brownlie's Principles,* above n 8, 424.

[346] The 1978 Convention has only 22 ratifications while the 1983 Convention has not yet entered into force: Crawford (ed), *Brownlie's Principles,* above n 8, 424.

Unfortunately, the scope of the Conventions is limited to treaties, properties and debt; not territorial disputes. While certain rights and obligations associated with the transferred territory are passed between the predecessor and successor state,[348] the law of state succession is largely silent in respect of territory disputes. Therefore it does nothing to assist in resolving North Korea's role in the Liancourt Rocks dispute.

## D *Application*

### 1 *North Korea's Ability to Access the ICJ*

The first step in determining North Korea's role in the Liancourt Rocks dispute is to determine whether they would be able to participate in proceedings. North Korea does not have diplomatic relations with Japan and would not be invited to participate in any Korean-Japanese talks regarding the dispute. Any agreement to send the dispute to an international tribunal would be between Japan and South Korea. If the dispute went before an international arbitral tribunal, then North Korea would be unlikely to be joined as tribunals cannot generally order a third party be joined unless they are a party to the arbitration agreement.[349] However the ICJ has two potential mechanisms:

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[347] Ibid; *Gabcikovo-Nagymaros Project (Hungary v Slovakia*) [1997] ICJ Rep 7, 70-2; *Arbitration Commission of the Conference on Yugoslavia* (*Opinion 9*) (1992) 92 ILR 203, 203; *Arbitration Commission of the Conference on Yugoslavia* (*Opinion 12)* (1993) 96 ILR 723, 724; *Arbitration Commission of the Conference on Yugoslavia (Opinion 14)* (1993) 96 ILR 729, 731; *Arbitration Commission of the Conference on Yugoslavia (Opinion 15)* (1993) 96 ILR 733, 736.

[348] See eg Crawford (ed), *Brownlie's Principles,* above n 8, 429-31; Jennings and Watts (eds), *Oppenheim,* vol 1A, above n 274, 224. The parties are also free to agree what rights and territory will pass with the succession.

[349] Doug Jones (ed), 'A Guide to International Arbitration' (Clayton Utz, 2nd ed, 2012) <http://www.claytonutz.com/docs/Guide%20to%20IA_2012.pdf> 7-8. Third party intervention is not generally provided for in PCA arbitrations: United Nations Conference on Trade and Development, *Dispute Settlement* (UNCTAD, 2003) <http://unctad.org/en/Docs/edmmisc232add26_en.pdf> [5.12]. The ICJ is also unable to direct a third party (even an intervener) to become a party to the case without the consent of the parties: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)(Jurisdiction and Admissibility)* [1984] ICJ Rep 392, 431 ('*Military and Paramilitary Activities (Jurisdiction)'*); *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Application to Intervene)* [1984] ICJ Rep 3, 25 ('*Libya v Malta (Application to Intervene)'*); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application for Intervention)* [1990] ICJ Rep 92, 135 ('*El Salvador v Honduras (Application to Intervene)'*).

intervention and the principle of *Monetary Gold*. As a UN member, North Korea is a party to the *ICJ Statute*[350] and has access to the Court.[351]

Under Article 62 of the *ICJ Statute*, a State that considers it has a legal interest that may be affected by the decision may request permission to intervene.[352] The State can also choose not to intervene and just rely on Article 59, which limits the binding force of ICJ judgments to the parties.[353] However this does not provide the same level of protection because the enforcement of the decision may have an effect on the third party State.[354] The Court recognises this, hence the doctrines of intervention and *Monetary Gold*.[355]

The intervening State can rely on the Statute without establishing additional jurisdictional title.[356] However they do need to establish how their rights and interests would be affected by the decision.[357] The original parties may object to the intervention[358] and the decision is at the Court's discretion.[359] When granted, intervention is usually limited to specific issues.[360] Of eleven

[350] *Statute of the International Court of Justice* ('*ICJ Statute'*).
[351] *UN Charter* art 93.
[352] *ICJ Statute* art 62. See also art 63.
[353] *ICJ Statute* art 59; *Libya v Malta (Application to Intervene)* [1984] ICJ Rep 3, 26; Paolo Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond' in J A Frowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations* (Kluwer Law International, 2002), vol 6, 139, 139.
[354] Palchetti, above n 353, 140.
[355] Ruth MacKenzie et al, *The Manual on International Courts and Tribunals* (Oxford University Press, 2nd ed, 2010) 27 n 184; *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA) (Preliminary Questions)* [1954] ICJ Rep 19, 33 ('*Monetary Gold'*); *East Timor* [1995] ICJ Rep 90, 101-4; Palchetti, above n 353, 140.
[356] MacKenzie et al, above n 355, 27; *El Salvador v Honduras (Application to Intervene)* [1990] ICJ Rep 92, 135.
[357] Palchetti, above n 353, 145.
[358] MacKenzie et al, above n 355, 28; *ICJ Statute* art 62(2); International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 84.
[359] *ICJ Statute* art 62. See also art 63.
[360] See, eg, *El Salvador v Honduras (Application to Intervene)* [1990] ICJ Rep 92, 128, 137; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Order on Application by Equatorial Guinea for Permission to Intervene)* [1999] ICJ Rep 1029, 1031, 1035 ('*Cameroon v Nigeria (Order on Intervention)'*). However a similar formulation was unsuccessful in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Application for Permission to Intervene)* [2001] ICJ Rep 575, 604, 607 ('*Ligitan and Sipadan (Application for Intervention')*. See also Palchetti, above n 353, 142.

applications for intervention,[361] the ICJ has only granted limited intervention in five instances.[362]

Intervention poses numerous difficulties for North Korea. First, South Korea and Japan would likely object to the intervention, and the application itself may be rejected. Second, North Korea would need full intervention as their claims relate to the core issue of sovereignty; essentially they would be making a claim themselves. Unlimited intervention has never occurred in the Court's history. Third, intervening would mean North Korea accepted the ICJ's jurisdiction, a prospect unlikely to appeal to the North Korean government. Finally, North Korea has not strongly pushed its claim to the Liancourt Rocks so it is unlikely to be suddenly be interested enough to intervene.

The second possibility is the principle of *Monetary Gold*.[363] This principle provides that the Court cannot decide upon the rights and obligations of a

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[361] *Haya de La Torre (Colombia v Peru) (Judgment)* [1951] ICJ Rep 71 ('*Haya de La Torre'*); *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Application to Intervene)* [1981] ICJ Rep 3 ('*Tunisia v Libya (Intervention)'*); *Libya v Malta (Application to Intervene)* [1984] ICJ Rep 3; *Military and Paramilitary Activities (Jurisdiction)* [1984] ICJ Rep 392; *El Salvador v Honduras (Application to Intervene)* [1990] ICJ Rep 92; *Cameroon v Nigeria (Order on Intervention)* [1999] ICJ Rep 1029; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Order of 22 September 1995)* [1995] ICJ Rep 288; *Ligitan and Sipadan (Application for Intervention)* [2001] ICJ Rep 575; *Territorial and Maritime Dispute (Nicaragua v Colombia) (Application for Permission to Intervene)* [2011] ICJ Rep 348; *Jurisdictional Immunities of the State (German v Italy) (Order on the Application by the Hellenic Republic for Permission to Intervene)* [2011] ICJ Rep 494 ('*Jurisdictional Immunities (Intervention)'*); *Whaling in the Antarctic (Australia v Japan) (Order on the Declaration of Intervention of New Zealand)* [2013] ICJ Rep 3 ('*Whaling (Intervention)'*).This list includes both applications and declarations of intervention.

[362] *Haya de La Torre* [1951] ICJ Rep 71, 77; *El Salvador v Honduras (Application to Intervene)* [1990] ICJ Rep 92, 137; *Cameroon v Nigeria (Order on Intervention)* [1999] ICJ Rep 1029, 1035; *Jurisdictional Immunities (Intervention)* [2011] ICJ Rep 494, 503; *Whaling (Intervention)* [2013] ICJ Rep 3, 10.

[363] First developed in *Monetary Gold* [1954] ICJ Rep 19. The case concerned gold that Germany had seized from Rome in 1943, which was later claimed by both Albania and Italy. Albania had taken control of it through the National Bank of Albania in 1945 but the UK claimed it as compensation after the Corfu Channel case. The resulting dispute between Italy, UK, France and USA was referred to the ICJ. Albania was not a party to the case. The Court held that in order to decide the dispute it was necessary to determine whether Albania's actions in seizing the gold had been lawful. The Court could not do so without Albania's consent to be a party before it: at 32.

State which is not party to the case before it.[364] It does not apply if the decision only impacts another State without deciding on its interests.[365] It was applied in the case of a sovereignty dispute in *East Timor*,[366] where the Court held that to determine whether Australia had failed to respect Portugal's administering power over East Timor by concluding a treaty with Indonesia would first require the Court to find that Indonesia's occupation of East Timor was unlawful.[367]

The problem with *Monetary Gold* is that it requires one of the parties to raise the objection because the Court may only consider what the parties bring before it.[368] It would be highly unlikely that either South Korea or Japan would raise *Monetary Gold* in North Korea's favour: doing so would indicate that North Korea had a legitimate claim to the Rocks, which both States wish to claim for themselves. In that case, North Korea's only option outside intervention would be to rely on Article 59 to limit the scope of the Court's decision.

### 2 *North Korean Claims*

The fundamental question is whether North Korea even has a claim to the Liancourt Rocks. The answer is that North Korea would be highly unlikely to be successful at international law. This is due to two factors, first the date of North Korean statehood, and second its geographical boundaries.

