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**The Resolution of the Territorial Disputes  
between Korea and Japan over the  
Liancourt Rocks**

*Seokwoo Lee*



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## **The Resolution of the Territorial Dispute between Korea and Japan over the Liancourt Rocks**

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The opinions contained herein are those of the author and are not to be construed as those of IBRU.

# Contents

	<b>Page</b>
1. <b>Introduction</b>	1
2. <b>Historical Background to the Dispute over Liancourt Rocks</b>	4
3. <b>Legal Arguments for Claiming Sovereignty over the Liancourt Rocks</b>	7
3.1 Korea's and Japan's Claims to the Liancourt Rocks	8
3.1.1 Prior Discovery and Occupation	8
3.1.2 Appraisal	12
3.2 Territorial Dispositions and the <i>San Francisco Peace Treaty</i> with Japan of 1951	13
3.2.1 The Implications of the Wartime Resolutions	14
3.2.2 Interpretation of the Supreme Commander for the Allied Powers' Instructions (SCAPINs)	14
3.2.3 The Inter-Divisional Area Committee on the Far East of the US Department of State	16
3.2.4 Drafts of the Territorial Clause of the <i>San Francisco Peace Treaty</i>	17
3.2.5 The Implications of Drafts on the Territorial Dispositions Clause for the Liancourt Rocks	27
3.3 The Legal Implications of Korea "Not Being a Party" to the <i>San Francisco Peace Treaty</i>	29
3.4 Implications of Korean Presidential Proclamation of Sovereignty over the Adjacent Sea ('Rhee Line')	29
3.5 Subsequent Incidents around the Liancourt Rocks and their Implications	31
3.6 Appraisal	33
4. <b>Further Observations on the Territorial Dispute over the Liancourt Rocks</b>	34
4.1 The United States' Response to the Territorial Dispute over the Liancourt Rocks	34
4.2 Implications of the <i>Treaty on Basic Relations between Korea and Japan</i>	38
5. <b>Conclusions</b>	39
<b>References</b>	41

## List of Figures

	<b>Page</b>
Figure 1: Map showing the location of the Liancourt Rocks	3
Figure 2: The Liancourt Rocks	6

This map is used with written permission from the National Oceanographic Research Institute (NORI), Ministry of Maritime Affairs and Fisheries, Republic of Korea. The author would like to express his appreciation to the NORI for its kind assistance in this matter.

# The Resolution of the Territorial Dispute between Korea and Japan over the Liancourt Rocks

*Seokwoo Lee*

*In the course of private talks on other matters [US Secretary of State Dean Rusk] referred to the Korea-Japan negotiations, and said that [the United States] hoped for an early conclusion. ... [President Chung-Hee Park of Korea] stated that one of the irritating problems, **although it was a small one**, in the negotiations was Tokto Island (Takeshima). These are uninhabited rocks in the Sea of Japan that are claimed by both Korea and Japan. Korean security forces actually guard them, and the Koreans believe that they historically belong to Korea. The Japanese believe they have a like claim. President Park said **he would like to bomb the island out of existence to resolve the problem**. Secretary Rusk ... suggested that perhaps a joint Korean-Japanese commanded light house be set up and **the problem of to whom it belonged left unanswered, letting it die a natural death**. President Park commented that a joint light house with Korea and Japan just would not work.<sup>1</sup>*

## 1. Introduction

The Liancourt Rocks/Tokdo/Takeshima (hereinafter ‘Liancourt Rocks’)<sup>2</sup> are two tiny rocky islets, the East Island (Tongdo/Onnajima) and the West Island (Sodo/Otokojima), and numerous small reefs. The Liancourt Rocks are located 93 km/49 miles east of Korea’s Ullung Island and 157 km/86 miles northwest of Japan’s Oki Islands. Subsequent to Japan’s relinquishment of control over Korea after its defeat in World War II, Korea and Japan have contested the ownership of Liancourt Rocks, which are currently occupied by Korea. The Liancourt Rocks dispute, together with the disputes over the other two islands in East Asia<sup>3</sup> in which Japan is a disputant,<sup>4</sup> still deeply influence international relations in this region.

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<sup>1</sup> USDOS 1965a, Emphasis added. *See also*, USDOS 1962a; USDOS 1962b; USDOS 1954b.

<sup>2</sup> The two tiny rocky islets are called ‘Tokdo’ in Korean, ‘Takeshima’ in Japanese, and internationally recognised as ‘Liancourt Rocks’. The order of the reference to the disputants in this paper is based on current occupant country first and the counter disputant later.

<sup>3</sup> Geographical definition of East Asia in this research means North-East Asia, which encompasses the East China Sea and the Sea of Japan/East Sea, is surrounded by the People’s Republic of China (hereinafter ‘China’), the Republic of China (hereinafter ‘Taiwan’), Japan, North Korea, South Korea (hereinafter ‘Korea’, unless otherwise specified), and Russia.

<sup>4</sup> Against Russia (formerly part of the erstwhile Soviet Union), Japan continues to claim sovereignty over the small group of islands just north of Hokkaido, known by the Russians as the ‘Southern Kurile (or Kuril) Islands’, but known to the Japanese as the ‘Northern Territories’; against China and Taiwan over the islands ‘Sento Shosho’ or ‘Senkaku Retto’ known to the Japanese, which means ‘Pinnacle Island’ as internationally recognised. China terms them ‘Diao-yu-tai’, and Taiwan uses the same Chinese

Ironically, regional stability in East Asia in the post World War II era still heavily depends on the legacy of Japanese militarism and colonialism; that is, the outcome of ongoing territorial disputes in which Japan is a disputant.

Unlike the disputes over the other islands, the Liancourt Rocks dispute suffers from a paucity of scholarly research, in particular in the western world.<sup>5</sup> This is mainly derived from the fact that the two most important areas to the Japanese are the Ryukyu (also known as 'Okinawa'; hereinafter 'Okinawa') and Kurile Islands. They take a very emotional attitude toward the Okinawa as these islands are regarded as an integral part of Japan, Japanese sovereignty there being based on cultural and racial affinity and a 400-year history of unity.<sup>6</sup> Their interest in the Kurile Islands is more of an economic nature, but none the less strong.<sup>7</sup>

Recently, the territorial dispute over the Liancourt Rocks was highlighted and re-surfaced again, largely, as a consequence of new revised and modified exclusive economic zone (hereinafter 'EEZ') claims<sup>8</sup> by the disputants together with their ratification of the 1982 United Nations Convention on the Law of the Sea (hereinafter 'UNCLOS').<sup>9</sup> In particular, Japan undertook a comprehensive revision of its maritime legislation in 1996,<sup>10</sup> and Japan's declaration of an EEZ represents a marked departure from its previously restrained policy in relation to its extended maritime claims to a much more expansive one.<sup>11</sup> Japan's new stance

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characters in a different romanisation system as 'Tiao-yu-tai'. For general information on these disputes, see, Allcock 1992: 438-9; 497-500, respectively; Sharma 1997: 279-82; 291-4, respectively. For relevant web-sites, refer to <http://www-ibru.dur.ac.uk/links.html> (last visited at January 7, 2001)

<sup>5</sup> For further information on this dispute, see, Chee 1999: 1-64; Lee 1998; Shin 1997; Sibbett 1998; Taijudo 1968.

<sup>6</sup> Senkaku Islands are a group of eight uninhabited islands, five small volcanic islands and three rocky outcroppings, with a total land area of 7 km<sup>2</sup> located in the East China Sea, approximately 170 km northeast of Taiwan and 410 km west of the Okinawa. 'The Agreement concerning the Ryukyu Islands and Daito Islands with Related Arrangements' (so-called and hereinafter 'Okinawa Reversion Treaty'; 23 T.I.A.S. 475) signed by the United States and Japan on June 17, 1971, which included Senkaku Islands as part of Okinawa to be returned to Japanese rule, brought the Senkaku Islands dispute back to limelight, with immediate challenges by both China and Taiwan.

<sup>7</sup> USDOS1950a.

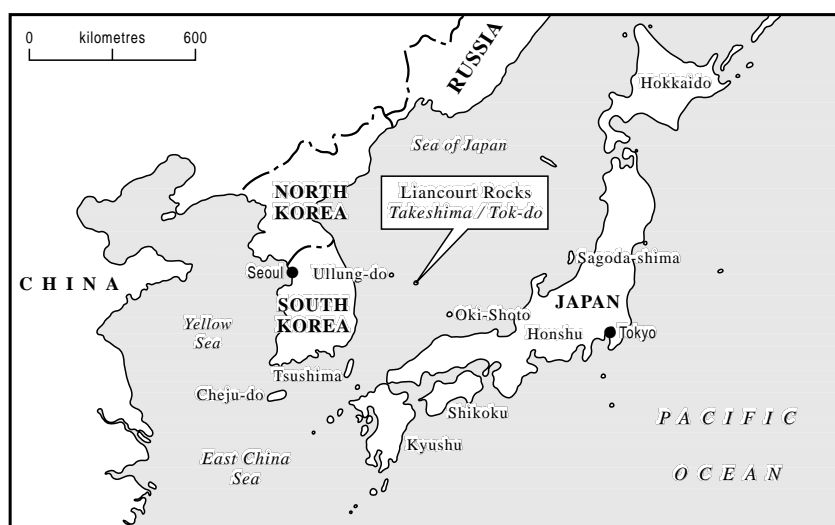
<sup>8</sup> For the most recent EEZ claims by the disputants over the Liancourt Rocks, refer to the following legislation: Korea, *Exclusive Economic Zone Act No. 5151* (August 8, 1996), reprinted in Pratt (1996): 171; Japan, *Law on the Exclusive Economic Zone and the Continental Shelf, Law No. 74* (June 14, 1996), reprinted in UN Division for Ocean Affairs and the Law of the Sea, 35 *Law of the Sea Bulletin* 94 (1997) [hereinafter 'LOS Bulletin']

<sup>9</sup> UN Doc. A/Conf. 62/122 (1982), reprinted in 21 *Int'l Leg. Mat.* 1261 (1982). The dates of ratification of UNCLOS by the disputants are as follows: Korea (January 29, 1996) and Japan (June 20, 1996). See, *Table Showing the Current Status of the United Nations Convention on the Law of the Sea and of the Agreement relating to the Implementation of Part XI of the Convention*, 39 *LOS Bulletin* (1999); Also available at <http://www.un.org/Depts/los/los94st.htm>. (last visited at January 7, 2001)

<sup>10</sup> See, *Law Amending the Law on the Territorial Sea and the Contiguous Zone* (June 14, 1996), 35 *LOS Bulletin* 76 (1997), 120 *Limits in the Seas* 19 (1998); *Law on the Exclusive Economic Zone and the Continental Shelf, Law No. 74* (June 14, 1996), *supra*, note 8

<sup>11</sup> In the *Law on the Exclusive Economic Zone and the Continental Shelf, Law No. 74* (June 14, 1996), Japan states that its EEZ: "...comprises the areas of the sea extending from the baseline of Japan...to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan (excluding therefrom the territorial sea) and its subjacent seabed and subsoil. Provided that, where any



**Figure 1 – Map showing the location of the Liancourt Rocks**

had a significant impact on, in particular, the disputed Liancourt Rocks in the Sea of Japan/East Sea. As a consequence, Japan's EEZ claims was construed by Korea as an attempt to refute Korean sovereignty over the disputed territory, and resulted in harsh responses.