South Korea's early claims rely on acts taken by the Kingdom of Korea before 1910. North Korea has equal claim to this history. However, because North Korea became a separate State in 1948, they would be unable to lay

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[364] *Monetary Gold* [1954] ICJ Rep 19, 32; *Military and Paramilitary Activities (Jurisdiction)* [1984] ICJ Rep 392, 431; *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 260-1 ('*Phosphate Lands'*); Palchetti, above n 353, 145.
[365] *Military and Paramilitary Activities (Jurisdiction)* [1984] ICJ Rep 392, 431; *Phosphate Lands* [1992] ICJ Rep 240, 261; *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 25 ('*Libya v Malta'*).
[366] *East Timor* [1995] ICJ Rep 90.
[367] Ibid 105.
[368] *ICJ Statute* art 36.

claim to the more recent actions South Korea has taken to solidify its claims. This is where the strength of South Korea's claim lay. As was established in Chapter III, neither Japan nor South Korea would be successful in establishing ancient title, and this extends to North Korea too. Since 1948, North Korea has been silent in the dispute.[369] Therefore it has likely abandoned any claim it may have had,[370] leaving South Korea to succeed to Korea's ancient acts in combination with their modern control.

The second reason is the boundaries. Technically North and South Korea do not have any boundaries in the Sea of Japan near the Liancourt Rocks. In the West Sea, the Northern Limit Line delimits the boundaries and this line is drawn close to the North Korean coast.[371] If a similar line were drawn in the east, the Rocks would easily fall in the South Korean zone. Likewise if maritime borders were drawn outwards from the 38th parallel, the Liancourt Rocks would fall south of the line. Geographically, the Rocks are closest to Ulleungdo, which is South Korean territory. For these reasons, it makes little sense to grant the Liancourt Rocks to North Korea.

### E *Conclusion*

North Korea is usually forgotten in the Liancourt Rocks dispute, but it is worth considering its role. The possibility of Communist control over the Rocks was one factor that led the USA to support Japan's claims over South Korea's. The legal relationship between North, South and old Korea has been complicated by history and reluctance to accept a divided Korea. North Korea satisfied the requirements for statehood in 1948 and thus emerged onto the international stage as a new State. Since then, North Korea has been quiet regarding the Liancourt Rocks dispute. They have not taken any actions to

[369] Some scholars do indicate that North Korea believes that the Liancourt Rocks are Korean territory but there are few official statements regarding this. See Kajimura, above n 1, 424, 429.
[370] See Chapter II, p 11 for law of abandonment.
[371] This maritime boundary has been the subject of ongoing dispute between North and South Korea. See, eg: Evan Ramstad, 'Korea Crisis Has Roots in Border Row', *Wall Street Journal* (online), 2 Jun2 2010 <http://online.wsj.com/news/articles/SB10001424052748703961204575280472071130754>.

protest Japanese claims, support South Korea or establish control over the Rocks themselves. Even if North Korea were able to intervene in the dispute, they would not be successful due to their inactivity and geographic reality. The Liancourt Rocks are closest to South Korea, who have built upon them and controlled them since 1952. For these reasons, the Rocks rightfully belong to South Korea alone.

## V UNCLOS

The Liancourt Rocks dispute took on a new dimension with the adoption of the *United Nations Convention on the Law of the Sea* (‘*UNCLOS’*).[372] The Convention’s introduction of extended maritime zones increased State control over the high seas. As a result, sovereignty over the Liancourt Rocks could extend well beyond the Rocks[373] themselves and cover valuable marine resources including fisheries and hydrocarbons.[374] The generation of maritime zones also affects the maritime boundary delimitation between Japan and South Korea. The delimitation of the boundary is closely tied to the question of sovereignty but it is important to consider the impact of *UNCLOS* for two reasons. First, it makes the stakes clear: what are they fighting over? Second, if the issue is not resolved at the same time as sovereignty is determined then it will be a cause for further dispute later as other States seek to minimise the impact of the decision.

### A *Law of the Sea*

#### 1 *UNCLOS*

*UNCLOS* was adopted during the Third United Nations Conference on the Law of the Sea that ran from 1973 to 1982. It built upon the work of the two preceding conferences: the first held in 1956 resulted in four treaties concluded in 1958[375] and the second held in 1960 without result. Japan and South Korea both signed and ratified *UNCLOS* in 1982, but the Convention did not enter into force until 16 November 1994, after Guyana deposited the sixtieth ratification.

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[372] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (‘*UNCLOS*’).
[373] In fact the Liancourt Rocks could affect 16,600 square nautical miles of waters: Lee, ‘San Francisco Peace Treaty’, above n 156, 92; Haas, above n 9 3.
[374] Van Dyke, ‘Sovereignty over Dokdo’, above n 4, 198; Evidence of this is inconclusive. See Kanehara, above n 253, 88.
[375] *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) (‘*GCTS’*); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) (‘*GCCS’*); *The Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of Living Resources of the High Seas,* opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966).

*UNCLOS* introduced a six-zone system to define what control States had over the waters surrounding them. These zones are the: internal seas, territorial sea, contiguous zone, exclusive economic zone and continental shelf. A sixth zone, an archipelagic sea, is permitted for recognised archipelagic States.[376] The zones are all measured from a baseline, which is normally the coastal low water mark.[377]

All water on the landward side of the baseline forms the first zone, the internal seas.[378] Internal seas are considered part of the State's land territory, with all the same sovereign rights and jurisdiction associated. The second zone is the territorial sea, extending a maximum of 12nm[379] from the baseline.[380] Within the territorial sea the coastal State has all the rights and duties inherent in sovereignty.[381] This includes the right to exercise general police powers, reserve fisheries for national use and exclude foreign vessels from trade,[382] subject to the right of innocent passage.[383] The third zone, the contiguous zone, extends a further 12nm from the territorial sea. This is not part of a State's sovereign territory[384] but is subject to its jurisdiction in four limited areas. These are: customs, fiscal, immigration and sanitary

[376] *UNCLOS* arts 46, 49.
[377] Ibid art 5; *GCTS* art 3; Jennings and Watts (eds), *Oppenheim,* vol 1A, above n 274, 602. States may also draw their own baselines using alternative methods provided for in *UNCLOS* to suit different conditions, provided that the baselines do not depart appreciably from the general direction of the coast. This includes using straight baselines if the coast is deeply indented or surrounded by a fringe of islands: see *UNCLOS* arts 7, 14; Van Dyke, 'Disputes over Islands', above n 47, 44.
[378] Van Dyke, 'Disputes over Islands', above n 47, 44-5.
[379] "nm" is generally used as the abbreviation for "nautical mile" although technically "M" is the correct abbreviation. See Clive Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in in Seong-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, 2009) 19, 20.
[380] *UNCLOS* art 3.
[381] Crawford (ed), *Brownlie's Principles,* above n 8, 264; Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 600.
[382] Crawford (ed), *Brownlie's Principles,* above n 8, 264-5; Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 600-1, 620.
[383] *UNCLOS* Art 17; *GCTS* art 14; Crawford (ed), *Brownlie's Principles,* above n 8, 264-5.
[384] On its own, the contiguous zone forms part of the high seas: *UNCLOS* arts 55, 86; *GCTS* art 24; Crawford (ed), *Brownlie's Principles,* above n 8, 265.

regulations, but only where the infringement has or will occur in the state's territory or territorial sea.[385]

The fourth zone is the Exclusive Economic Zone ('EEZ'). This zone is a significant extension of State jurisdiction[386] and developed from fisheries zones.[387] It extends to a maximum of 200nm from the territorial sea and allows the State to exercise a mix of sovereign and jurisdictional rights. The State has sovereign rights to explore, exploit, conserve and manage the natural resources of the seabed, subsoil and waters.[388] It has jurisdiction to establish infrastructure, conduct scientific research and preserve the marine environment.[389] An EEZ must be proclaimed and does not always extend to the full 200nm limit.[390] Some States still prefer to claim a fishery zone instead of, or in conjunction with, an EEZ.[391] Japan traditionally maintained a 200nm exclusive fishing zone[392] but now claims that the Liancourt Rocks are entitled to an EEZ.

The final zone is the continental shelf. This overlaps the EEZ but may extend further. It is defined as extending along the natural prolongation of the State's land territory to the outer edge of the continental margin, or to a distance of 200nm from the coastal baseline, whichever is longer.[393] Within this area the coastal State can exercise sovereign rights for the purposes of exploring and exploiting the minerals in the subsoil and living resources physically attached

[385] *UNCLOS* art 33; Crawford (ed), *Brownlie's Principles,* above n 8, 266; Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 625.
[386] In fact if all coastal States insisted upon their maximum claims approximately 44.5% of the world ocean would be under the national jurisdiction of States: Schofield, above n 379, 20.
[387] Crawford (ed), *Brownlie's Principles,* above n 8, 274. See also Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 789.
[388] *UNCLOS* art 56.
[389] Ibid.
[390] Crawford (ed), *Brownlie's Principles,* above n 8, 277; Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 791; *Libya v Malta* [1985] ICJ Rep 13, 32; Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press, 2013) vol 1, 418.
[391] Crawford (ed), *Brownlie's Principles,* above n 8, 277.
[392] Ibid.
[393] *UNCLOS* art 76.

to the shelf.[394] Everything beyond this zone forms part of the normal high seas.[395]

2 *Article 121(3)*

Not all maritime features are entitled to these five zones. Islands are generally entitled to all five zones[396] but this is qualified by Article 121(3) which provides that 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'[397] *UNCLOS* defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide.'[398] However it does not include a definition of "rocks". The issue was contentious during the drafting of *UNCLOS* due to competing State interests.[399] The inclusion of rocks in Article 121 'Regime of Islands' indicates that rocks satisfy the definition of islands but are a disqualified subclass because they are unable to sustain life.[400]

Four main tests have been proposed for distinguishing between rocks and other islands. Two derive from the wording of Article 121(3): human habitability and economic life. The other two, size and geology, were raised during discussions at the *UNCLOS* Conference but were not included in the final text.[401] The International Hydrographic Bureau has a mathematical distinction between small islets (1 to 10 sq km), isles (10 to 100 km) and