Given the grant of maritime jurisdiction in form of territorial sea, contiguous zone, EEZ, and continental shelf to islands and, in some cases, rocks, with the introduction of UNCLOS, the outcome of maritime boundary disputes often depends on the ownership and classification of such features as an island or a rock sustaining human habitation or economic life.<sup>12</sup> As a result,

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*part of that line lies beyond the median line... as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line) shall be substituted for that part of the line.*" And the median line is defined as "the line every point of which is equidistant from the nearest point on the baseline of Japan and the nearest point on the baseline from which the breadth of the territorial sea pertaining to the foreign coast of Japan is measured." *Id.* Japan established straight baselines around much of its coast by means of its *Law Amending the Law on the Territorial Sea and the Contiguous Zone* (June 14, 1996). Some of these straight baselines are in excess of 50nm in length and connect islands which are arguably remote from the mainland coastline. Japan has not, however, provided details of the precise extent of its EEZ claim. *See*, 120 *Limits in the Seas* 3-11 (1998)(straight baseline), 11-18 (territorial sea claims). For charts showing Japanese territorial seas and straight baselines, *refer to* the relevant web-sites: <http://www.jhd.go.jp/cue/ENGAN/ryokai/tokutei/tokutei2.html> (last visited at January 7, 2001); <http://www.jhd.go.jp/cue/ENGAN/ryokai/kakudai2/itiran2.html> (last visited at January 7, 2001); *See also*, Pratt (1999): 102-3.

<sup>12</sup> Article 121(1) of UNCLOS defines island as "a naturally formed area of land, surrounded by water, which is above water at high tide." UNCLOS, *supra*, note 9. Under the new regime of UNCLOS, a state exercising territorial sovereignty over an island may declare a territorial sea extending 12 nautical miles and an EEZ that extends 200 nautical miles from the island's baseline. *Id.*, Arts. 2, 3, 56, 57. Within the EEZ, the controlling state has sovereign rights over the natural resources located in the water, sea-bed, and subsoil. *Id.*, Art. 56(1)(a). Article 121(3), however, states that rocks unable to sustain human habitation or economic life shall not be entitled to an EEZ, although UNCLOS itself does not explicitly define 'human habitation or economic life'. *Id.*, Art. 121(3). Therefore, in particular, the relationship

sovereignty over the Liancourt Rocks has become increasingly important, although the size of this territory is relatively very small.<sup>13</sup> If considered to be fully-fledged islands under UNCLOS, ownership of the Liancourt Rocks could affect 16,600 nm<sup>2</sup> of marine space.<sup>14</sup> Thus, it is a typical feature of the Liancourt Rocks dispute involving questions that, *inter alia*, border on national pride as well as contestation over territory, resources, and the associated maritime area.

## 2. Historical Background to the Dispute over the Liancourt Rocks

Based on Korea's point of view, the Liancourt Rocks were at one time part of the Kingdom of Korea.<sup>15</sup> Korea's claims are based on numerous Korean historical records, including some written in the 8<sup>th</sup> century, indicating that the Liancourt Rocks became part of Korea in 512 A.D. Additionally, Korea asserts that various maps verify its title to both Liancourt Rocks and Ullung Island, of which, Korea argues, Liancourt Rocks is an appendage.<sup>16</sup> On the other hand, Japan's historical claims are based on records documenting Japanese ownership of Liancourt Rocks from 1650, which indicate the granting of the Liancourt Rocks to what is known today as Tottori Prefecture. Japan also relies on other pre-19<sup>th</sup> century documents providing evidence of Japanese fishermen's use of the Liancourt Rocks during the 17<sup>th</sup> and 19<sup>th</sup> centuries, and Japanese hunting of sea lions on the Liancourt Rocks during the early-20<sup>th</sup> century.<sup>17</sup>

Following the Russo-Japanese War, Japan annexed Korea in a series of agreements made between 1904 and 1910.<sup>18</sup> During this period, Japan specifically reaffirmed its claim to the

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between certain rocks and 'human habitation or economic life' independent of outside assistance will be a pivotal matter since it was left unanswered by UNCLOS. For scholarly works on figuring out the definition of 'human habitation or economic life', see, Charney 1995; Charney 1999.

<sup>13</sup> Its total area is 186,121m<sup>2</sup>. See, Lee 1998: 4.

<sup>14</sup> Pratt 1999: 171; See also, Johnston & Valencia 1991: 113.

<sup>15</sup> For further information on the historical background of Korea, see generally, Allen 1901; Hulbert 1905; Kuno 1940; Nelson 1945; McCune 1946.

<sup>16</sup> See generally, Lee 1997; Shin 1997. See also, USDOS 1952a.

<sup>17</sup> See generally, Hori 1997; Kajimura 1997.

<sup>18</sup> The Protocol concluded between Japan and Korea on February 23, 1904, regarding the Situation of Korea provided that "Article I. ... [T]he Imperial Government of Korea shall place full confidence in the Imperial Government of Japan and adopt the advice of the latter in regard to improvements in administration. ... Article IV. In case the welfare of the Imperial House of Korea or the territorial integrity of Korea is endangered by aggression of a third Power or by internal disturbances, the Imperial Government of Japan shall immediately take such necessary measures as the circumstances require, and in such cases the Imperial Government of Korea shall give full facilities to promote the action of the Imperial Japanese Government: The Imperial Government of Japan may, for the attainment of the above-mentioned objects, occupy, when the circumstances require it, such places as may be necessary from strategical points of view. ..." Reprinted in Maki 1961: 23-4. Meanwhile, the Treaty of Annexation in 1910 provided that "Article I. His Majesty the Emperor of Korea makes complete and permanent cession to His Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea. Article II. His Majesty the Emperor of Japan accepts the cession mentioned in the preceding Article, and consents to the complete annexation of Korea to the Empire of Japan. ..." *Id.*, pp.24-5; See also, Choi 1987: 137.

Liancourt Rocks by officially incorporating it into the Shimane Prefecture. A Cabinet Decision on January 28, 1905 and Shimane Prefecture Notice 40 on February 22, 1905 declared that the island 85 miles northwest of Oki Islands should be designated as “*Takeshima*” and be placed under the jurisdiction of the head of Oki Islands,<sup>19</sup> himself under Japanese sovereignty. During World War II, the terms of the territorial disposition regarding Korea were primarily decided by the 1943 Cairo Declaration<sup>20</sup> and 1945 Potsdam Proclamation.<sup>21</sup> The Potsdam Proclamation, in particular, in stating that “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu and Shikoku, and such minor islands as we determine”,<sup>22</sup> indicated that other minor Japanese islands may be detached from Japan, at the discretion of the Allied Powers.

However, after the conclusion of World War II, the clause on territorial disposition regarding Korea, Article 2(a) of the *Treaty of Peace with Japan*,<sup>23</sup> namely the ‘*San Francisco Peace Treaty with Japan of 1951*’ (hereinafter ‘*San Francisco Peace Treaty*’), did not specifically mention disposition of the Liancourt Rocks. Instead, it simply provided that “*Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart<sup>24</sup>, Port Hamilton<sup>25</sup> and Dagelet.<sup>26,27</sup>*” Following Japan’s surrender, the Supreme Commander for the Allied Powers (hereinafter ‘SCAP’) removed the Liancourt Rocks from Japanese jurisdiction, and US armed forces controlled and used it as a bombing range.<sup>28</sup>

On January 18, 1952, President Syngman Rhee of Korea declared a ‘Korean Presidential Proclamation of Sovereignty over the Adjacent Sea’ (so-called “*Peace Line*” or “*Syngman Rhee Line*”, and hereinafter “*Rhee Line*”)<sup>29</sup> with effect of Korean jurisdiction over waters within a line running an average of 60 nm from the Korean coast.<sup>30</sup> Aimed principally at excluding the Japanese from the Sea of Japan/East Sea, this so-called Rhee Line ran beyond the Liancourt Rocks, which were therefore expressly included within Korean territory. Japan responded by officially protesting against what it described as Korea’s unilateral proclamation

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<sup>19</sup> See, Hori 1997: 524; Kajimura 1997: 456-61.

<sup>20</sup> USDOS 1961a: 448-9; USDOS 1950b: 20. Also available at <http://www.yale.edu/lawweb/avalon/wwii/cairo.htm> (last visited at January 7, 2001); <http://newtaiwan.virtualave.net/cairo.htm> (last visited at January 7, 2001).

<sup>21</sup> USDOS, *Dept. of State Publication*, 2671 (Far Eastern Series, 17): 53; USDOS 1950b: 28-40. Also available at <http://www.yale.edu/lawweb/avalon/decade/decade17.htm> (last visited at January 7, 2001); <http://newtaiwan.virtualave.net/potsdam.htm> (last visited at January 7, 2001).

<sup>22</sup> Available at <http://www.yale.edu/lawweb/avalon/decade/decade17.htm> (last visited at January 7, 2001)

<sup>23</sup> 3 UST. 3169; 136 U.N.T.S. 45 [hereinafter ‘SF Peace Treaty’]. A full text is also available on the Internet at <http://newtaiwan.virtualave.net/sanfrancisco01.htm> (last visited at January 7, 2001).

<sup>24</sup> Cheju Island in Korean.

<sup>25</sup> Keomun Island in Korean.

<sup>26</sup> Ullung Island in Korean.

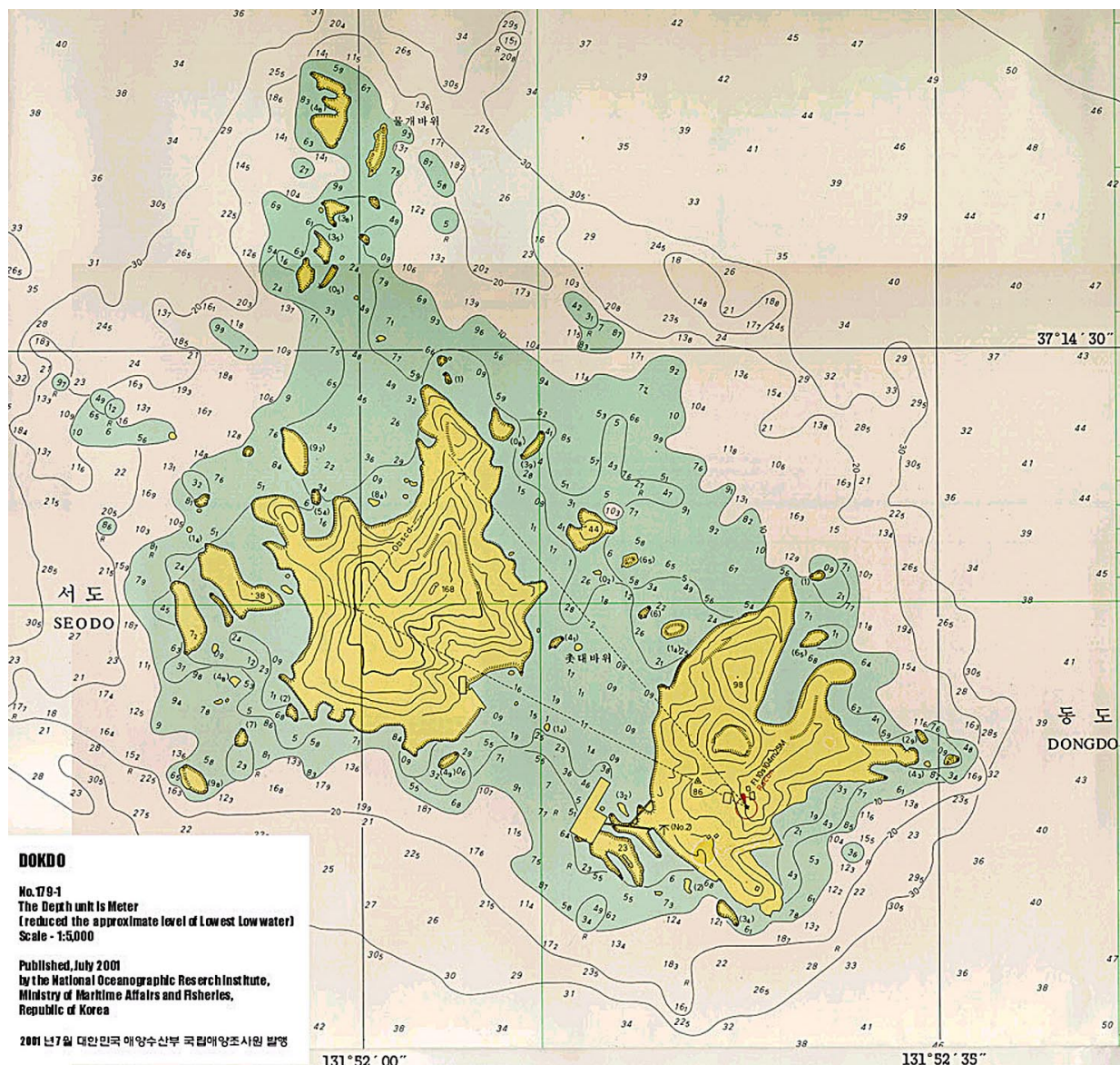
<sup>27</sup> SF Peace Treaty, *supra*, note 23, Art. 2(a)

<sup>28</sup> USDOS 1950c.

<sup>29</sup> The full text is available in Pak 1988: 126, and for map: 18.

<sup>30</sup> See, *id.*, pp.16-20

Figure 2: The Liancourt Rocks



of jurisdiction over the high seas, and also declaring its non-recognition of the Korean assumption of rights to the Liancourt Rocks.<sup>31</sup>

Despite disagreement over the ownership of the Liancourt Rocks, the two claimants signed a ‘*Treaty on Basic Relations between Korea and Japan*’<sup>32</sup> (hereinafter “*Treaty on Basic Relations*”) on 22 June 1965, for normalisation of their diplomatic relations. The issue of Liancourt Rocks was not taken as an agenda during the negotiation periods and so no explicit reference was made to the disputed islands in the treaty.

<sup>31</sup> Oda & Owada 1982: 67-71.

<sup>32</sup> 583 U.N.T.S. 33.

Korea, however, has taken numerous steps to develop the disputed area since 1952, including the recent construction of wharf on the Liancourt Rocks. There has been a continual Korean presence on the Liancourt Rocks of at least one or two fishing families and a permanent coastguard. In the meantime, Korea and Japan signed a fisheries agreement in November 1998, which took effect on January 22, 1999.<sup>33</sup> This agreement sets quotas for each state's fishermen in the other's EEZ and establishes a joint fishing zone around the Liancourt Rocks.<sup>34</sup>

### 3. Legal Arguments for Claiming Sovereignty over the Liancourt Rocks

The key legal issues in respect of the dispute over the Liancourt Rocks are mainly two-fold. The first is to evaluate the probative value of the evidence for the arguments on whether Korea and Japan claim their ownership over the Liancourt Rocks based on prior discovery and occupation. This issue is significantly related with the question whether they were *terra nullius* when Japan incorporated the Liancourt Rocks into the Shimane Prefecture in 1905. Japan opines that the Liancourt Rocks were *terra nullius* in 1905 and, therefore, subject to occupation, while Korea asserts that historical documentation proves that the Liancourt Rocks belonged to Korea prior to Japan's alleged 1905 incorporation, thereby refuting Japan's contentions that the Liancourt Rocks were *terra nullius*. The other relevant issues to be examined within the context of the first legal issue are: the so-called 'Vacant Islands Policy' by Korea during the period between the 15<sup>th</sup> and 19<sup>th</sup> century, and its implication for abandonment; and the feasibility of employing the appendage/dependency theory by Korea considering the nature of the Liancourt Rocks which is based on their geographical proximity with Korea's Ullung Island, and the fact that the Liancourt Rocks are uninhabited islands.

To approach these issues, the fundamental legal arguments to be explored are as follows: first, whether, there existed at the material times legal concepts or a legal regime on territorial acquisition in East Asia, in particular, in the cases of Korea and Japan; second, assuming that such a regime existed/exists, what role, if any, did/does, or can, it play in the resolution of the Liancourt Rocks in question in contemporary times?; and third, allied to the above, even if such a regime existed/exists, what was/is the impact of subsequent factual and legal developments, particularly having regard to the fact that the areas in question have been the subject of significant factual and legal changes over the years?

The second is to interpret the territorial clause of the *San Francisco Peace Treaty*, since the Allied Powers omitted to mention the Liancourt Rocks in the territorial clause. As to this indeterminacy of the territorial disposition, Japan has assumed that its sovereignty still extends over the Liancourt Rocks, and, in like manner, Korea has disputed this assumption. This issue relates to the need for a careful interpretation and clarification of how a series of drafts defined the terms of the Liancourt Rocks beyond postulating it from the territorial clauses of the *San*

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<sup>33</sup> Reprinted in Park 2000: 215-223.

<sup>34</sup> Pratt 1999: 171.

*San Francisco Peace Treaty*, together with resorting to relevant acts and behaviour of the interested parties. The legal implication of the fact that Korea is not a party to the *San Francisco Peace Treaty* is also noted within that context.

The ongoing territorial dispute on Liancourt Rocks involves intertwined political and legal issues. This is particularly so given that historical facts did not count as a major factor in the post-World War II territorial dispositions in East Asia. Though it is not always easy to dichotomise politics and law in specific territorial disputes, it is also not impossible to reach a conclusion as to the strength of the competing claims to disputed territories based on international legal principles and sources. Therefore, by applying the relevant international law relating to territorial disputes, mainly customary international law, and by interpreting territorial clause of the *San Francisco Peace Treaty*, this research will endeavour to address the question of ownership of the Liancourt Rocks.

### 3.1 Korea's and Japan's Claims to the Liancourt Rocks<sup>35</sup>

#### 3.1.1 Prior Discovery and Occupation

The fundamental legal issue in respect of the territorial dispute over the Liancourt Rocks is to clarify who first discovered and occupied them. The subsequent question, as to whether they were *terra nullius* when Japan incorporated the islands in 1905, substantially depends on an evaluation of the Korean claims based on prior discovery and occupation.

#### *Korea's Claims of 'Prior Discovery and Occupation'*

The names of Liancourt Rocks have changed, thus appearing as different names, throughout history, such as Usan Guk, Usando, Kajido, and Tokdo. The historical arguments advanced by Korea to support its claims to the Liancourt Rocks also reflect these circumstances. Liancourt Rocks appeared as Usan Guk, which comprised the Liancourt Rocks and Ullung Island, in *Samguk Sagi* (History of the Three Kingdom),<sup>36</sup> which provided that Usan Guk was subjugated by Silla, one of the Three Kingdom, in 512,<sup>37</sup> and Usan Guk continued to pay tribute until 1017.<sup>38</sup>

Later, the Liancourt Rocks were called Usando in the Chosun Dynasty, and were placed under its municipal administrative jurisdiction, together with Ullung Island.<sup>39</sup> The *Annals of King Sejong* described the locations of and the relationship of the Liancourt Rocks and Ullung Island in these terms: “*The distance between the two islands is not far off from each other so one is visible from the other on a fine day.*”<sup>40</sup> In the circumstance, Korea also anchors its position on geographical proximity. Korea also cites that in 1933 the Japanese Navy published

<sup>35</sup> For this section the research mainly relied on two articles (Lee 1998; Taijudo 1968), which are considered as the authoritative ones representing the respective claims of each claimant.

<sup>36</sup> *Samguk Sagi* was compiled in 1145, and is considered as the oldest extant history of Korea.

<sup>37</sup> Lee 1998: 10.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, p.6, p.11.

*Chosen Engan Suirosi* (Records on the Coastal Sealanes of Korea), which had an account to the effect that the Liancourt Rocks were utilised by the peoples who came from Ullung Island,<sup>41</sup> and cites the fact that this document categorised Liancourt Rocks and Ullung Island together, as they were listed under the same heading.<sup>42</sup>

*Sinjung Tongguk Yoji Sungnam* (Augmented Survey of the Geography of Korea) mentioned Usando and Ullung Island as islands attached to Ulchin County, one of the municipal administrative units.<sup>43</sup> Other references to Liancourt Rocks are Sambongdo, which appeared in *Annals of King Songjong*,<sup>44</sup> *Chungbo Munhon Pigo* (Augmented Reference Compilation of Documents on Korea);<sup>45</sup> Kajido (Islands of Sea Lions) which appeared in the *Annals of King Chongjo*.<sup>46</sup>

In the *Annals of King Sukjong* and the Augmented Reference Compilation of Documents on Korea, the activities of Ahn, Yong-bok, who privately as an individual citizen settled the ownership issue of the Liancourt Rocks with Japanese authorities, were recorded. In his own personal capacity without mandate from Korean Government, he forced Japanese authorities to recognise Korean title over the Liancourt Rocks.<sup>47</sup> Korean view of Ahn's above-mentioned activities was that "[Ahn]'s activity was undoubtedly a personal act, but the fact that the official annals of the Korean government duly recorded it should be taken as evidence of its relevancy to government policy."<sup>48</sup>

As Ullung Island came to be used as a shelter for displaced people of the preceding dynasty, who sought to evade taxes and military service, the Chosun Dynasty employed a vacant islands policy in 1403, effecting Ullung Island together with Liancourt Rocks, which lasted over 400 years. During those periods, the Chosun Dynasty dispatched an inspector to this area every three years,<sup>49</sup> however, it did not fully prohibit the Japanese from having access to and exploiting Ullung Island and Liancourt Rocks. During the period of the so-called vacant islands policy, Japanese authorities granted Japanese fishermen's application to cross over and engage in fishing activities over the Ullung Island,<sup>50</sup> in particular after Japan abandoned the isolationist policy of the Shogunate.<sup>51</sup>

In May 1881, the Korean government, having been acquainted with Japanese activities over the Ullung Island, protested to the Japanese Foreign Minister. Further, the Korean government appointed an inspector for Ullung Island and surrounding areas, and finally decided to

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41 *Id.*, p.31.

42 *Id.*, p.32.

43 *Id.*, p.11.

44 *Id.*, pp.14-15.

45 *Id.*, p.15.

46 *Id.*, p.17.

47 *Id.*, pp.21-33.

48 *Id.*, p.26.

49 *Id.*

50 *Id.*, pp.26-9.

51 *Id.*, p.28.

redevelop the islands by abandoning the vacant islands policy.<sup>52</sup> Upon receiving the Korean protest, the Japanese government reconfirmed Korean ownership over the Ullung Island.<sup>53</sup>

Subsequent actions taken by the Korean government include the following: Ullung Island began to be settled again from 1881; a superintendent of Ullung Island was set up in 1895; Imperial Ordinance 41 was proclaimed on October 25, 1900, providing that “*on the redesignation of [Ullung Island] as Uldo county and the change of the title of island superintendent to county magistrate.*”<sup>54</sup> Under this ordinance, the position of Ullung Island superintendent was upgraded to county magistrate, and the county was incorporated into the administrative system of the government. The Liancourt Rocks was also incorporated under its jurisdictional area.<sup>55</sup>

Korea further relies on the fact that the Japanese Meiji Government dispatched a mission to Korea in December, 1869, to conduct research on Korean diplomacy and other topics, including Liancourt Rocks and Ullung Island. This mission’s report appeared under the title *Chosen Koku Kosai Shimatsu Naitansho* (A Confidential Inquiry into the Particulars of Korean Diplomacy), and the relevant part mentioned the Japanese mission’s acknowledgement of Korean ownership over the Liancourt Rocks.<sup>56</sup>

Meanwhile, the Japanese Government turned down applications from individual Japanese for the development of Liancourt Rocks and for voyages to Liancourt Rocks, based on opinions of the Foreign Ministry acknowledging Korean ownership over the Liancourt Rocks.<sup>57</sup> On 29 September 1904, when an islander from Oki Islands, Nakai Yozaburo, filed an application to the Japanese Ministers of Home Affairs, Agriculture-Commerce, and Foreign Affairs, requesting for annexation of Liancourt Rocks into Japan and its lease for the purpose of catching sea lions, he acknowledged Korean ownership over the Liancourt Rocks.<sup>58</sup> This appeared in the *Shimane Kenshi* (Chronicles of Shimane Prefecture), compiled and published by the Shimane Prefecture Educational Board in June 1923, which stated that “*As Nakai believed [Liancourt Rocks] to be Korean territory, he planned to go to Tokyo and request the Agriculture-Commerce Ministry to help him take a lease of the island from the Korean government.*”<sup>59</sup> The Nakai’s application was authorised after the Japanese asserted claims to the Liancourt Rocks by a Cabinet Decision of 28 January 1905, and a Shimane Prefecture Notice 40 of 22 February 1905.<sup>60</sup>

Another notable submission of Korea is that in 1906, upon receiving notice from Japanese officials at Oki Islands that the Liancourt Rocks became Japanese territory, the Korean Magistrate of Ullung Island reported this to his higher officer reiterating that Liancourt Rocks

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<sup>52</sup> *Id.*, pp.28-9.