[394] Ibid art 77; *GCCS* art 2; Crawford (ed), *Brownlie's Principles,* above n 8, 271.
[395] *UNCLOS* art 86. See also *UNCLOS* art 58; Crawford (ed), *Brownlie's Principles,* above n 8, 271.
[396] *UNCLOS* art 121(2).
[397] *UNCLOS* art 121(3). See also Jonathan I Charney, 'Rocks that Cannot Sustain Human Habitation' (1999) 93 *American Journal of International Law* 863, 864.
[398] *UNCLOS* art 121(1); *GCTS* art 10; *Qatar and Bahrain* [2001] ICJ Rep 40, 99; Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 604; Barbara Kwiatkowska and Alfred H A Soons, 'Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of their Own' (1990) 21 *Netherlands Yearbook of International Law* 139, 139-40; Jon M Van Dyke, Joseph R Morgan and Jonathan Gurish, 'The Exclusive Economic Zone of the Northwestern Zone Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?' (1988) 25 *San Diego Law Review* 425, 434; Charney, 'Rocks', above n 397, 864.
[399] Schofield, above n 379, 27. See also Kwiatkowska and Soons, above n 398, 141-2.
[400] See Schofield, above n 379, 25; Kwiatkowska and Soons, above n 398, 150.
[401] See Schofield, above n 379, 25 citing David Hodgson, *Islands: Normal and Special Circumstances* (US Dept of States: Bureau of Intelligence and Research, Research Study, 1973).

islands (100 to 5 x 106 sq km).[402] These measurements inspired political geographers Hodgson and Smith to develop their own formula including a fourth classification of rocks.[403] Using their measurements, rocks have an area of less than .001 square miles, islets are between .001 and 1 sq mile, isles between 1 to 1000 sq miles and islands are larger than 1,000 square miles.[404] However size criteria has not attracted much support from States.[405]

The second proposal was to define rocks on the basis of geology. In its ordinary meaning a rock is a 'hard part of the earth's crust'.[406] Various phrases such as 'islands', 'islets', 'small islands' and 'rocks' were suggested in the course of drafting Article 121 to distinguish between different features.[407] No consensus has been reached on whether the final wording should be read to include features like sandbanks,[408] although some commentators suggest that it should.[409]

The key tests then are those listed in Article 121(3): human habitation and economic life. International tribunals have shed light on the issue. In the *Volga*[410] Judge Budislav Vukas of the International Tribunal for the Law of the Sea ('ITLOS') explained that all features that cannot sustain human habitation or economic life of their own are considered to be rocks for the purposes of Article 121.[411] The case concerned the application for prompt release of a Russian flagged fishing vessel that had been apprehended near the Australian islands of Heard and McDonald.[412] Although Heard Island is large, both islands lack a permanent population and are located in sub Antarctic waters.[413] Judge Vukas objected to Australian claims to EEZs around these

[402] Haas, above n 9, 4.
[403] Kwiatkowska and Soons, above n 398, 155.
[404] Ibid 155-6; Haas, above n 9, 4.
[405] Kwiatkowska and Soons, above n 398, 156.
[406] Schofield, above n 379, 26.
[407] Kwiatkowska and Soons, above n 398, 151-2.
[408] Schofield, above n 379, 26.
[409] Ibid; Kwiatkowska and Soons, above n 398, 151-2.
[410] *Volga (Russian Federation v Australia) (Judgment)* (International Tribunal for the Law of the Sea, Case No 11, 23 December 2002) ('*Volga'*).
[411] See Haas, above n 9, 4; Van Dyke, 'Sovereignty over Dokdo', above n 4, 196.
[412] Schofield, above n 379, 29.
[413] Ibid 30.

features on the basis that they were rocks for the purposes of Article 121(3).[414] The majority of ITLOS made no comment on the issue.[415] Judge Vukas took a similar view regarding French EEZ claims around Kerguelen Islands in *The Monte Confurco Case*.[416] The Kerguelen Islands are also in sub-Antarctic waters and have a small scientific settlement, staffed all year round.[417]

Judge Vukas's reasoning was based on the principle of an EEZ. EEZs were designed to protect the economic interests of coastal States and communities that depended on maritime resources to survive.[418] This protection is unnecessary if the feature does not support human habitation.[419] Judge Vukas recognised that while EEZs were useful to preserve marine resources other mechanisms were designed to achieve this.[420] Scholars have supported this reasoning, with Professor Charney stating that 'the primary purpose of Article 121(3) was to ensure that insignificant features, particularly those far from other States, could not generate broad zones of national jurisdiction in the middle of the ocean.'[421]

So what is meant by 'human habitation' and 'economic life of their own' and must they both be satisfied? Both tests rely on human activity, and earlier versions of Article 121(3) used the word 'and' to link 'human habitation' to 'economic life'.[422] However the final text uses the word 'or' which supports

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[414] *Volga* (International Tribunal for the Law of the Sea, Case No 11, 23 December 2002), 42, 44 (Vice President Vukas); Schofield, above n 379, 29.
[415] *Volga* (International Tribunal for the Law of the Sea, Case No 11, 23 December 2002); Schofield, above n 379, 31.
[416] *Monte Confurco (Seychelles v France) (Judgment)* (International Tribunal for the Law of the Sea, Case No 6, 18 December 2000), 122 (Judge Vukas) ('*Monte Confurco'*); Schofield, above n 379, 30.
[417] Schofield, above n 379, 30.
[418] Van Dyke, 'Disputes over Islands', above n 47, 49-50; Van Dyke, 'Sovereignty over Dokdo', above n 4, 196; Haas, above n 9, 4.
[419] *Volga* (International Tribunal for the Law of the Sea, Case No 11, 23 December 2002) 42-3 (Vice President Vukas); Van Dyke, 'Sovereignty over Dokdo', above n 4, 196.
[420] *Volga* (International Tribunal for the Law of the Sea, Case No 11, 23 December 2002), 45 (Vice President Vukas); Van Dyke, 'Disputes over Islands', above n 47, 50; Van Dyke, 'Sovereignty over Dokdo', above n 4, 196; Haas, above n 9, 4.
[421] Charney, 'Rocks', above n 397, 866; Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at May 2010), Jon M Van Dyke, 'Rocks' [14].
[422] Charney, 'Rocks', above n 397, 867-8; Kwiatkowska and Soons, above n 398, 163.

the proposition that a feature does not need to satisfy both tests.[423] The requirements to satisfy the test seem to set a low bar. Human habitation does not need to be permanent only regular.[424] Economic life does not need to be capable of supporting humans throughout the year but the mere existence of valuable natural resources is not sufficient – the use of the phrase 'life of its own' indicates that the resource must have an economic value that would support its exploitation.[425] In a 1999 article, Professor Charney examined the texts of *UNCLOS* in English, French, Spanish, Arabic, Chinese and Russian. He concluded that 'Article 121(3) ought to be interpreted to permit the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.'[426]

The most important decision in respect of Article 121(3) is the 2009 ICJ decision of *Maritime Delimitation in the Black Sea (Romania v Ukraine*).[427] The case was primarily a maritime delimitation case, but in argument the Romanian and Ukrainian agents addressed whether Snake Island was classified as an island or a rock. Snake Island has a total landmass of 0.17km squared. It has no fresh water, was historically uninhabited, and had only one structure, a lighthouse built in the 1800s.[428] In recent years however Ukraine began developing the islands, building structures and a pier.[429] Ukraine argued that Snake Island was able to sustain human habitation and economic activity, with sufficient water supplies, vegetation and buildings.[430] Romania argued that it was a rock because it was 'totally dependent for food, water and every

[423] Ie a rock will lack both a human habitation and economic life. Any feature which satisfies one of the test will be classified as an island: Schoenbaum, above n 4, 215. Charney, 'Rocks', above n 397, 868.
[424] Charney, 'Rocks', above n 397, 868, 871; Van Dyke, Morgan and Gurish, above n 398, 437; Schoenbaum argues that temporary shelter for seasonal fishing is sufficient, that there is no requirement for arable land or potable water: Schoenbaum, above n 4, 215.
[425] Charney, 'Rocks', above n 397, 868, 871; Jonathan I Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea' (1995) 89 *American Journal of International Law* 724, 733-4.
[426] Charney, 'Rocks', above n 397, 871.
[427] *Maritime Delimitation in the Black Sea (Romania v Ukraine) (Judgment)* [2009] ICJ Rep 61 ('*Black Sea'*).
[428] Van Dyke, 'Max Planck', above n 421, [6].
[429] Ibid.
[430] *Black Sea* [2009] ICJ Rep 61, 121.

other human need.'[431] The Romanian agent also argued that in order to satisfy the human habitation requirement, the population must be stable and not ordered to go there by employers.[432] The ICJ declined to provide a definition of 'rock' and did not directly respond to these arguments but their decision strongly favoured Romania, excluding Snake Island from the boundary delimitation.[433]

State practice has been ambivalent. In 1970, before *UNCLOS* was adopted, Taiwan issued a reservation when ratifying the *Convention on the Continental Shelf* stating that exposed rocks and islets would not be taken into account when determining the boundary of their continental shelf. This was in apparent reference to the Diaoyu/Senkaku Islands, and China reportedly shares this opinion.[434] In 1997, before ascending to *UNCLOS*, the UK renounced any claim to a continental shelf or EEZ around Rockall, a barren granite feature northwest of Scotland.[435] However Japan's position is that all islands and islets can generate maritime zones regardless of their size and habitability[436] and for this reason continues to maintain that Okinotorishima is entitled to an EEZ and continental shelf.[437]

### B *Maritime Boundary Delimitation*

#### 1 *Equitable Delimitation*

Whenever claims to maritime zones overlap there is a potential boundary delimitation problem.[438] This is a major problem because every coastal State

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[431] 'Verbatim Record', *Maritime Delimitation in the Black Sea (Romania v Ukraine),* International Court of Justice, CR 2008/31, 16 September 2008, 14.
[432] *Black Sea* [2009] ICJ Rep 61, 120.
[433] Ibid 122, 131.
[434] Van Dyke, 'Sovereignty over Dokdo', above n 4, 196-7.
[435] Schofield, above n 379, 28-9; Van Dyke, 'Disputes over Islands', above n 47, 50; Crawford (ed), *Brownlie's Principles,* above n 8, 263; Van Dyke, 'Sovereignty over Dokdo', above n 4, 196.
[436] Van Dyke, 'Disputes over Islands', above n 47, 51; Van Dyke, 'Sovereignty over Dokdo', above n 4, 197.
[437] Crawford (ed), *Brownlie's Principles,* above n 8, 263; Van Dyke, 'Sovereignty over Dokdo', above n 4, 202.
[438] Schofield, above n 379, 31.