<sup>53</sup> *Id.*, p.33.

<sup>54</sup> *Id.*, p.29.

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

<sup>56</sup> *Id.*, p.39.

<sup>57</sup> *Id.*, p.19.

<sup>58</sup> *Id.*, pp.35-7.

<sup>59</sup> *Id.*, p.37.

<sup>60</sup> *Id.*, pp.38-9.



is Korean territory.<sup>61</sup> There are also Japanese works recognising Korean ownership over the Liancourt Rocks such as:<sup>62</sup> Toibata Setsuko's article titled "*Nihonkai Ni Aru Takeshima Ni Kansuru Nikkan Kankei*" ("*Japanese-Korean Relations over Takeshima in the Sea of Japan*" in *Rekishu Chiri* (History and Geography) of 1930; Tokio Shunjo' *Chosen to Manshu Annai* (A Guide to Korea and Manchuria) published in 1935; *Chosen Suisanshi* (Records on Korean Marine Products) in 1908 by Japanese Government; the Japanese Navy' *Chosen Engan Suirosshi* (Records on the Coastal Sealanes of Korea) in 1933.

*Japan's Claims of 'Prior Discovery and Occupation'*

From the Japanese point of view, they knew of the existence of the Liancourt Rocks from ancient times. However, the earliest documentary evidence of this knowledge is to be found in the *Inshu Shicho Goki* (Oki Province; Things Seen and Heard) a book published in 1667, which contains the description that "*To the northwest from the Province of Oki there is Matsushima at a two days' distance, and at another days' distance further out there is Take-shima. The latter, also called Iso-take-shima, is rich in bamboo, fish etc.*"<sup>63</sup>

The names of Liancourt Rocks in Japan also appeared confusing in particular, as Japan called Liancourt Rocks Takeshima and Matsushima interchangeably.<sup>64</sup> Japan refuses to recognise Usando, Sambongdo, Kajido, and other ancient names of Liancourt Rocks as today's Liancourt Rocks as Korea asserts due to the vagueness of its description in Korean historical documents.<sup>65</sup> Japan further assumes that those descriptions were rather related with Ullung Island, not Liancourt Rocks.<sup>66</sup>

As to the activities of Ahn, Yong-bok, the Japanese Government doubts its authenticity.<sup>67</sup> Japan also casts some doubts on the claims that the Chosun Dynasty dispatched an inspector to this area every three years, since the activities of the inspectors were only related with the Ullung Island, not Liancourt Rocks.<sup>68</sup>

Japan interprets the Korean vacant islands policy as an abandonment of the Liancourt Rocks, at least during the period of some 300 years, up until Korean inspectors were dispatched to those areas.<sup>69</sup> Japan also emphasises that Japanese went to Ullung Island together with the Liancourt Rocks, and utilised them for fishing<sup>70</sup> and that the Japanese Government gave concessions to Japanese people who wanted to exploit them, and these operations continued over 80 years.<sup>71</sup>

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<sup>61</sup> *Id.*, pp.41-2.

<sup>62</sup> *Id.*, pp.43-4.

<sup>63</sup> Foreign Office 1947: 9.

<sup>64</sup> Taijudo 1968: 2-3.

<sup>65</sup> *Id.*, p.3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, p.5.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, p.4.

<sup>70</sup> *Id.*

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

Japan maintains that the Liancourt Rocks has been a part of the territory of Japan since the beginning of history, this fact having been established by authentic historical documents<sup>72</sup>, including the fact that for a long time Japanese fisherman migrated there during certain seasons of the year. In 1905, the Japanese Government formally reaffirmed its claim to Liancourt Rocks as an integral part of Japan, apparently without protest from Korea, and placed it under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture.<sup>73</sup>

### 3.1.2 Appraisal

Both the Korean and Japanese Governments have produced historical evidence supporting their respective claims to the Liancourt Rocks. “*However, if one were to attempt to assess the merits of the claims, without reference to the peace treaty, a more thorough study, with the guidance of experts in Oriental history, would have to be made.*”<sup>74</sup> Unlike the two territorial disputes in East Asia mentioned earlier, however, a key consideration in appraising the disputed Liancourt Rocks is the bilateral historical relationship between Korea and Japan. The relationship between the two claimants is very distinct from those of the claimants involved in the other territorial disputes, due to the fact that the whole of Korea was colonised by Japan during the period 1910-1945. Indeed, the Japanese colonisation of Korea commenced in 1904, a period which predates Japan’s official incorporation of the Liancourt Rocks into the Shimane Prefecture. This fact is significant given that the general understanding of territorial disputes in international law has been developed through decisions and awards by international judicial and arbitral bodies<sup>75</sup> and these cases basically involve either colonising countries or colonised/newly independent countries. Consequently, and having regard to the fact that none of these cases parallels the situation in respect of the Liancourt Rocks, it is debatable whether the general rule of international law on territorial disputes can be applied, without modification, to the Liancourt Rocks.

Despite the fact that there exists certain doubts on the authenticity of the documents relied upon by Korea, and so it is doubtful whether any probative value can be attached to them, the

<sup>72</sup> *Id.*, p.6.

<sup>73</sup> *Id.*, pp.6-7.

<sup>74</sup> USDOS 1954b.

<sup>75</sup> As to case law, refer to the following: *Islands of Palmas Arbitration* (U.S. v. Neth.), 2 R.I.A.A. 829 (1928); *Clipperton Island Arbitration* (Fr. v. Mex.), 2 R.I.A.A. 1105 (1931), reprinted in 26 *Am. J. Int’l L.* 390 (1932); *Legal Status of Eastern Greenland Case* (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53 (Apr. 5) [hereinafter ‘*Eastern Greenland Case*’]; *Minquiers and Ecrehos Case* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17); *Advisory Opinion on the Status of Western Sahara*, 1975 I.C.J. 12 (Oct. 16) [hereinafter ‘*Western Sahara*’]; and *Case concerning the Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.: Nicar. intervening), 1992 I.C.J. 351 (Sept. 11) [hereinafter ‘*El Salvador v. Honduras Case*’]; *Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute* (1998), available at: <http://www.pca-cpa.org/ER-YEAwardTOC.htm> (last visited Oct. 20, 2000) [hereinafter ‘*Eritrea-Yemen Arbitration*’]; *Case concerning Kasikili/Sedudu Island* (Bots. v. Namib.)(1999), available at: [http://www.icj-cij.org/icjwww/idocket/ibona/ibonaJudgments/ibona\\_ijudgment\\_toc.htm](http://www.icj-cij.org/icjwww/idocket/ibona/ibonaJudgments/ibona_ijudgment_toc.htm) (last visited Oct. 20, 2000) [hereinafter ‘*Kasikili/Sedudu Island Case*’]; and, *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain)(2001), available at: [http://www.icj-cij.org/icjwww/idocket/iqb/iqbjudgments/ijudgment\\_20010316/iqb\\_ijudgment\\_20010316.htm](http://www.icj-cij.org/icjwww/idocket/iqb/iqbjudgments/ijudgment_20010316/iqb_ijudgment_20010316.htm) (last visited Mar. 16, 2001) [hereinafter ‘*Qatar v. Bahrain*’]

historical evidence supporting the parties' respective claims to the Liancourt Rocks seems to indicate that Korea has probably made out a better case, in particular within the context of prior discovery and occupation. However, this can be damaged by the legal implication of Korea's virtual inaction over the Liancourt Rocks during the material periods.

Can Korea employ the appendage/dependency theory considering the geographical proximity of the Liancourt Rocks with Korea's Ullung Island, and the fact that the Liancourt Rocks are uninhabited islands? The appendage/dependency theory explored in cases involving territorial disputes in international law is better understood in the context of large or main islands. In other words, if the Ullung Island were to be the subject of a territorial dispute between Korea and Japan, and the outcome of the decisions/awards by international judicial/arbitral bodies were to favour Korea, the appendage/dependency theory could be adopted to decide the destiny of the Liancourt Rocks, based on geographical proximity, uninhabitable nature, and smallness. The fact that the dependent islands in the present dispute is the Liancourt Rocks, not the Ullung Island, it is not appropriate to simply adopt the appendage/dependency theory, which was fully explored in *El Salvador v. Honduras Case*.<sup>76</sup>

### 3.2 Territorial Dispositions and the *San Francisco Peace Treaty* with Japan of 1951

Article 2 of the *San Francisco Peace Treaty* covers territory with respect to which Japan was obligated to renounce all right, title and claim and divided such territory into six categories: (a) Korea, (b) Formosa and the Pescadores, (c) the Kurile Islands, (d) the Mandated Islands, (e) the Antarctic area, and (f) the Spratly and Paracel Islands. As to Korea, Article 2(a) of the *San Francisco Peace Treaty* provided that "*Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.*"<sup>77</sup> Thus, the Allied Powers did not specifically mention the Liancourt Rocks in this territorial clause. The uncertainty arising therefrom largely accounts for the dispute over the ownership of the Liancourt Rocks.<sup>78</sup>

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<sup>76</sup> See, *El Salvador v. Honduras Case, id.*, pp.361-71, 558-9, 569-79. This is similar, in part, to the reasoning in the *Minquiers and Ecrehos Case*, where it was stated that "*the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by another State.*" See, *Minquiers and Ecrehos Case, id.*, p.99 (Levi Carneiro, J., sep. op.). In the *Eritrea-Yemen Arbitration*, High Islet was included to preserve the unity of the Mohabbakah Islands, though the reasoning therein is not fully persuasive. See, *Eritrea-Yemen Arbitration, id.*, paras.467, 475, 482, 527 ("[Here] the unity theory might find a modest and suitable place, for the Mohabbakahs have always been considered as one group, sharing the same legal destiny." para.475). See also, *Eritrea-Yemen Arbitration, id.*, paras.460-6 (natural and physical unity)

<sup>77</sup> See, *supra*, note 27.

<sup>78</sup> As Charney (1998) also pointed out, "[w]hile intending to return to the status quo ante for states that were deprived of territory during the Japanese expansionism, the peace treaties did not by name return these islands to the claimant states."

### 3.2.1 *The Implications of the Wartime Resolutions*

There was general agreement that the *San Francisco Peace Treaty* could hardly do other than endorse the territorial agreements made at Cairo, Yalta, and Potsdam,<sup>79</sup> and in fact, the territorial dispositions of the *San Francisco Peace Treaty* followed the terms of these agreements and of US studies and policy decisions relating to the implementation of these agreements.<sup>80</sup>

The terms of the territorial disposition regarding Korea followed the terms of the Cairo Declaration of December 1, 1943, confirmed at Potsdam on July 26, 1945, to the effect that "... Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent."<sup>81</sup> It also declared that Quelpart Island, Port Hamilton, Dagelet (Utsuryo) Island, and all the other offshore Korean islands were naturally to be included in the new independent Korea, for they were historically and administratively part of Korea and are inhabited primarily by Koreans.<sup>82</sup> The Potsdam Declaration also, in stating that "[t]he terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine",<sup>83</sup> indicated that other minor Japanese islands may be detached from Japan, at the discretion of the Allied Powers. As for the other areas, it was stipulated only that Japan shall renounce right, title and claim to them, and no reference was made as to their status following such renunciation. Further, Japan accepted the provisions set forth in the Potsdam Proclamation in the Instrument of Surrender of 14 August 1945.<sup>84</sup>

### 3.2.2 *Interpretation of the Supreme Commander for the Allied Powers' Instructions (SCAPINs)*

The General Headquarters of the SCAP gave instruction (hereinafter SCAPIN) No. 677 entitled "*Governmental and Administrative Separation of Certain Outlying Areas from Japan*" on 29 January 1946<sup>85</sup> which stated: "*The Imperial Japanese Government is directed to cease exercising, or attempting to exercise, governmental or administrative authority over any area*

<sup>79</sup> USDOS 1947a; USDOS 1947b.

<sup>80</sup> USDOS 1949a.

<sup>81</sup> USDOS, *supra*, note 20

<sup>82</sup> Ministry of Foreign Affairs 1951. *See also*, USDOS 1946a: 8 (Appendix "B" Discussion 1.c.). According to another US memorandum, the master paper on "*Disposition of the Outlying and Minor Japanese Islands*" was never prepared in final form. *See*, USDOS n/d a.

<sup>83</sup> USDOS, *supra*, note 21

<sup>84</sup> USDOS 1945a: 257-9.

<sup>85</sup> General Headquarters, Supreme Commander for the Allied Powers (hereinafter 'SCAP'), "SCAPIN No. 677: Governmental and Administrative Separation of Certain Outlying Areas from Japan", 1946/1/29, [USNARA/DC/S SCAP File] There were other relevant SCAPINs such as: SCAPIN 677/1–Governmental and Administrative Separation of Certain Outlying Areas from Japan, December 5, 1951; SCAPIN 841–Governmental and Administrative Separation of Certain Outlying Areas from Japan, March 22, 1946; SCAPIN 1033–Area Authorized for Japanese Fishing and Whaling, June 22, 1946; SCAPIN 1033/1–Area Authorized for Japanese Fishing and Whaling, December 23, 1948; SCAPIN 1033/2–Japanese Fishery Inspection System, June 30, 1949; SCAPIN 1778–Liancourt Rocks Bombing Range, September 16, 1947.

outside of Japan, or over any government officials and employees or any other persons within such areas.”<sup>86</sup> And it further stated that “For the purpose of this directive, Japan is defined to include the four main islands of Japan ... and the approximately 1,000 smaller adjacent islands ... and excluding ... Liancourt Rocks...”<sup>87</sup>

This instruction is considered one of the significant legal instruments that could decide the destiny of the Liancourt Rocks, especially in favour of Korea. Korea continuously maintains that SCAPIN 677 decreed the cessation of Japanese administration over various non-adjacent territories, including the Liancourt Rocks, and this is a strong indication of what the Allied Powers desired to dispose of.<sup>88</sup> In response to this Korean claim, Japan argues that SCAPIN 677 only suspended Japanese administration of the various island areas, including the Liancourt Rocks, and it did not preclude Japan from exercising sovereignty over this area permanently, as the United States also opined in the same vein.<sup>89</sup>

A later SCAPIN, No. 1778 of September 16, 1947 designated the islets as a bombing range for the Far East Air Force and further provided that use of the range would be made only after notification through Japanese civil authorities to the inhabitants of the Oki Islands and certain ports on Western Honsu.<sup>90</sup> The action of the US-Japan Joint Committee in designating these rocks as a facility of the Japanese government is therefore interpreted as further justification and support according to the Japanese.<sup>91</sup>

The United States recognised that the question of international sovereignty was outside SCAP’s authority. As SCAPIN 677 itself stated that “Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration”,<sup>92</sup> the United States also pointed out that in all SCAPINs to the Japanese Government regarding authorisation of areas for Japanese fishing and whaling which were established under SCAP, there appeared a statement providing essentially that “the present authorization is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.”<sup>93</sup>

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<sup>86</sup> SCAPIN 677, *id.*, Art.1

<sup>87</sup> *Id.*, Art.3

<sup>88</sup> USDOS 1951 (“... YONHAP November 27 carries report from Tokyo correspondent that SCAP will punish members of Asahi party who sailed to [Tokdo] without authorization, concludes this proves island not Japanese territory. ...”).

<sup>89</sup> USDOS 1952b.

<sup>90</sup> *Id.* (“1. The islands of Liancourt Rocks (or Take Shima), located 37° 15’ north, 131° 50’ east, are designated as a bombing range. 2. The inhabitants of Oki-Retto (Oki-Gunto) and the inhabitants of all the ports on the west coast of the island of Honshu north to the 38<sup>th</sup> parallel, north latitude, will be notified prior to each actual use of this range. This information will be disseminated through Military Government units to local Japanese civil authorities.”).

<sup>91</sup> SCAP, “SCAPIN No. 1778: Memorandum for Japanese Government: Liancourt Rocks Bombing Range”, 1947/9/16 [USNARA/Doc. No.: N/A] (on file with author).

<sup>92</sup> *Id.*, Art.6.

<sup>93</sup> SCAP, “SCAPIN No. 1033: Area Authorized for Japanese Fishing and Whaling”, 1946/6/22, [USNARA/DC/S SCAP File Room 600-I], Art.5. *See also*, Headquarters of the Far East Command, “Letter to Mr. E. Allan Lightner, Jr. (Charge d’Affaires, ad interim in US Embassy in Korea) from Lt.

In the same context, SCAPIN 1033 of June 22, 1946, also provided that “3.(b) Japanese vessels or personnel thereof will not approach closer than twelve (12) miles to Takeshima (37° 15′ North Latitude, 131° 53′ East Longitude) nor have any contact with said island. ... 5. The present authorisation is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area.”<sup>94</sup> However, there is also a report on “Summaries of FEC Policy Statements and Certain SCAP Directives to the Japanese Government, with Proposals for Disposition in the Peace Settlement with Japan” regarding the relationship between territorial questions and SCAPIN 677 to the effect that it “Defines present area of Japanese jurisdiction and provides a starting point for decisions on details of territorial adjustments.”<sup>95</sup>

### 3.2.3 The Inter-Divisional Area Committee on the Far East of the US Department of State

For the drafting of the *San Francisco Peace Treaty*, the US Government set up working groups within the Department of State. They regularly met to discuss specific topics, make reports according to their timetable, and submit them to the Department of State and relevant organisations for circulation and further considerations. Among them, The Inter-Divisional Area Committee on the Far East (hereinafter ‘Inter-Divisional Area Committee’) was both a product of and a contributor to the post-war planning program of the US Department of State. By the autumn of 1943, the general discussion within the Department of State of post-war policy had already reached an advanced stage. The Inter-Divisional Area Committee began its meeting in October, 1943, and until February, 1944, it held some twenty-seven sessions. In the course of these twenty-seven meetings the Inter-Divisional Area Committee agreed on the preferred solutions to some thirty post-war problems, and postponed two questions – the future of Portuguese Timor and the Japanese mandated islands – for further discussion.<sup>96</sup> Throughout the rest of 1944 and until V-J Day of 1945, the Inter-Divisional Area Committee held 192 meetings. The bulk of the actual work took place during 1944, when during the eleven months from February to December the Committee met 158 times, while during the first eight months of 1945 it met only 34 times.<sup>97</sup>

As far as the relationship with other policy making committees in the Department of State and the Government was concerned, the Inter-Divisional Area Committee was the “*working committee*” of the Department of State. It was in this group that the basic task of obtaining agreement among the important “*middle-group*” of officers of the Department of State was accomplished. It was the drafting body for the preliminary papers, which meant that it considered, corrected, and reviewed the work of individual officers. It was therefore the first important step in the long process of obtaining the approval of a particular policy within the Department of State. For this reason the work of the Committee was exceptionally important.<sup>98</sup>

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Gen. Doyle O. Hickey (General Staff, Chief of Staff)”, 1952/11/27, [USNARA/Doc. No.: N/A] (on file with author). For the sceptical US response against Korean claims, *see*, USDOS 1952c.

<sup>94</sup> SCAP, *id.*

<sup>95</sup> USDOS 1947c.

<sup>96</sup> USDOS n/d b.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, pp.14-5.

In the hierarchy of the committee system that developed for the formulation of post-war policy of the US Government, the Inter-Divisional Area Committee occupied a position at the bottom of the pyramid. Depending upon the procedure in effect at various times during 1944-45, the papers of the Committee would generally be submitted to the Post War Programs Committee, to the Policy Committee, or to the Staff Committee. Depending upon the decision of these higher groups, the papers would then go to the President or State-War-Navy Coordinating Committee for further consideration or be held in the Department of State pending developments. There were, of course, many changes in the papers after they left the Inter-Divisional Area Committee, but these papers were given their first definite formulation in this group and hence their most extensive consideration. In this latter sense in particular, the Committee was the pivotal “*Working Committee*” in the post-war planning program of the Far East.<sup>99</sup>

### 3.2.4 Drafts of the Territorial Clause of the San Francisco Peace Treaty

*There will be no complicated frontiers to define in the Japanese Peace Treaty since Japanese territories are all insular. ... It will be for the Peace Conference to decide which of the minor islands shall remain under Japanese sovereignty and when this decision has been reached the main territorial article could be something quite simple. ... In determining which of the minor islands shall remain under Japanese sovereignty the decisive considerations must be strategic. ... A large number of islands in waters immediately adjacent to Japan which should clearly remain under Japanese sovereignty. A number of islands between Hokkaido and Sakhalin, between Hokkaido and the Kuriles, and **between Japan proper and Korea in regard to the disposal of which some difference of opinion may be expected.** .... Very careful drafting of this section will be necessary in order to ensure that no islands are left in disputed sovereignty. [Emphasis added by the author]<sup>100</sup>*

Although there could be other versions, this research uses the following drafts: 19 March 1947;<sup>101</sup> 5 August 1947;<sup>102</sup> 8 January 1948;<sup>103</sup> 13 October 1949;<sup>104</sup> 2 November 1949;<sup>105</sup> 8 December 1949;<sup>106</sup> 19 December 1949;<sup>107</sup> 29 December 1949;<sup>108</sup> 3 January 1950;<sup>109</sup> 7 August

<sup>99</sup> *Id.*, p.15.

<sup>100</sup> “Memorandum by the United Kingdom Delegation: Territorial, Political and General Clauses of the Treaty of Peace with Japan” in USDOS 1947a.

<sup>101</sup> USDOS 1947d.

<sup>102</sup> USDOS 1947e.

<sup>103</sup> USDOS 1948a.

<sup>104</sup> USDOS 1949b.

<sup>105</sup> USDOS 1949c.

<sup>106</sup> USDOS 1949d.

<sup>107</sup> USDOS 1949e.

<sup>108</sup> USDOS 1949f.

<sup>109</sup> USDOS 1950d.

1950;<sup>110</sup> 11 September 1950;<sup>111</sup> 12 March 1951;<sup>112</sup> 17 March 1951;<sup>113</sup> 7 April 1951;<sup>114</sup> 3 May 1951;<sup>115</sup> 14 June 1951;<sup>116</sup> 3 July 1951;<sup>117</sup> 20 July 1951;<sup>118</sup> and 13 August 1951.<sup>119</sup>

*Drafts Dated 19 March 1947; 5 August 1947; 8 January 1948; 13 October 1949; and 2 November 1949*

The first available draft of the territorial clause on the Liancourt Rocks dated March 19, 1947<sup>120</sup> provided that “*Japan hereby renounces all rights and titles to Korea and all minor offshore Korean islands, including Quelpart Island, Port Hamilton, Dagelet (Utsuryo) Island and Liancourt Rock (Takeshima)...*”<sup>121</sup> This inclusion of the Liancourt Rocks as Korean territory continued throughout the drafts of 5 August 1947;<sup>122</sup> 8 January 1948;<sup>123</sup> 13 October 1949;<sup>124</sup> 2 November 1949.<sup>125</sup>

There were very slight differences among these drafts, but the main contents were identical. The territorial clause on the Liancourt Rocks in the draft dated August 5, 1947, provided that “*Japan hereby renounces all rights and titles to Korea (Chosen) and all offshore Korean islands, including Quelpart (Saishu To); the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai); Dagelet Island (Utsuryo To, or Matsu Shima); Liancourt Rocks (Takeshima);...*”<sup>126</sup> in the draft dated 8 January 1948, “*Japan hereby renounces in favour of the Korean people all rights and titles to Korea (Chosen) and all offshore Korean islands, including Quelpart (Saishu To); the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai); Dagelet Island (Utsuryo To, or Matsu Shima); Liancourt Rocks (Takeshima); ...*”<sup>127</sup>; in the draft dated 13 October 1949, “*Japan hereby renounces in favour of Korea all rights and titles to the Korean peninsula and offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima), ...*”<sup>128</sup>; and, in the draft dated 2 November 1949, “*Japan hereby renounces in favour of Korea all rights and titles to the Korean mainland territory and all offshore Korean*

<sup>110</sup> USDOS 1950e.