in the world has an overlapping maritime zone with another State.[439] The majority of maritime boundaries have never been formally agreed, with only 168 of approximately 427 potential maritime boundaries even partially agreed.[440] In Central East Asia most maritime boundaries are subject to disputes.[441] Maritime boundary disputes have formed a large part of the ICJ's work. At the time of writing, there are three maritime delimitation cases pending before the Court.[442]

Different mechanisms are used to delimitate the different maritime zones. *UNCLOS* Article 15 provides that where there are overlapping claims to a territorial sea the equidistance method is to be used unless the parties agree otherwise or there are historic titles or other special circumstances that make it inappropriate.[443] The ICJ developed a three-step[444] method after *Qatar and Bahrain* and the *Caribbean Sea*, using equidistance.[445] First, the Court considers drawing a provisional line of equidistance.[446] Second, they consider whether that line should be abandoned due to special circumstances.[447] Some considerations the Court bears in mind are the coastal geography, the delimitation of the territorial sea of adjacent States and the physical features of the area adjacent to the land boundary.[448] Finally, the Court may consider their own means of delimitation or adopt those proposed by the parties.[449]

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[439] Crawford (ed), *Brownlie's Principles,* above n 8, 281.
[440] Schofield, above n 379, 19, 31.
[441] Ibid, 19-20; Charney, 'Central East Asian Maritime Boundaries', above n 425, 724.
[442] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya*); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia).* A fourth pending case relates to access to the Pacific Ocean: *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* while a fifth relates to sovereign rights in maritime zones: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia*).
[443] Schofield, above n 379, 32; Crawford (ed), *Brownlie's Principles,* above n 8, 283. This provision is virtually identical to *GCTS* art 12(1).
[444] See generally Crawford (ed), *Brownlie's Principles,* above n 8, 284.
[445] *Qatar and Bahrain* [2001] ICJ Rep 40, 41,104, 111*; Caribbean Sea* [2007] ICJ Rep 659, 740; Ibid.
[446] *Caribbean Sea* [2007] ICJ Rep 659, 740; *Qatar and Bahrain* [2001] ICJ Rep 40, 94.
[447] *Caribbean Sea* [2007] ICJ Rep 659, 744-5; *Qatar and Bahrain* [2001] ICJ Rep 40, 94, 104.
[448] *Caribbean Sea* [2007] ICJ Rep 659, 748.
[449] *Caribbean Sea* [2007] ICJ Rep 659, 741-5.

The provisions for continental shelf disputes (Article 83) and EEZ claims (Article 74) mirror each other, providing that the parties come to an agreement on the basis of international law to achieve an equitable solution.[450] These two provisions do not indicate a preferred method of delimitation.[451] Initially the equidistance method was used for delimitation of continental shelves and EEZs. Article 6 of the 1958 *Geneva Convention on the Continental Shelf* specified using a median line for opposite States[452] and an equidistance line for adjoining States.[453] The ICJ rejected the equidistance method as the sole method in *North Sea Continental Shelf*[454] because it would result in areas forming a natural part of one State being given to another.[455] Instead the Court held that delimitation was to be effected by agreement in accordance with equitable principles and taking account of natural prolongation.[456] The principle of natural prolongation was prominent in the 1970s but has not been utilised by tribunals since.[457]

In a number of cases the ICJ has preferred to use the equidistance or median lines as an aid to preliminary analysis before adjusting them to suit the circumstances.[458] Similar to the delimitation of territorial sea claims, this forms the first of a three stage process.[459] First, the Court establishes a

[450] Schofield, above n 379, 32. See also *Qatar and Bahrain* [2001] ICJ Rep 40, 110; *Libya v Malta* [1985] ICJ Rep 13, 33.
[451] Schofield, above n 379, 32.
[452] *GCCS* art 6(1). See also Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 777.
[453] *GCCS* art 6(2). See also Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 777.
[454] *North Sea* [1969] ICJ Rep 3.
[455] Ibid, 31-2, 46; Thirlway, above n 390, 427; Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 779; Crawford (ed), *Brownlie's Principles,* above n 8, 286; Van Dyke, 'Sovereignty over Dokdo', above n 4, 198.
[456] *North Sea* [1969] ICJ Rep 3, 47; Thirlway, above n 390, 426. See also Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 779.
[457] *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Judgment)* [1982] ICJ Rep 18, 44-9 ('*Tunisia v Libya*'); *Libya v Malta* [1985] ICJ Rep 13, 33-6, 45, 55-6*; Gulf of Maine* [1984] ICJ Rep 246, 293; Van Dyke, 'Disputes over Islands', above n 47, 54; Van Dyke, 'Sovereignty over Dokdo', above n 4, 199.
[458] *Libya v Malta* [1985] ICJ Rep 13, 37, 46, 48*; Gulf of Maine* [1984] ICJ Rep 246, 333 *Qatar and Bahrain* [2001] ICJ Rep 40, 110-1; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Judgment)* [1993] ICJ Rep 38, 61 ('*Jan Mayen*'); Van Dyke, 'Sovereignty over Dokdo', above n 4, 198.
[459] See generally *Qatar and Bahrain* [2001] ICJ Rep 40, 110-1; *Jan Mayen* [1993] ICJ Rep 38, 61; Crawford (ed), *Brownlie's Principles,* above n 8, 286-7.

provisional equidistance line.[460] If the equidistance method is inappropriate in the particular circumstances then the Court will consider a different method of delimitation.[461] Next, the Court considers the relevant circumstances.[462] These circumstances are similar to the special circumstances referred to in Article 6 of the *Geneva Convention on the Continental Shelf*.[463] They include the general coastal geography, the disparity of coastline length and equitable access to natural resources.[464] Finally, the Court will verify that the line is not inequitable.[465] Specific equitable principles have emerged through the Court's jurisprudence.[466] These include the principle of non-encroachment (neither party should encroach on natural prolongation of another),[467] that the delimitation should not cut off the seaward projection of the coastline,[468] and that delimitation is to be effected by agreement in accordance with international law and the use of practical methods to ensure an equitable result.[469] There is also a slight presumption that the equitable solution will result in an equal division of the areas of overlap.[470] Proportionality is not a

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[460] *Qatar and Bahrain* [2001] ICJ Rep 40, 94; *Caribbean Sea* [2007] ICJ Rep 659, 742-5; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar) (Judgment)* (International Tribunal for the Law of the Sea, Case No 16, 14 March 2012) [239]-[40] ('*Bangladesh and Myanmar'*).
[461] Crawford (ed), *Brownlie's Principles,* above n 8, 287.
[462] Ibid.
[463] *GCCS* art 6(3) *Jan Mayen* [1993] ICJ Rep 38, 62; *Guyana and Suriname (Guyana v Suriname) (Award)* (2007) 139 ILR 566, 650-1 ('*Guyana and Suriname'*); Ibid.
[464] *GCCS* art 6(3); *Jan Mayen* [1993] ICJ Rep 38, 62; *Guyana and Suriname* (2007) 139 ILR 566, 650-1; Crawford (ed), *Brownlie's Principles,* above n 8, 287-9; Van Dyke, 'Sovereignty over Dokdo', above n 4, 199; Schoenbaum, above n 4, 220-1.
[465] Crawford (ed), *Brownlie's Principles,* above n 8, 287.
[466] See generally Ibid 289.
[467] *North Sea* [1969] ICJ Rep 3, 46-7; *Gulf of Maine* [1984] ICJ Rep 246, 258, 318; *Libya v Malta* [1985] ICJ Rep 13, 39; *Dubai-Sharjah Border* (*Dubai v Sharjah) (Award)* (1981) 91 ILR 543, 659; *Barbados v Trinidad and Tobago (Barbados v Trinidad and Tobago) (Award)* (2006) 139 ILR 449, 521 ('*Barbados v Trinidad and Tobago*'); *Jan Mayen* [1993] ICJ Rep 38, 69, 79-81; *UNCLOS* art 7(6); Van Dyke, 'Sovereignty over Dokdo', above n 4, 199.
[468] *North Sea* [1969] ICJ Rep 3, 46-9; *Gulf of Maine* [1984] ICJ Rep 246, 298-9, 312-3, 328, 335; *Guinea-Guinea Bissau Maritime Delimitation (Guinea v Guinea Bissau) (Award)* (1985) 77 ILR 635, 681 ('*Guinea-Guinea Bissau'*); *Barbados v Trinidad and Tobago* (2006) 139 ILR 449, 521, 521; *Bangladesh and Myanmar* (International Tribunal for the Law of the Sea, Case No 16, 14 March 2012), 331.
[469] *North Sea* [1969] ICJ Rep 3, 46-9; *Gulf of Maine* [1984] ICJ Rep 246, 292-3, 299-300; *Libya v Malta* [1985] ICJ Rep 13, 39; *Barbados v Trinidad and Tobago* (2006) 139 ILR 449, 521.
[470] Crawford (ed), *Brownlie's Principles,* above n 8, 288. However equity does not mean equality, when the area is not naturally equal. See *North Sea* [1969] ICJ Rep 3, 36, 49, 53-4; *Tunisia v Libya* [1982] ICJ Rep 18, 61-4, 81; *Gulf of Maine* [1984] ICJ Rep 246, 300, 313, 321-31; *Libya v Malta* [1985] ICJ Rep 13, 43, 47; *Guinea-Guinea Bissau* (1985) 77 ILR 635,

separate principle of delimitation but it can be used to determine whether the result is equitable.[471]

Although EEZ delimitation is based upon the same principles as continental shelves, some differences emerge. These differences relate to balancing the equitable factors, particularly when the EEZ is important for fisheries.[472] The presence of oil and gas are also relevant factors. In *Tunisia/Libya* the ICJ was willing to consider the presence of oil wells in the delimited area.[473] However this does not mean that the delimitation is influenced by the economic positions of the two States.[474]

2 *Effect of Islands*

One of the most important circumstances to consider in maritime boundary delimitation is the presence and effect of islands.[475] There are four possibilities: islands may be given full[476] or half effect,[477] or they may be ignored or enclaved.[478] Enclaving is popular where islands exist in the middle of the delimited area or on the wrong side of the median line.[479] Even islands entitled to the full maritime zones are often given diminished effect on

638, 676-9; *Cameroon v Nigeria* [2002] ICJ Rep 303*,* 445-6; *Delimitation of the Continental Shelf (UK v France) (Award)* (1977) 54 ILR 6, 123 (‘*Anglo-French Continental Shelf*’).