<sup>111</sup> USDOS 1950f.

<sup>112</sup> USDOS 1951a.

<sup>113</sup> USDOS 1951b.

<sup>114</sup> USDOS 1951c.

<sup>115</sup> USDOS 1951d.

<sup>116</sup> USDOS 1951e.

<sup>117</sup> USDOS 1951f.

<sup>118</sup> USDOS 1951g.

<sup>119</sup> Japanese Peace Conference, San Francisco, California, September, 1951, “*Treaty of Peace with Japan*”, 1951/8/13 [USNARA/Doc. No.: N/A] (on file with author).

<sup>120</sup> USDOS 1947d. There is the possibility that earlier drafts existed, though their contents on the territorial disposition were identical. *See*, USDOS 1947f.

<sup>121</sup> Article 4

<sup>122</sup> USDOS 1949b.

<sup>123</sup> USDOS 1948a.

<sup>124</sup> USDOS 1949b.

<sup>125</sup> USDOS 1949c.

<sup>126</sup> Article 4.

<sup>127</sup> Article 4.

<sup>128</sup> Article 4.



islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima), ...”<sup>129</sup>

Concerning the above provisions in previous drafts, Mr. William J. Sebald, the US Political Adviser for Japan, recommended a reconsideration of the Liancourt Rocks, in series which the United States considered of high importance, because, according to him, “*Japan’s claims to these islands is old and appears valid. Security considerations might conceivably envisage weather and radar stations thereon*”;<sup>130</sup> and that “*it is suggested that Liancourt Rocks ... be specified in our proposed Article 3 as belonging to Japan. Japan’s claims to these islands is old and appears valid, and it is difficult to regard them as islands off the shore of Korea. Security considerations might also conceivably render the provision of weather and radar stations on these islands a matter of interest to the United States.*”<sup>131</sup> Though the effect of this memorandum on the territorial disposition of the Liancourt Rocks was not obviously addressed in other diplomatic documents, the position of the drafters of the *San Francisco Peace Treaty* was placed in the opposite side in the subsequent drafts.

Other memoranda which emphasised that territorial dispositions should favour Japan are as follows: first, Professor Reischauer of Harvard stressed the psychological approach to the Japanese;<sup>132</sup> second, Mr. Sebald suggested that the idea of drawing straight lines<sup>133</sup> should be eliminated, for the reasons that a figurative fencing about of Japan was undesirable psychologically, and that it was unnecessary since from the earlier draft post-treaty Japan was supposed to be circumscribed by a continuous line described in the territorial clause of the treaty and drawn on the map accompanying that treaty;<sup>134</sup> third, to spare Japan the trouble of having to cede or renounce by name a long list of former territories and territorial claims, Mr. Sebald also suggested that the territorial chapter should be reduced merely to two simple articles; one would list the territories to be retained by Japan, while in the other Japan would renounce all other former territories and territorial claims, which would not be mentioned by name, to the Allied Powers for disposition under a separate agreement concluded among themselves;<sup>135</sup> and fourth, the US drafters considered the idea of a second/separate document

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<sup>129</sup> Article 6(1).

<sup>130</sup> USDOS 1949g.

<sup>131</sup> “Detailed Comment on November 2 Draft Treaty in Enclosure to Despatch No. 806”, in USDOS 1949h.

<sup>132</sup> USDOS 1949i.

<sup>133</sup> “*Introducing a series of straight lines, in Articles 1, 2 and 4, in order to eliminate uncertainties regarding islands to which the articles relate – and making reference to the maps accompanying the treaty. ... Because of the impracticability of naming all the islands and island groups which these articles are intended to cover in such manner as to avoid all ambiguity, [it was] added to the description in Article 1 a continuous line within which Japan retains all islands to which she has acquired title; similarly ... in Art. 4 a line in the sea surrounding all islands ceded to Korea.*” USDOS 1947g.

<sup>134</sup> USDOS 1949a.

<sup>135</sup> *Id.* This proposal was rejected after careful consideration because it was feared that, as was probable, the USSR and China would not sign the treaty or separate agreement, and present an unfeasible outcome for the final disposition of Formosa. *Id.*

for the reason that in the case of cessions of Japanese territory, the absence of “*cession to*” clauses in the treaty would be of psychological benefit to Japan.<sup>136</sup>

There was a difference of opinion between the drafters at the US Department of State and the Commonwealth Japanese Treaty Working Party as to how the territorial clause would be described. While the former opined that “*Provision for the disposition of Formosa, the Pescadores, Southern Sakhalin, the Kuriles, the Central and Southern Ryukyus, the Bonin and Volcano Islands, ... should be made in the treaty itself. Tsushima, Takeshima, ... and thousands of other islands in the Inland Sea and elsewhere close to Japan which have long belonged to Japan would be assumed to remain Japanese without mention in the treaty*”,<sup>137</sup> the latter generally agreed that “*Japan might merely renounce all claims to the ceded territories in the treaty, disposition of the territories being made in a separate agreement or agreements.*”<sup>138</sup>

*Draft Dated December 8, 1949*

The territorial clause on the Liancourt Rocks in the draft dated on December 8, 1949,<sup>139</sup> provided that:

*The territory of Japan shall comprise the four principal Japanese home islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including the islands of the Inland Sea (Seto Naikai); Tsushima, Takeshima (Liancourt Rocks), Oki Retto, Sado, Okujiri, Rebun, Riishiri and all other islands in the Japan Sea (Nippon Kai) within a line connecting the farther shores of Tsushima, Takeshima and Rebun; ...*<sup>140</sup>

From this draft, the drafters of the *San Francisco Peace Treaty* began to recognise Japanese ownership of the Liancourt Rocks. It should be also noted that, before this draft, there was a US memorandum providing that “*The basic concept of the San Francisco Peace Treaty is that the treaty should be as brief and general as possible*”,<sup>141</sup> and it would seem to be reflected in the subsequent drafts.

*Draft Dated 19 December 1949*

The draft dated 19 December 1949,<sup>142</sup> was drafted as the “*Agreement respecting the Disposition of Former Japanese Territories on December 19, 1949.*” The territorial clause on the Liancourt Rocks in this draft provided that:

*The Allied and Associated Powers agree that there shall be transferred in full sovereignty to the Republic of Korea all rights and titles to the Korean mainland*

<sup>136</sup> USDOS 1949j. The Legal Adviser responded in negative terms, stating that “*While the assessment of such a rationale is not the function of this Office, it would appear to be difficult to appreciate since the territory will in any event be lost-in two documents instead of one.*” *Id.*

<sup>137</sup> USDOS 1947h.

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

<sup>139</sup> USDOS 1949d.

<sup>140</sup> Article 3

<sup>141</sup> USDOS 1949k.

<sup>142</sup> USDOS 1949e.

*territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Degelet Island (Utsuryo To, or Matsu Shima), Liancourt Rocks (Takeshima), ...*<sup>143</sup>

Thus, the ownership of the Liancourt Rocks was given to Korea.

*Drafts Dated 29 December 1949; 3 January 1950*

The territorial clause on the Liancourt Rocks in the drafts dated 29 December 1949,<sup>144</sup> and 3 January 1950,<sup>145</sup> provided that:

*The territory of Japan shall comprise the four principal Japanese islands of Honshu, Kyushu, Shikoku and Hokkaido and all adjacent minor islands, including the islands of the Inland Sea (Seto Naikai); Tsushima, Takeshima (Liancourt Rocks), Oki Retto, Sado, Okujiri, Rebun, Riishiri and all other islands in the Japan Sea (Nippon Kai) within a line connecting the farther shores of Tsushima, Takeshima and Rebun; ...*<sup>146</sup>

*Japan hereby renounces in favour of Korea all rights and titles to the Korean mainland territory and all offshore Korean islands, including Quelpart (Saishu To), the Nan How group (San To, or Komun Do) which forms Port Hamilton (Tonaikai), Dagelet Island (Utsuryo To, or Matsu Shima), and all other offshore Korean islands and islets to which Japan had acquired title.*<sup>147</sup>

As the draft dated 8 December 1949, provided, both drafts dated 29 December 1949, and 3 January 1950, recognised Japanese ownership of the Liancourt Rocks. Allied to the above mentioned memorandum by Mr. Sebald, this stance would be influenced by the “*Commentary on Draft Treaty of Peace with Japan*”, which provided that:

*Takeshima (Liancourt Rocks) ... were formally claimed by Japan in 1905, apparently without protest by Korea, and placed under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture. ... [R]ecords show that for a long time Japanese fisherman migrated there during certain seasons. Unlike Dagelet Island a short distance to the west, Takeshima has no Korean name and does not appear ever to have been claimed by Korea. The islands have been used by US forces during the occupation as a bombing range and have possible value as a weather or radar station site.*<sup>148</sup>

In the meantime, the pattern of designating either Korea or Japan as the recipient of the Liancourt Rocks changed, and no reference was made to the Liancourt Rocks again in the

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<sup>143</sup> Article 3  
<sup>144</sup> USDOS 1949a.  
<sup>145</sup> USDOS 1949d.  
<sup>146</sup> Article 3(1)  
<sup>147</sup> Article 6  
<sup>148</sup> USDOS 1949a.

subsequent drafts. This has led to self-serving interpretations between the claimants. The adoption of this pattern was the reflection of compromise, as shown below, between the Commonwealth Japanese Treaty Working Party and the US Department of State's new stance, including Mr. Dulles' proposed shortened version of the draft.

Among the list of general areas of agreement reached by the Commonwealth Japanese Treaty Working Party in London is an item on "*Territories to be taken from Japan need not be mentioned in a Peace Treaty.*"<sup>149</sup> On other territorial issues, it was generally agreed by the Commonwealth Japanese Treaty Working Party that: first, Japanese sovereignty would be confined to the four main islands and to a number of adjacent minor islands whose precise definition would be a matter for the Peace Conference; and second, the disposition of the territories to be ceded by Japan need not be dealt with in the *San Francisco Peace Treaty* itself. In the treaty Japan might merely renounce all claims to the ceded territories.<sup>150</sup>

*Drafts Dated 7 August 1950; 11 September 1950*

The territorial clause on Korea in the draft dated 7 August 1950,<sup>151</sup> provided that "*Japan recognizes the independence of Korea and will base its relation with Korea on the resolutions adopted by the United Nations Assembly on December, 1948.*"<sup>152</sup> There is a memorandum in regard to Article 4 of the short form treaty on Korea, in the draft dated 7 August 1950, suggesting modification of the last clause to read as "*and will base its relations with Korea on the actions taken by the United Nations with respect to Korea*", which took account of Security Council and General Assembly resolutions subsequent to December 1948.<sup>153</sup> Accordingly, the draft dated 11 September 1950,<sup>154</sup> further provided that "*Japan recognizes the independence of Korea and will base its relation with Korea on the resolutions of the United Nations General Assembly and Security Council with respect to Korea.*"<sup>155</sup> The draft dated 11 September 1950, had been made of a possible text of the *San Francisco Peace Treaty* to serve as a basis for further consideration and informal discussion with other members of the Allied Powers, though this present text was purely tentative.<sup>156</sup> Allied to the agreed suggestions by the Commonwealth Japanese Treaty Working Party, as mentioned above, this short version of the territorial disposition over Korea was the basic framework throughout the remaining subsequent drafts, with some changes in style. As a result, it became unclear what the drafters' intention was over the territorial disposition of the Liancourt Rocks.

As evidenced by the memoranda and notes within the US Department of State, the drafters weighed the gains and the losses of adopting a short version or a long one. Those in favour of a long version expressed concerns about possible loss in precision and comprehensiveness of

<sup>149</sup> USDOS 1950g; USDOS 1950h

<sup>150</sup> British Embassy in Washington, DC 1950: 8.

<sup>151</sup> USDOS 1950e.

<sup>152</sup> Chapter IV. Territory. 4

<sup>153</sup> USDOS 1950i.

<sup>154</sup> USDOS 1950f.

<sup>155</sup> Chapter IV. Territory. 4.

<sup>156</sup> USDOS 1950j. It appears that other drafts were made between August 7, 1950, and September 11, 1950, as this memorandum also indicated that "*It reflects certain of the points of view put forward by the ... Department since the circulation of the prior draft of August 18, 1950.*" *Id.*

the treaty, saying that “*the omission of a given Article or paragraph or the substitution of single sentence for an Article or Annex will leave uncovered matters which in consequence will become the source of confusion and disputes.*”<sup>157</sup> This group further raised some substantive issues, such as the following question: “*Are the territorial dimensions of the new Japan sufficiently clear, for example, offshore islands like Sado and islands to which title may be disputed such as Tsushima and Takeshima?*”<sup>158</sup> They further pointed out that the only advantages of a very short treaty was that it could be more quickly negotiated if the other Allied Powers were willing to go along with such a treaty or, if they were not, the United States was willing to proceed without them.<sup>159</sup>

In general, it was agreed that a long draft afforded less opportunity for disputes.<sup>160</sup> Mr. Adrian S. Fisher, the Legal Adviser of the US Department of State, also opined that “*In light of the inter-Allied agreements on Japan made from 1943 to 1945, I believe the Japanese Peace Treaty ought not only to contain a definite statement of what territory shall henceforth be Japan but also clear provisions as to how all detached territories shall be disposed of.*”<sup>161</sup> In the same vein, as to the chapter on territorial settlements, it was suggested that a reference be made to an annex to the treaty in which precise descriptions of the territories of Japan, Korea, Formosa and the Pescadores, and Sakhalin, could be set forth, and that the annex might appropriately contain the provisions set forth in the longer form of the draft treaty.<sup>162</sup>

Eventually, the drafters preferred to adopt the short version due to the advantage of making negotiations with other Allied Powers a great deal briefer.<sup>163</sup> It is also interesting to note that the drafting work appears to have been done by very few officers in the US Department of State, as borne out by a memorandum to the effect, *inter alia*, that “*To my knowledge, the Draft Treaty has not been widely circulated in the Department. In fact, I do not know what progress has been made on the project.*”<sup>164</sup>

In the meantime, in response to an Australian Government’s request for clarification of certain questions arising out of the positions which the United States would wish to see reflected in the *San Francisco Peace Treaty*,<sup>165</sup> in particular concerning the disposition of former Japanese territories, the United States stated that “*It is thought that the islands of the Inland Sea ... [Liancourt Rocks]..., all long recognized as Japanese, would be retained by Japan.*”<sup>166</sup>

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<sup>157</sup> USDOS 1950k.

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

<sup>159</sup> *Id.*

<sup>160</sup> USDOS 1950l.

<sup>161</sup> USDOS 1950i.

<sup>162</sup> *Id.*

<sup>163</sup> USDOS 1950l.

<sup>164</sup> USDOS 1950m.

<sup>165</sup> Australian Mission to the United Nations 1950.

<sup>166</sup> USDOS 1950n.

*Drafts Dated 12 March 1951; 17 March 1951*

The territorial clause on Korea in the draft dated 12 March 1951,<sup>167</sup> and 17 March 1951,<sup>168</sup> provided that “*Japan renounces all rights, titles and claims to Korea,...*”<sup>169</sup> These drafts are the shortest versions of the *San Francisco Peace Treaty* in respect of territorial dispositions over Korea. It is also unclear from these drafts how the drafters made the territorial disposition over the Liancourt Rocks.

*Draft Dated 7 April 1951*

The territorial clause on Korea in the draft dated 7 April 1951,<sup>170</sup> provided that:

*Japanese sovereignty shall continue over all the islands and adjacent islets and rocks lying within an area bounded by a line from latitude 30° N. in a north-westerly direction to ... the south-east and Take Shima to the north-west curving with the coast of Honshu, ...*<sup>171</sup>

*Japan hereby renounces any claim to sovereignty over, and all right, title and interest in Korea, and undertakes to recognise and respect all such arrangements as may be made by or under the auspices of the United Nations regarding the sovereignty and independence of Korea.*<sup>172</sup>

As the drafts dated 8 December 1949, 29 December 1949, and 3 January 1950, provided, the draft dated 7 April 1951, recognised Japanese ownership of the Liancourt Rocks.

Meanwhile, the United Kingdom proposed that the islands between Korea and Japan should be disposed of by specific mention, for example, by inserting “*including Quelpart*” after “*Korea*” in the territorial clause,<sup>173</sup> which is reflected in subsequent drafts.

*Draft Dated 3 May 1951*

The territorial clause on Korea in the draft dated 3 May 1951,<sup>174</sup> provided that:

*Japan renounces all right, title and claim to Korea, including Quelpart, Port Hamilton and Dagelet, and agree to recognize and respect all arrangements which may be made by or under the auspices of the United Nations regarding the sovereignty and independence of Korea.*<sup>175</sup>

Again, the reference to the Liancourt Rocks disappeared; thus, it became unclear how the drafters made the territorial disposition over the Liancourt Rocks. This is the more so that

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<sup>167</sup> USDOS 1951a.  
<sup>168</sup> USDOS 1951b.  
<sup>169</sup> Chapter III Territory. 3, respectively  
<sup>170</sup> USDOS 1951c.  
<sup>171</sup> Part I. Territorial Clauses, Article 1  
<sup>172</sup> Part I. Territorial Clauses, Article 2  
<sup>173</sup> USDOS 1951h.  
<sup>174</sup> USDOS 1951d.  
<sup>175</sup> Chapter II Territory, Article 2(a)

from the draft dated 3 May 1951, the provisions on the territorial dispositions/arrangements in respect of Japan also disappeared.

In the meantime, New Zealand proposed that “*In view of the need to ensure that none of the islands near Japan is left in disputed sovereignty, the New Zealand Government favours the precise delimitation by latitude and longitude of the territory to be retained by Japan as suggested in Article 1 of the United Kingdom’s draft. The adoption of this device could ... make it clear ...*”<sup>176</sup> With respect to this suggestion, the United States commented in the following negative term:

*In the discussions at Washington the British agreed to drop this proposal when the United States pointed to the psychological disadvantages of seeming to fence Japan in by a continuous line around Japan. The Japanese had objected to the British proposal when it was discussed with them in Tokyo. US willingness to specify in the treaty that Korean territory included Quelpart, Port Hamilton and Dagelet also helped to persuade the British.*<sup>177</sup>

France also raised the question whether it would be desirable to include a reference to the resolution of the territorial problems by the United Nations. In response, the United States stated that since exchanges of views already had indicated that there was strong opposition to this solution, it seemed for the United States, therefore, better to limit the treaty to liquidating the Japanese interest and not going into the question of how the future might be dealt with.<sup>178</sup> The United States also maintained its stance that it was dangerous by treaty to impose upon the United Nations a responsibility so heavy that it might even disrupt the United Nations itself,<sup>179</sup> as subsequent drafts demonstrate.

*Drafts Dated 14 June 1951; 3 July 1951; 20 July 1951*

The territorial clause on Korea in the drafts dated 14 June 1951,<sup>180</sup> 3 July 1951,<sup>181</sup> and 20 July 1951,<sup>182</sup> provided that “*Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.*”<sup>183</sup>

As to these drafts, in particular regarding the draft dated 3 July 1951, there appeared amendments proposed by Korea for the territorial disposition over Korea, including the Liancourt Rocks. Korea proposed the following revisions in the draft dated 3 July 1951:

*Revision of Article 2(a) to provide that Japan “confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part*

<sup>176</sup> USDOS 1951i.

<sup>177</sup> *Id.*

<sup>178</sup> USDOS 1951j.

<sup>179</sup> *Id.*

<sup>180</sup> USDOS 1951e.

<sup>181</sup> USDOS 1951f.

<sup>182</sup> USDOS 1951g.

<sup>183</sup> Chapter II Territory, Article 2(a)

*of Korea prior to its annexation by Japan, including the islands Quelpart, Port Hamilton, Dagelet, Dokdo and Parangdo.*"<sup>184</sup>

As to Dokdo or Tokdo, which is the Korean name corresponding to the name conventionally used in English for the Liancourt Rocks, Mr. Boggs, a geographer in the Department of State, reported that Japan formally claimed it in 1905, apparently without protest by Korea, which appeared never to have claimed it before, though this report was subject to further research.<sup>185</sup> This memorandum, however, recognised that the issue of the Liancourt Rocks was one of the several remaining problems, and further proposed that "*Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including Quelpart, Port Hamilton and Dagelet*",<sup>186</sup> as Article 2(a) provided.

Nevertheless, as the other US memoranda on the Liancourt Rocks indicated, the final disposition over the Liancourt Rocks was not completely decided by the US drafters. There appeared a few US memoranda which favoured Korean ownership over the Liancourt Rocks, as one memorandum provided that "*If it is decided to give them to Korea, it would be necessary only to add "and Liancourt Rocks" at the end of Art.2, par.(a).*"<sup>187</sup> Another memorandum further clarified this issue as follows:

*The Liancourt Rocks ... were among the islands to which, in a 1949 draft treaty, Japan would have renounced claim to Korea. In a Japanese Foreign Office publication, entitled "Minor Islands Adjacent to Japan Proper"<sup>188</sup>, Part IV, June 1947, Liancourt Rocks are included. It may therefore be advisable to name them specifically in the draft treaty, in some such form as the following (Article 2): (a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton, Dagelet, **and Liancourt Rocks.***<sup>189</sup>

Korea's position was reiterated by its Foreign Minister who proposed that the final phrase in Article 2(a) should be amended after "*claim to Korea*" to read "*and all islands which were part of Korea prior to its annexation by Japan, including [Quelpart], Port Hamilton, Dagelet, Dokdo and [Parangdo].*"<sup>190</sup> Further, Korea requested that the word "*renounces*" in Article 2(a) should be replaced by "*confirms that it renounced on August 9, 1945, all right, title and claim*

<sup>184</sup> USDOS 1951k.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> USDOS 1951l.

<sup>188</sup> Shortly after the Draft dated March 19, 1947 was made, the Foreign Office of the Japanese Government published "Minor Islands Adjacent to Japan Proper" for information of the Allied Power in June 1947. This document contained the basic position of the Japanese Government, which maintained historical title to Liancourt Rocks. *See, supra*, note 63

<sup>189</sup> USDOS 1951m.

<sup>190</sup> USDOS 1951n.



to Korea and the islands which were part of Korea prior to its annexation by Japan, including the islands Quelpart, Port Hamilton, Dagelet, Dokdo and Parangdo.”<sup>191</sup>

As to the first proposal providing inclusion of the Liancourt Rocks in Article 2(a), Mr. Dulles responded that there was no particular problem in including these islands in the pertinent part of the treaty which related to the renunciation of Japanese territorial claims to Korean territory if the Liancourt Rocks had been Korean territory before the Japanese annexation.<sup>192</sup> However, as it was unable to identify any reliably relevant resources,<sup>193</sup> including even by the Korean Embassy in the United States,<sup>194</sup> the United States was inclined not to consider this Korean proposal to confirm its sovereignty over the Liancourt Rocks.<sup>195</sup>

With respect to the second request of Korea that Article 2(a) of the draft be revised to provide that Japan “confirms that it renounced on August 9, 1945, all right, title and claim to Korea and the islands which were part of Korea prior to its annexation by Japan, including ... Dokdo ...”, the United States was also unable to concur in this proposed amendment because of the following facts: first, according to US information, the Liancourt Rocks were never treated as part of Korea and, since about 1905, had been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan; second, the United States was in doubt that the formula confirming Japan’s renunciation of certain territorial claims to Korea could be included in the treaty as suggested by Korea;<sup>196</sup> third, the United States recognised that the terms of the Japanese surrender instrument of August 9, 1945 did not, of themselves, technically constitute a formal and final determination of this question;<sup>197</sup> and fourth, the United States could not follow the argument that the treaty should adopt the theory that Japan’s acceptance of the Potsdam Declaration constituted a formal or final renunciation of sovereignty by Japan over the areas dealt with in the declaration.<sup>198</sup>

### 3.2.5 The Implications of Drafts on the Territorial Dispositions Clause for the Liancourt Rocks

When Japan agreed in Article 2 of the *San Francisco Peace Treaty* to renounce “all right, title and claim to Korea, including the islands Quelpart, Port Hamilton, and Dagelet”, the drafters of the treaty did not include the Liancourt Rocks within the area to be renounced. Japan has, and with reason, assumed that its sovereignty still extends over the Liancourt Rocks, and the Koreans have disputed this assumption.<sup>199</sup> Therefore, as Charney pointed out, “There is even a dispute over whether by implication or, by general terms, the victors in World War II intended to return the disputed [Liancourt Rocks] to Korea.”<sup>200</sup>

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<sup>191</sup> “A Letter to Dean G. Acheson (US Secretary of State) from You Chan Yang (Korean Ambassador in Washington, DC, USA), July 19, 1951”, in USDOS 1951o.