[471] Crawford (ed), *Brownlie’s Principles,* above n 8, 291. See also Van Dyke, ‘Sovereignty over Dokdo’, above n 4, 198-9; *Libya v Malta* [1985] ICJ Rep 13, 44-9, 53-4; *Jan Mayen* [1993] ICJ Rep 38, 64-9; *Maritime Delimitation (Eritrea v Yemen) (Award in the Second Phase)* (Permanent Court of Arbitration, 17 December 1999), 5, 9-10, 38, 49-50 (‘*Eritrea-Yemen (Phase 2)*’).

[472] Crawford (ed), *Brownlie’s Principles,* above n 8, 293.

[473] *Tunisia v Libya* [1982] ICJ Rep 18, 77-8; Thirlway, above n 30, 422. See also *North Sea* [1969] ICJ Rep 3, 21, 52, 54.

[474] *Libya v Malta* [1985] ICJ Rep 13, 41; Thirlway, above n 30, 422-3. See also *North Sea* [1969] ICJ Rep 3, 49-50.

[475] Crawford (ed), *Brownlie’s Principles,* above n 8, 294.

[476] See, eg *Bangladesh and Myanmar* (International Tribunal for the Law of the Sea, Case No 16, 14 March 2012), 51, See also Ibid 294.

[477] See, eg, *Tunisia v Libya* [1982] ICJ Rep 18, 89; *Anglo-French Continental Shelf* (1977) 54 ILR 6, 124; *Gulf of Maine* [1984] ICJ Rep 246, 336-7. See also Crawford (ed), *Brownlie’s Principles,* above n 8, 294.

[478] See, eg, *Bangladesh and Myanmar* (International Tribunal for the Law of the Sea, Case No 16, 14 March 2012), 318-19; *North Sea* [1969] ICJ Rep 3, 36; *Anglo-French Continental Shelf* (1977) 54 ILR 6*,* 98-104. See also Crawford (ed), *Brownlie’s Principles,* above n 8, 294; Charney, ‘Rocks’, above n 397, 875.

[479] Schofield, above n 379, 33.

maritime delimitation as opposed to the mainland.[480] Tiny islands are frequently ignored altogether. Islands are often ignored when they are barren or uninhabitable.[481] In *Qatar and Bahrain* the ICJ chose to ignore the small, barren and uninhabited islet of Qit'at Jaradah as well as the larger feature of Fasht al Jarim which was a low-tide elevation.[482] The Court stated that using such features as base points on the baseline would 'distort the boundary and have disproportionate affects' on the delimitation.[483]

### C *Application*

#### 1 *Liancourt Rock's Entitlement to Maritime Zones*

Both Japan and South Korea (despite previously stating otherwise)[484] maintain that the Liancourt Rocks are islands entitled to all five maritime zones.[485] The waters surrounding the Liancourt Rocks include rich fishing grounds, particularly the Yamato Deposit.[486] The ability to claim an EEZ over these waters would give the sovereign State exclusive rights to exploit these resources. Both parties currently agree that the Liancourt Rocks are entitled to an EEZ so it is possible that the question would not be put before an international tribunal. However in all likelihood, after the issue of sovereignty was decided, the other State or surrounding States would challenge exclusive rights to these resources. As a result it is worth considering whether the Liancourt Rocks are legally entitled to these extended maritime zones.

The answer has to be that they are not. The Liancourt Rocks satisfy the test outlined in Article 121(1) of *UNCLOS* for the definition of an island but as rocks they fall under the exclusion in Article 121(3). The Rocks are a

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[480] Van Dyke, 'Disputes over Islands', above n 47, 43-4; Charney, 'Rocks', above n 397, 876.
[481] *Eritrea-Yemen (Phase 2)* (Permanent Court of Arbitration, 17 December 1999), 45*; Qatar and Bahrain* [2001] ICJ Rep 40, 104-5; *North Sea* [1969] ICJ Rep 3, 36; *Libya v Malta* [1985] ICJ Rep 13, 48; Van Dyke, 'Sovereignty over Dokdo', above n 4, 200; Van Dyke, 'Max Planck', above n 421, [11].
[482] *Qatar and Bahrain* [2001] ICJ Rep 40, 104, 109, 115.
[483] *Anglo-French Continental Shelf* (1977) 54 ILR 6*,* 114; *North Sea* [1969] ICJ Rep 3, 36; *Qatar and Bahrain* [2001] ICJ Rep 40, 114-5; *Black Sea* [2009] ICJ Rep 61, 122; *Libya v Malta* [1985] ICJ Rep 13, 48; *Caribbean Sea* [2007] ICJ Rep 659, 751.
[484] Kanehara, above n 253, 77-8; Asada, above n 4, [18].
[485] Kanehara, above n 253, 72-3, 76.
[486] Ibid 83, 88; Van Dyke, 'Sovereignty over Dokdo', above n 4, 193; See also Chee, above n 2, 2.

naturally formed area of land, surrounded by water and above water at high tide. However they are small and generally inhospitable. Vegetation is scarce and there is no fresh drinking water. This deficiency has been corrected using artificial means after the development of a desalination plant but it is not clear that artificial additions are sufficient to satisfy the test.[487] If it was, then nearly any rock could become an island and generate extended maritime zones. A contingent of South Korean marine police is stationed on the Rocks to support South Korea's sovereignty claim, along with one family.[488] However they only generally reside on the Rocks during the summer months.[489] Even South Korean scholars have acknowledged that the Rocks are unsuitable for general human habitation.[490]

In many ways, the Liancourt Rocks are similar to the many other small maritime features that have formed the subject of international disputes. The small management staff stationed in the Liancourt Rocks is similar to the scientific community that resided on the French Kerguelen Islands. In a similar situation to that described by the Romanian agent regarding Snake Island, the majority are ordered to go to the Liancourt Rock by employers. The majority of scholars who have considered the Liancourt Rock's entitlement to extended maritime zones have concluded that they are rocks for the purposes of Article 121(3) and are therefore not entitled to an EEZ or continental shelf.[491]

2 *Boundary Delimitation between Japan and South Korea*

In 1974 Japan and South Korea entered into two agreements delimiting part of the continental shelf boundary and creating a joint development zone in the disputed area.[492] The continental shelf boundary uses a median line that starts

[487] See Haas, above n 9, 5.
[488] Van Dyke, 'Disputes over Islands', above n 47, 46; Van Dyke, 'Sovereignty over Dokdo', above n 4, 197.
[489] Van Dyke, 'Disputes over Islands', above n 47, 46.
[490] See Ibid 51; Van Dyke, 'Sovereignty over Dokdo', above n 4, 197.
[491] Van Dyke, 'Disputes over Islands', above n 47, 51; Van Dyke, 'Sovereignty over Dokdo', above n 4, 202; Schoenbaum, above n 4, 237; Haas, above n 9, 5.
[492] Van Dyke, 'Disputes over Islands', above n 47, 53-4. See also Kanehara, above n 253, 78.

at the midpoint of Cheju Island (Korean) and Gotto Retto (Japanese).[493] It then moves north and closer to the Korean coastline due to the impact of the Japanese island of Tsuhima which is located in the Korean strait.[494] It continues to head north from there, but veers away from the Korean coast. The line stops sharply at "Point 35", the point at which the Liancourt Rocks come into play and affect the boundary delimitation.[495]

Both South Korea and Japan believe that the delimitation line for the EEZs should be a median line and both use the Liancourt Rocks as a basepoint on that line.[496] South Korea initially proposed that the median line should be between the Korean island of Ulleungdo and the Japanese island of Oki, based on the belief that the Liancourt Rocks were not entitled to generate maritime zones.[497] However after changing their position on the Rocks' entitlement, South Korea proposed a new median line between the Liancourt Rocks and Oki Island.[498] Japan however contests that the median line should be between the Liancourt Rocks and Ulleungdo.[499]

The boundary delimitation argument, to a large extent, depends upon the sovereignty decision. As outlined in Chapter 3, South Korea has the best claim to the Liancourt Rocks and would likely be successful before the ICJ. As a result, the Rocks should fall on the Korean side of the boundary. This is possible by using two different points: either incorporating the Liancourt Rocks as a basepoint and drawing the line between the Rocks and Oki Islands, or by excluding it and drawing the line between Ulleungdo and Oki Islands (Ulleungdo is entitled to the full maritime zones and the Liancourt Rocks would fall within this area). However if Japan were successful in claiming sovereignty over the islands, then including the Liancourt Rocks would extend their zones into the South Korean zone generated by Ulleungdo, which

[493] Van Dyke, 'Disputes over Islands', above n 47, 54.
[494] Ibid.
[495] Ibid.
[496] Kanehara, above n 253, 77, 86.
[497] Ibid 86; Asada, above n 4, [18]; Pedrozo, above n 4, 94.
[498] Kanehara, above n 253, 86.
[499] Ibid; Asada, above n 4, [18]; Pedrozo, above n 4, 94.

would cause significant delimitation problems and result in reduced zones for both. If full EEZs were claimed then the zones would overlap considerably however the Liancourt Rocks are not entitled to a full EEZ, only to a territorial sea and contiguous zone. These zones would extend into the territorial sea of Ulleungdo but not Oki Island.[500]

However as a small maritime feature the Liancourt Rocks should not be taken into consideration in the boundary delimitation. Their significance lay in the potential for an EEZ; a potential that is unfounded at international law. For South Korea they have very little other use; whereas Japan historically used them as a stopover point to reach Ulleungdo, South Korea has no such need. Given the problems associated with using the Liancourt Rocks as a base point, they should be excluded and the maritime boundary would become the median line or equidistance line between Ulleungdo and Oki Islands.[501] If this occurs then the Liancourt Rocks would be located on the South Korean side and would not affect the boundary delimitation at all.[502] The late Professor Van Dyke argues that if a different approach were used and the Liancourt Rocks ended up on the Japanese side of the boundary then its maritime zone should be enclaved and limited to a 12nm territorial sea.[503]

### D *Conclusion*

In practical terms the Liancourt Rocks are valuable for the waters surrounding them. If the Rocks were able to sustain extended maritime zones, particularly an EEZ, then their sovereign would be able to claim exclusive rights to exploit valuable marine resources. Both Japan and South Korea maintain that the

[500] 1nm is equivalent to approximately 1.85km. A full territorial sea therefore extends up to 22.2km while an EEZ could extend up to 370km. The distances between Ulleungdo, the Liancourt Rocks and Oki Islands are not that great. Ulleungdo and Oki Islands are approximately 252km from each other, while the Liancourt Rocks are 87km from Ulleungdo and 157km from Oki Island. The Liancourt Rock's territorial sea would extend 22.2km and a contiguous zone a further 44.4km.
[501] Van Dyke, 'Disputes over Islands', above n 47, 52; Van Dyke, 'Sovereignty over Dokdo', above n 4, 197-8.
[502] Van Dyke, 'Disputes over Islands', above n 47, 52; Van Dyke, 'Sovereignty over Dokdo', above n 4, 197-8, 202.
[503] Van Dyke, 'Sovereignty over Dokdo', above n 4, 198. See also Schoenbaum, above n 4, 237.

Rocks are entitled to an EEZ, but these claims are not supported by international law. The Rocks cannot sustain a stable population, are largely uninhabitable due to sharp cliffs, and basic necessities like water must be supplied from outside. For these reasons, the Rocks fall under the exclusion contained in Article 121(3). As a result, the Rocks should not be taken into account in boundary delimitation. The maritime boundary line between South Korea and Japan should fall between Ulleungdo and Oki Islands. Given that Ulleungdo is entitled to the full maritime zones, the Liancourt Rocks would fall on the South Korean side, consistent with their sovereignty.

## VI CONDOMINIUMS

There is a potential middle ground solution to the Liancourt Rocks dispute whereby both Japan and South Korea would be able to retain use of the Rocks and surrounding marine resources. This solution is a condominium, which would render the area subject to joint sovereignty and control. However while this could be a practical approach, it would not resolve the underlying issue: national pride.

### A *Condominiums*

#### 1 *Historical Use*

Sovereignty is traditionally regarded as an exclusive and indivisible right of a single State.[504] However there are exceptions, the main one being that of a condominium.[505] There is no universally agreed definition of a condominium and most scholars focus on different aspects of it, either sovereignty, territory, or control.[506] A condominium generally exists when two or more States exercise joint sovereignty over a territory.[507] Sovereignty is not exclusively vested in either State alone, or halved between them but entirely vested in them as a joint entity.

Condominiums have been a feature of international law for centuries. They were traditionally used as temporary measures to resolve territorial disputes after negotiation failed. Despite this, condominiums have been widely ignored in international scholarship.[508] Critics claim that if States are unable to resolve disputes peacefully then they will never be able to work cooperatively in a condominium arrangement.[509] Historical condominiums are frequently

[504] See Jennings and Watts (eds), *Oppenheim,* vol 1B, above n 7, 565.
[505] Ibid. They call the condominium 'the first and perhaps only true exception': at 565.
[506] See, eg, discussion of definitions in Vincent P Bantz, 'The International Legal Status of Condominia' (1998) 12 *Florida Journal of International Law* 77.
[507] Shaw, *International Law,* above n 21, 228; Oxford Public International Law, *Max Planck Encyclopedia of Public International Law* (at July 2006), Fred L Morrison, 'Condominium and Coimperium' [A1]-[A2]; Joel H Samuels, 'Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution' (2008) 29 *Michigan Journal of International Law* 727, 728; Schoenbaum, above n 4, 214.
[508] Bantz, above n 506, 78.
[509] Samuels, above n 507, 730.

regarded as failures that resulted in unstable governance. However condominiums were frequently used and often long lasting.

The earliest condominium was created in the thirteenth century BC between Egypt and Hatti.[510] After a brutal war, the Egyptian and Hattian Kings agreed to a treaty to end their hostilities in Asia Minor.[511] They renounced all planned conquests, pledged mutual assistance in case of third party attacks and agreed to cooperate in governing their Syrian subjects.[512] This joint cooperation over Syria was an early example of condominium.[513] Later, condominiums were influenced by Roman civil law, in particular the doctrine of *communion pro indivisio* which translates to undivided joint property.[514]

Condominiums were used extensively during the nineteenth and twentieth centuries as a quick solution to maintain the balance of power and resolve colonial disputes. The most famous example is the New Hebrides. This was a colonial condominium to govern a chain of islands in the Pacific Ocean of interest to both France and Britain.[515] In 1906 Britain and France agreed to a condominium that lasted seventy-four years.[516] It was based on strict equality over the territory. The terms were essentially this: each power was responsible for its own expenses but a unified condominium fund, drawn equally from both States, would be used to cover joint expenses.[517] Executive command rested with two High Commissioners, one British and one French, who acted in unison on all major decisions.[518] All administrative departments were staffed by officers of both nations and the police were divided into two separate forces of armed natives, one reporting to the British and the other to

[510] Ibid 732.
[511] Ibid 732-3.
[512] Ibid 733.
[513] Ibid.
[514] Ibid. See also Bantz, above n 506, 79-81.
[515] Samuels, above n 507, 737. The British Government was particularly influenced by Australia, as many Australian settlers were involved in trade in the New Hebrides. See D P O'Connell, 'The Condominium of the New Hebrides' (1969) 43 *British Yearbook of International Law* 71, 73-4.
[516] Samuels, above n 507, 737.
[517] Ibid 738.
[518] Ibid 738-40.

the French.[519] Both States retained sovereignty over their nationals but the indigenous population fell into a legal vacuum.[520] The condominium territory had its own judicial system, with a Joint Court for condominium matters and separate British and French Courts.[521] In its early years, the condominium was unsuccessful despite numerous agreements between Britain and France to enhance its administration.[522] By 1939, the New Hebrides were neglected and backward.[523] Circumstances did improve after 1954[524] and the condominium only ended in 1980 when the New Hebrides became the independent State of Vanuatu.[525]

The Moresnet Condominium is proof that two disputing States can successfully operate a condominium. The dispute revolved around the District of Moresnet, which was claimed by both Prussia and the Netherlands. Unable to agree on who was the rightful sovereign, the parties created to a condominium which lasted from 1816 to 1919.[526] The village of Moresnet became Dutch territory, Neu-Moresnet became Prussian and the zinc mine and surrounding village of Kelmis became subject to a condominium.[527] The condominium even survived a change of party in 1830 when Belgium achieved independence from the Netherlands and took control of the Dutch side.[528] The Agreement of Aachen set down the governing rules. The French Code of the First Empire, which was the existing law in Moresnet, remained in force and could only be amended by the agreement of both governments.[529] Legislative and executive powers were exercised in common[530] and the territory was initially governed by two royal commissioners, representing

[519] Ibid 739-40.
[520] Shaw, *International Law,* above n 21, 229.
[521] O'Connell, 'Condominium of the New Hebrides', above n 515, 122.
[522] Ibid 76.
[523] O'Connell states that the New Hebrides had not advanced beyond its position in 1900: Ibid 76-7. This led Jessup and Taubenfeld to condemn it as a failure in 1959: Ibid 71 citing Philip C Jessup and Howard J Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (Columbia University Press, 1959) 11.
[524] See O'Connell, 'Condominium of the New Hebrides', above n 515, 77.
[525] Shaw, *International Law,* above n 21, 229; Morrison, above n 507, [8].
[526] Samuels, above n 507, 741.
[527] Ibid.
[528] Ibid 740.
[529] Ibid.
[530] Ibid.

each sovereign.[531] The two commissioners appointed the Mayor, who acted as Head of State.[532] Residents were joint citizens and could choose their country of allegiance to determine what laws applied to them.[533] Services were shared between the two States and the condominium brought many economic benefits including lowers taxes and prices for goods.[534] The condominium effectively ended during World War One when Germany [535] annexed Moresnet and invaded Belgium.[536] In 1919 the *Treaty of Versailles* passed Moresnet to Belgium and it has remained under Belgian control since.[537]

Condominium type arrangements can even continue after the formal condominium has been dissolved, as is the case in the Kuwait-Saudi Arabia Neutral Zone. A condominium was established by the *Uqair Convention* in December 1922.[538] The convention provided that the two countries would share equal rights over the territory until definitive frontiers could be agreed on.[539] The arrangement ended in 1965 when the countries partitioned the Neutral Zone into two sections, one belonging to Kuwait and the other to Saudi Arabia.[540] However the Convention also provided that the parties would continue to share equal rights in the whole zone in order to enable the exploration of natural resources.[541]

States may also exercise joint jurisdiction without asserting sovereignty.[542] Some examples of this include military occupations and mandated or trust territories.[543] Another example for use of resources is the Antarctic system.

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[531] Ibid 741-2. The territory was later given a greater degree of self-administration.
[532] Ibid.
[533] Ibid 742.
[534] Ibid 742-3.
[535] Prussia became one of the constituent parts of Germany in 1871, when the Germanic states united under the Prussian King Wilhelm I to form the German Empire.
[536] Samuels, above n 507, 743.
[537] Apart from a brief period of annexation by Germany during World War Two. See Ibid 743.
[538] Jennings and Watts (eds), *Oppenheim*, vol 1B, above n 7, 567.
[539] Ibid.
[540] Ibid.
[541] Ibid; Shaw, *International Law,* above n 21, 229 n 168.
[542] Morrison, above n 507, [10].
[543] Ibid [11]-[14].

Numerous States have asserted sovereignty of different parts of Antarctica.[544] Those claims were suspended (but not renounced) by the *Antarctic Treaty*.[545] This Treaty established an international organisation to provide common standards for the use of Antarctica.[546] Those States active in Antarctica have voting rights.[547] Administration of individuals and scientific bases in Antarctica is carried out by each individual State, in line with those common standards.[548] Morrison refers to this arrangement as a 'kind of non-sovereign condominium of the members of the organization.'[549]

In respect of marine resources, the International Seabed Authority[550] is another modern example. The high seas are the property of all mankind, and no State can hold sovereignty over them.[551] However States do have interests in exploiting the mineral resources of the deep seabed. The International Seabed Authority, therefore, is vested with a type of collective sovereignty, on behalf of mankind, over the seabed. It delegates to institutions (representatives of the State parties) the right to allocate exploration rights and regulate seabed use.[552] This collective action is not an exercise of sovereignty but of collective control and use of common property.[553]

### 2 *The Gulf of Fonseca*

One of the most important precedents for condominiums is the ICJ decision in *El Salvador/Honduras* regarding the Gulf of Fonseca. This decision established that condominiums can be created by circumstances and judicial decision, not only by agreement. The Gulf of Fonseca is located off the Pacific coast of Honduras, Nicaragua and El Salvador. The three States were

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[544] Ibid [16].
[545] *Antarctic Treaty,* opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) art IV ('*Antarctica Treaty*'); Ibid.
[546] *Antarctica Treaty* art IX. See also *Antarctica Treaty* arts III and IV; Morrison, above n 507, [16].
[547] *Antarctica Treaty* art VII; Morrison, above n 507, [16].
[548] Morrison, above n 507, [16].
[549] Ibid.
[550] Established by *UNCLOS* art 156.
[551] *UNCLOS* art 136 and Preamble para 6.
[552] Morrison, above n 507, [17].
[553] Ibid.

each successors of the Spanish Empire in South America. The Gulf was the subject of a 1917 dispute between El Salvador and Nicaragua before the Central American Court of Justice regarding the leasing of a naval base to the USA.[554] The Court found that the Gulf was a historic bay subject to a condominium between Nicaragua, El Salvador and Honduras.[555] By 1986 another dispute had arisen between Honduras, who had not been party to the 1917 case, and El Salvador over the Court's conclusion.[556] There were effectively three aspects to the dispute before the ICJ regarding land boundaries, the legal situation of islands and maritime spaces within and outside the Gulf.[557] Only the third aspect, that of maritime spaces, is relevant to condominium.[558]

The ICJ defined a condominium as 'a structured system for the joint exercise of sovereignty between governmental powers over a territory.'[559] The Court also noted that it was generally created by agreement between States, but accepted that it could be created as a legal consequence of state succession, as had been the case in the Gulf of Fonseca.[560] The ICJ based its decision upon the 1917 case, the historic character of the waters, the absence of claims of other States and consistent claims of Nicaragua, El Salvador and Honduras.[561] On this basis, the Court upheld the 1917 decision, concluding that the waters of the Gulf, beyond the 3 mile territorial sea of each State, were subject to

[554] *The Republic of El Salvador v The Republic of Nicaragua* (1917) 11 American Journal of International Law 674, 674.
[555] *The Republic of El Salvador v The Republic of Nicaragua* (1917) 11 American Journal of International Law 674, 705, 712-4.
[556] Shaw, *International Law,* above n 21, 229-30 n 170.
[557] *El Salvador v Honduras* [1992] ICJ Rep 351, 380; Malcolm N Shaw, 'Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua Intervening), Judgment of 11 September 1992' (1993) 42(4) *The International and Comparative Law Quarterly* 929, 930.
[558] Nicaragua was granted permission to intervene in regard to this question only. See *El Salvador v Honduras* [1992] ICJ Rep 351, 360.
[559] *El Salvador v Honduras* [1992] ICJ Rep 351*,* 597; Shaw, *International Law,* above n 21, 230.
[560] *El Salvador v Honduras* [1992] ICJ Rep 351*,* 598; Shaw, *International Law,* above n 21, 230.
[561] *El Salvador v Honduras* [1992] ICJ Rep 351, 585, 601-2; Shaw, *International Law,* above n 21, 230.

joint sovereignty between El Salvador, Honduras and Nicaragua.[562] However the Court left open the final determination of the waters, stating this was for the parties to agree.[563] At present, the Gulf is still held in condominium.

Although the Court's decision related specifically to maritime spaces, which are subject to the laws of the sea addressed in the previous chapter, there is no reason why the same principles of condominium cannot be applied to land territory.

### B *A Middle Ground: Condominium over the Liancourt Rocks*

Like most sovereignty disputes, the Liancourt Rocks dispute has focused on which State holds sovereignty over the Rocks. This traditional approach means one party wins everything while the other loses completely. A condominium presents an opportunity to find a middle ground, where both parties can benefit from the resources surrounding the Rocks. This dispute does not involve too many complicating factors. There are only two parties, the Rocks are reasonably close to both States and there are no citizenship concerns because the Rocks cannot sustain a permanent population. On a practical level the dispute is about the use of resources. As the Rocks themselves are not resource rich, the focus turns to the surrounding seas.

As explained in Chapter V, the maritime zones around the Liancourt Rocks are an important aspect of the dispute. These zones extend over rich fishing grounds, including the Yamato Deposit. Japan and South Korea have already achieved agreement on provisional delimitations of these zones. These agreements, in combination with agreements on fisheries, provide for cooperation to utilise the natural resources in the area. These agreement also provide a strong basis to begin a condominium over the Liancourt Rocks.

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[562] *El Salvador v Honduras* [1992] ICJ Rep 351, 617; Shaw, *International Law,* above n 21, 230.
[563] *El Salvador v Honduras* [1992] ICJ Rep 351, 617.

In 1965, Japan and South Korea concluded the *Basic Treaty*, normalising their relations after the events of the Second World War. The preamble declared that the two States have a 'mutual desire for good neighbourliness and for…mutual respect for sovereignty' and recognise 'the importance of close cooperation…to the promotion of their mutual welfare and common interests.' [564] Building upon this, the two States concluded a Fisheries Agreement in 1965 regulated shared use of marine resources. The preamble reflected a desire to cooperate for the development of fisheries, to eliminate disputes and achieve maximum sustained productivity in waters of common interest to both States.[565]

In 1998 the parties concluded a new Fisheries Agreement ('1998 Fisheries Agreement')[566] to regulate fishery zones, yields, licenses, scientific research and conservation.[567] This agreement did not provide a final delimitation of EEZs, but instead used provisional fishing zones and limited EEZ fishing zones as EEZs.[568] It serves as a provisional arrangement as called for in Article 74(3) *UNCLOS*.[569] It introduced two provisional zones in disputed areas, one in the East China Sea and one in the Sea of Japan (near the Liancourt Rocks), where both States could fish.[570] The zones were set widely to ensure that the Yamato Deposit did not fall entirely within the Japanese EEZ.[571] The agreement resulted in reduced Korean fishing in Japanese waters but allowed South Korea to retain access to the Yamato Deposit.[572]

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[564] *Basic Treaty*, Preamble.
[565] *Agreement between Japan and the Republic of Korea on Fisheries* Japan-ROK, signed 22 June 1965, 583 UNTS 51 (entered into force 18 December 1965), Preamble ('*1965 Fisheries Agreement'*).
[566] *Agreement between Japan and the Republic of Korea concerning Fisheries,* Japan-ROK, signed 28 November 1998, 2011 UNTS 163 (entered into force 22 January 1999) ('*1998 Fisheries Agreement'*).
[567] *1998 Fisheries Agreement,* arts I-VI.
[568] Sun Pyo Kim, 'The UNCLOS Convention and New Fisheries Agreements in North East Asia' published at Ministry of Foreign Affairs (Republic of Korea) <http://www.mofa.go.kr> [2.1]; Kanehara, above n 253, 82.
[569] *UNCLOS* art 74(3); Kim, above n 568, [2.1]; Kanehara, above n 253, 80.
[570] Van Dyke, 'Disputes over Islands', above n 47, 53; Kim, above n 568 [2.1]; Kanehara, above n 253, 83.
[571] Kanehara, above n 253, 83.
[572] Van Dyke, 'Disputes over Islands', above n 47, 53; Van Dyke, 'Sovereignty over Dokdo', above n 4, 193.

Another important aspect of the 1998 Fisheries Agreement is the establishment of the Joint Japan-Korea Fisheries Commission.[573] The Commission is composed of one commissioner and one representative appointed by each State, with the power to establish a subsidiary body of experts.[574] The Commission meets annually, in alternate venues,[575] and can meet for special sessions with permission from both States.[576] It is vested with the power to consult, deliberate and recommend on: conditions of fishing;[577] maintenance of order in operations;[578] status of marine living resources;[579] cooperation between the parties in the fishing areas;[580] conservation and management of marine living resources;[581] and, broadly, any other matter concerning the implementation of the Agreement.[582] The Commission can only make decisions with the consent of both representatives and these decisions are binding on the two States.[583] However in the disputed zone around the Liancourt Rocks, the Commission only has the power to make recommendations, not decisions, regarding conservation and management of living marine resources.[584] This distinction is critical for South Korea to avoid the appearance of taking joint measures over the Rocks with Japan.[585]

The 1998 Fisheries Agreement contains many aspects of condominium administration, without the core aspect of sovereignty. It provides for areas of joint control, in which both States are equal and unable to exclude the other. In these areas, the States have set rights to resources. Both States retain sovereignty over their nationals, and are required to ensure their own nationals comply with international law and the Agreement itself.[586] The Commission

[573] *1998 Fisheries Agreement* art XII.
[574] Ibid art XII(2).
[575] Ibid art XII(3).
[576] Ibid art XII(3).
[577] Ibid art XII(4)(1).
[578] Ibid art XII(4)(2).
[579] Ibid art XII(4)(3).
[580] Ibid art XII(4)(4).
[581] Ibid art XII(4)(5).
[582] Ibid art XII(4)(6).
[583] Kim, above n 568 [2.1].
[584] Ibid.
[585] Ibid.
[586] *1998 Fisheries Agreement* art XI.

has broad reaching powers in relation to fisheries. Like many condominium administrations, it is composed of representatives of both States, can only act on the consent of those representatives, and has the power to bind both States.

So what basis would the 1998 Fisheries Agreement serve for a condominium? First, it would need to be decided whether such an arrangement would be a full condominium (with corresponding sovereign rights) or simply a joint-administration arrangement (like those for resource exploration). The latter would not resolve the sovereignty dispute, but would allow both States to retain benefits until the dispute could be resolved. The former would require both States to set aside their sovereignty claims and accept joint sovereignty over the Liancourt Rocks. As a long-term solution, this is the better option, however it would require extensive planning and would need to be treated as a permanent, not temporary, arrangement.[587]

Under such a scheme, the Liancourt Rocks would be subject to joint sovereignty. Effectively the Rocks would become a station for exploration and use of the surrounding areas. Sovereignty would extend beyond the Rocks into the surrounding seas, into a territorial sea and contiguous zone.[588] These rights would be governed by *UNCLOS*, but vested jointly in Japan and South Korea. For this arrangement to work, the parties would need to agree on the delimitation lines between Ulleungdo and Oki Islands, with a joint zone surrounding the Liancourt Rocks.

From there, the focus would turn to resources. The 1998 Fisheries Agreement provides a strong foundation for shared resource use in the disputed waters. This agreement would have to be re-negotiated with the view towards the entire area being subject to joint-sovereignty, rather than dividing parts into Japanese and South Korean zones. However a condominium arrangement

[587] Samuels states that '[o]ne basic lesson of past condominium experience is that, as a quick solution to pressing problems, condominium is not a successful solution to territorial disputes. Therefore, condominia must be built with long-term vision and a strong support structure': Samuels, above n 507, 732.
[588] These are the only two zones that the Liancourt Rocks are entitled to, as discussed in Chapter V, pp 68-9.

would require more extensive coverage than just fisheries. Although there is no concrete evidence, there have been suggestions of rich hydrocarbons in the seabed surrounding the Rocks.[589] The parties would need to agree on a mechanism to allow joint exploration and exploitation of these resources, or to share profits from third party exploration. The Kuwait-Saudi Arabia Neutral Zone and Antarctic areas are good precedents for how such an arrangement could work. The Parties would also need to formalise agreements on navigation rights and scientific research in the zones.

Developing the Joint Japan-Korea Fisheries Commission into an effective condominium administration is critical. The Commission has extensive powers to control fisheries, but these powers would need to be developed for a long-term condominium to work. First, its scope would need to be increased to cover all aspects of condominium authority. Second, a stronger dispute resolution mechanism would need to be developed. The 1998 Fisheries Agreement provides for arbitration, but only on the basis of party consent.[590] For joint governance to work successfully for an extended period of time, there must be a mechanism to ensure disagreement are resolved promptly. A compulsory arbitration clause, like that in the 1965 Fisheries Agreement,[591] would be more appropriate. However because resource exploration would involve nationals of both States and potentially third party States, a condominium court or tribunal could be established to decide upon disputes related to the condominium territory. To ensure respect for its authority, its governing law and rules would need to be mutually agreed by the parties as its decisions would be binding on both. A similar system was used in the New Hebrides, but was complicated by the fact that the New Hebrides support a permanent population. The Liancourt Rocks Court's jurisdiction would be more limited, as disputes would likely focus on private and public international law.

[589] Van Dyke, 'Sovereignty over Dokdo', above n 4, 198.
[590] Kim, above n 568, [2.1].
[591] Ibid; *1965 Fisheries Agreement* art IX.

The main hurdle to establishing a condominium is party consent. Although Japan stands to gain from the arrangement, there is little incentive for South Korea who already controls the Rocks. However although South Korea controls the Rocks themselves, both States have an active presence in the surrounding waters. This arrangement would allow South Korea to secure more rights in these areas, just as the 1998 Fisheries Agreement did for fishing rights.

### C *Would it Resolve the Problem?*

On a practical level there is no reason why a condominium could not resolve many of the problems between Japan and South Korea. The Liancourt Rocks are not of significant benefit as territory because they are unsuitable for human habitation. What is useful are the surrounding seas and marine resources. Japan and South Korea already cooperate for the exploitation of the major resource – fisheries – and this could be expanded to encompass hydrocarbon exploration and governance of the Liancourt Rocks as a station for commerce, research and exploration. However a condominium does not resolve the issues underlying the sovereignty dispute: the historical context.

The Liancourt Rocks dispute is about more than territorial acquisition and marine resources. The importance of sovereignty over the Rocks stems not from international law but from history. For South Korea this dispute is about nationhood and the legacy of World War Two. South Korea sees Japan's 1905 incorporation of the Rocks as the first step to annexing all of Korea.[592] Subject to strict Japanese influence, Korea was unable to protest and just five years later became the first victim of Japanese expansionism. Despite appeals to Western countries, Korea was ignored and Japan supported. For the next forty-five years, Korea was subject to harsh Japanese rule. The end of the war brought freedom from the Japanese but left Korea occupied and divided. American occupation policy, driven by the desire to use Japan as a bulwark against communism, meant that Japanese interests were prioritised over

[592] Lee and Lee, above n 190, 3.

Korea's. As a result, Japan did not have to fully account for its actions.[593] Ongoing disputes over the text of Japanese history books and Japanese official visits to the Yasukuni Shrine are testament to South Korea's feelings that Japan have not accepted their crimes and made amends.[594]

This wartime legacy underlies the regional tensions. Although Japan and South Korea normalised their diplomatic relations in 1965 and have taken great steps forward, they have never truly dealt with their past. Japan's insistence that the Liancourt Rocks are Japanese territory, and reliance on the 1905 incorporation, are seen as an insult to South Korean sovereignty. Japan recognised Korean independence in the *San Francisco Peace Treaty*, but by refusing to relinquish their claims to the Liancourt Rocks, they continue to deny South Korean sovereignty. Until these problems are resolved, the Liancourt Rocks dispute will never be over. South Korea can set aside its emotion to cooperate on specific issues but it is unlikely that it will renounce sovereignty in favour of a condominium. Doing so would simply bury history again.

That's not to say that a condominium would not have benefits. The process of reaching an agreement and working cooperatively may help both States see what is truly in issue over the Liancourt Rocks, and attain economic benefits from the region. However it could only ever be a temporary fix. Likewise a judicial decision forcing Japan to renounce its sovereignty claims over the Rocks would not satisfy South Korea's desire for atonement. Only Japan's

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[593] Harry N Scheiber, 'Legalism, Geopolitics, and Morality: Perspectives from Law and History on War Guilt in Relation to the Dokdo Island Controversy' in Seokwoo Lee and Hee Eun Lee, *Dokdo: Historical Appraisal and International Justice* (Martinus Nijhoff Publishers, 2011) 13, 23.

[594] See, eg, 'Joint Statement by DPRK and ROK Historians Accusing Japan of Trying to Whitewash its History of Aggression' (2 March 2001) and 'Comment by Minister for Foreign Affairs Makiko Tanaka on the Official Stance Conveyed by the Government of the Republic of Korea on the Decision to Authorize Japanese History Textbooks' (8 May 2001) archived at Institute for Advanced Studies on Asia (University of Tokyo) <http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/indices/JPKR/index-ENG.html>; 'Japanese Parliamentarians Visit War Shrine Condemned by China and Korea', *The Telegraph* (online), 17 October 2014 < http://www.telegraph.co.uk/news/worldnews/asia/japan/11168589/Japanese-parliamentarians-visit-war-shrine-condemned-by-China-and-Korea.html>.

acceptance of its past and voluntarily renunciation of its claims to the Liancourt Rocks present hope for that.

## VII CONCLUSION

Historically, both Japan and South Korea have ties to the Liancourt Rocks. During the course of history each State has had primary control of the Rocks at various points. However while Japan's claim has been tainted by its actions during World War Two, Korea's has remained strong. Since South Korea emerged as a State after the end of the war, it has worked to build upon the Rocks and solidify Korea's ancient claims as its own. Today the Liancourt Rocks are undoubtedly controlled by South Korea. For these reasons, South Korea will likely prevail as the rightful sovereign over the Liancourt Rocks before any international tribunal.

For South Korea, proper recognition of their sovereignty over the Rocks is recognition, by the world and by Japan, of their nationhood and how it was stripped from them in 1910. This motivation drives them to relentlessly insist on their sovereignty, even to the point of rejecting judicial settlement. Enforced recognition by an international court or tribunal like the ICJ will not achieve South Korea's aims. Although it is international recognition of their claim, it is not recognition by Japan. And it is Japan's recognition that is critical to resolving the dispute.

Beyond these emotional goals there is little to be gained from sovereignty over the Liancourt Rocks. The Rocks themselves are essentially useless: they do not supply food, water or shelter. Although there are rich resources in the surrounding seas, these are not attached to the Rocks. The fact that the Rocks cannot sustain life is the exact reason they are not entitled to extensive maritime zones under *UNCLOS*. Fishery rights in the seas surrounding the Rocks would be limited to the 12nm territorial sea, and would not extend into an EEZ. Due to the Liancourt Rock's location and the likely maritime boundary delimitation, these rights would have to be claimed using Ulleungdo and the Oki Islands.

On a practical level, the provisional fishery agreements already provide a strong basis for sharing the resources of the Sea of Japan. These agreements

allow both countries to benefit economically and encourage cooperation in a region historically marred by tension. If the Liancourt Rocks dispute were to be resolved practically, then the best option would be to extend this agreement into other areas including hydrocarbon exploration and marine scientific research. This would encourage further cooperation between the parties and ensure continued mutual benefits.

However this arrangement, while suitable in practice, would not resolve the underlying problems. To end the ongoing tension in the region both parties need to come to terms with their past. For Japan, there is little to be gained from attaining sovereignty over the Rocks but much to be gained from renouncing it. In renouncing their claims over the Liancourt Rock, Japan could re-affirm their 1951 recognition of Korean sovereignty and provide a symbolic, but powerful act, of making amends with their past. In doing so, Japan would pave the way for both countries to build upon their strong economic relationship and retain mutual advantages in the currently disputed region.

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