<sup>192</sup> USDOS 1951o, *id.*

<sup>193</sup> USDOS 1951p.

<sup>194</sup> USDOS 1951q.

<sup>195</sup> *Id.*

<sup>196</sup> USDOS 1951r.

<sup>197</sup> USDOS, 1951o, *supra*, note 191

<sup>198</sup> USDOS 1951r.

<sup>199</sup> USDOS 1952a.

<sup>200</sup> Charney 1998: 161.

During the course of drafting the *San Francisco Peace Treaty*, Korea's views were solicited, in consequence of which, the Korean Ambassador requested the US Secretary of State in a letter of July 19, 1951 to amend Article 2(a) of the draft treaty so as to include the Liancourt Rocks as well as Quelpart, Port Hamilton and Dagelet among those islands over which Japan would renounce right, title and claim by virtue of recognising Korea's independence. In his reply to the Korean Ambassador, Mr. Dean Rusk, the Assistant Secretary of State, stated in a letter dated August 10, 1951 that the United States could not concur in the proposed amendment as it applied to the Liancourt Rocks since according to his information the Liancourt Rocks had never been treated as a part of Korea, they had been under the jurisdiction of the Oki Islands Branch Office of Japan's Shimane Prefecture since 1905 and it did not appear that they had ever before been claimed by Korea. As a result Article 2(a) of the *San Francisco Peace Treaty* made no mention of the Liancourt Rocks.<sup>201</sup>

Accordingly, it appeared that the United States viewed that the *San Francisco Peace Treaty* constituted a determination of the "minor islands" to be left to Japan under the Potsdam Declaration, and that the treaty left the Liancourt Rocks to Japan. The United States remarked however that the US view was simply that of one of the several signatories of the treaty, and that Article 22 of the *San Francisco Peace Treaty*, providing for reference to the International Court of Justice, was drafted in order to settle the disputes deriving from the treaty.<sup>202</sup>

In determining what course of action should be taken in the light of this development, the question arose whether the statement made in Mr. Rusk's letter entailed the legal conclusion that the *San Francisco Peace Treaty* left the Liancourt Rocks to Japan. On the one hand it may be argued that the determination of the minor islands to be left under Japanese sovereignty required by the Potsdam Proclamation has been made by the treaty, i.e., Japan retained everything not renounced under Article 2, that Korea, prior to the signing of the treaty specifically asked for a renunciation of the Liancourt Rocks by Japan and was turned down and that therefore it was the intent of the drafters of the treaty that Japan did not renounce the Liancourt Rocks, and that these islands were accordingly included in the minor islands determined to remain under Japanese sovereignty.

On the other hand, it may be argued that Mr. Rusk's letter refusing to include the Liancourt Rocks in the enumeration of islands renounced in connection with the renunciation of Korea was based on the US understanding of the historical facts, providing that "*Dokdo... was according to our information never treated as part of Korea*", and that his statement left the door open to Korea to show that it had in fact treated the Liancourt Rocks as part of Korea prior to 1905, when the Japanese placed the Liancourt Rocks under the jurisdiction of the Shimane Prefecture of Japan. Under this theory Korea would still be free to establish legally, if it could, that the "Korea" renounced in the *San Francisco Peace Treaty* included the Liancourt Rocks.<sup>203</sup> This is the more so that the reports on the Liancourt Rocks was based for the most part on Japanese language references available in the Department of State and the Library of

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<sup>201</sup> USDOS 1952b.

<sup>202</sup> USDOS 1954b.; SF Peace Treaty, *supra*, note 23; For the text of Article 22, *see, infra*, note 262

<sup>203</sup> *Id.*

Congress, and the studies prepared within the Department of State and by the Japanese Foreign Office on some of the islands.<sup>204</sup>

### **3.3 The Legal Implications of Korea “Not Being a Party” to the *San Francisco Peace Treaty***

Despite the strong support of the US Ambassador in Korea,<sup>205</sup> together with a request by Korea to be invited to participate in negotiations and the signing of the *San Francisco Peace Treaty*,<sup>206</sup> Mr. Dulles pointed out that Korea would not be a signatory to the treaty, since only those nations in a state of war with Japan and which were signatories of the United Nations Declaration of January 1942 would sign the treaty. He pointed out, however, that Korea would benefit from all of the general provisions of the treaty equally with other nations.<sup>207</sup> The other influential factors for not envisaging Korea as a participant in negotiations were, in part, excessive claims by Korea for restitution and reparations, and North Korean demands for participation.<sup>208</sup> Instead, it was suggested that Korea should play a consultative, rather than a negotiating, role in the peace conference, due to concerns from the fact that complete rejection of Korean participation in the peace conference would produce intense governmental and popular resentment directed at Japan, the conferees, and especially the United States.<sup>209</sup>

In the *San Francisco Peace Treaty* the term “*Allied Powers*” denotes those countries which were at war with Japan and which signed and ratified this treaty. Therefore, those countries which were not at war with Japan during World War II, and countries which did not participate in the San Francisco conference as well as countries which did participate and signed the treaty but did not ratify it are not Allied Powers as defined in this treaty. It is clearly stated in Article 25, following the definition of an Allied Power, that subject to the provisions of Article 21, which reserved the benefits of China and Korea, the *San Francisco Peace Treaty* shall not confer any rights, titles or benefits on any country which was not an Allied Power. It also provided that no right, title or interest of Japan shall be diminished or prejudiced by any provision of the treaty in favour of a country which is not an Allied Power.<sup>210</sup>

### **3.4 Implications of Korean Presidential Proclamation of Sovereignty over the Adjacent Sea (‘Rhee Line’)**

The Japanese Ministry of Foreign Affairs presented its compliments to the Korean diplomatic mission in Japan, concerning the proclamation of the Rhee Line of 18 January 1952, claiming sovereignty over the shelf and seas adjacent to Korean territory, as follows:

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<sup>204</sup> USDOS 1950c.

<sup>205</sup> USDOS 1951s; USDOS 1949l.

<sup>206</sup> Korean Embassy in Washington, DC 1951a; Korean Embassy in Washington, DC 1951b.

<sup>207</sup> USDOS 1951t. *See also*, USDOS 1951u.

<sup>208</sup> USDOS 1949m.

<sup>209</sup> *Id.*

<sup>210</sup> Ministry of Foreign Affairs, Tokyo, Japan 1951: 46.

*The Japanese Government considers that the contents of the proclamation of the President of the Republic of Korea of January 18, 1952 not only are entirely incompatible with the long internationally established principle of the freedom of the high seas, but also run counter to the basic principle of international cooperation for the development and protection on an equal footing of the marine resources of the high seas. This unilateral proclamation is utterly untenable under any of the accepted ideas of international society, and therefore cannot be acquiesced in by the Japanese Government. ... Furthermore, in the proclamation the Republic of Korea appears to assume territorial rights over the islets in the Japan Sea known as Takeshima (otherwise known as Liancourt Rocks). The Japanese Government does not recognize any such assumption or claim by the Republic of Korea concerning these islets which are without question Japanese territory.*<sup>211</sup>

In addition to this protest directly headed to Korea, the Japanese Foreign Minister, Okazaki, requested the United States to intervene immediately with Korea in an attempt to stop Korean actions within the Rhee Line and to see if an amicable settlement of the present difficulty could be reached without delay.<sup>212</sup> At the same time, however, to prevent incidents, Japan quietly advised fishing interests to refrain from engaging in fishing activities within the small area where the Rhee Line overlapped MacArthur Line.<sup>213</sup> The Japanese assertion of sovereignty over the Liancourt Rocks brought this dispute back into the limelight, with an immediate challenge by Korea.

Meanwhile, the United States evaluated the Korean proclamation as intended purely for bargaining purposes in coming bilateral negotiations between Korea and Japan considering the fact that: first, Korean capacity for enforcement in this restricted area was unable and unwilling;<sup>214</sup> second, it aroused little enthusiasm among the officers within the Korean Foreign Ministry;<sup>215</sup> third, it was admitted by top legal authorities in private conversation, including Korean Army Judge Advocate General, that the assertion of Korean sovereignty had little legal basis, and they further expressed fear that the president's unilateral action would jeopardise Korean-Japanese negotiations;<sup>216</sup> and fourth, the president probably issued the proclamation without consulting government leaders outside the Foreign Ministry, according to another source close to the Korean Government.<sup>217</sup>

As to the question of sovereignty over the Liancourt Rocks posed by Korean inclusion of them within the Rhee Line, the United States also opined that;<sup>218</sup> first, Japan had been deprived of

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<sup>211</sup> USDOS 1952d.

<sup>212</sup> USDOS 1953a.

<sup>213</sup> USDOS 1952d. The main purpose of the MacArthur Line had been to prevent an indiscriminate depletion by the Japanese of fishery resources. For further information on the MacArthur Line, see, Pak 1988: 15-6.

<sup>214</sup> USDOS, *id.*

<sup>215</sup> USDOS 1952e.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> USDOS 1952d.

governmental and administrative jurisdiction over the Liancourt Rocks by SCAPIN; second, by that exclusion, terms of the *San Francisco Peace Treaty* appeared to reserve sovereignty to Japan; and third, presumably, this was the proper subject for negotiation between Korea and Japan without reference to SCAP or the Allied Powers.

### 3.5 Subsequent Incidents around the Liancourt Rocks and their Implications

Following Japan's surrender, the SCAP removed the Liancourt Rocks from Japanese jurisdiction, and the US armed forces controlled the island and used it as a bombing range.<sup>219</sup> Under an Administrative Agreement signed on February 28, 1952, by Japan and the United States<sup>220</sup> the Liancourt Rocks were designated as Japanese facility and area to be used by the United States as bombing range. In the selection of manoeuvring areas by the Joint Committee implementing Japanese-American security arrangements, it was agreed that these rocks would be designated as a facility by the Japanese Government and would serve the purposes mentioned above.<sup>221</sup> According to Japan, the implication of agreeing with the Japanese on such an arrangement was that the United States recognised Japanese sovereignty over the Liancourt Rocks.<sup>222</sup>

Meanwhile, on 7 September 1952, Vice Admiral Sohn, Won-il, the Chief of Naval Operations of the Korean Navy, notified the UN Naval Commander in Pusan, Korea that a "*scientific inspecting party*" would visit the Ullung Island and the Liancourt Rocks on a vessel belonging to the Korean Ministry of Transportation. The UN Naval Commander granted that permission on 7 September 1952 and the expedition departed from Pusan on 12 September 1952, and further advised the UN Naval forces of the projected trip so as to avoid any danger of an attack upon the Korean vessels. Subsequently, two attempts were made to land on the Liancourt Rocks that were prevented by the appearance of American planes that dropped bombs.<sup>223</sup>

The Korean Ministry of Foreign Affairs, on 10 November 1952, regarding the alleged bombing of the Liancourt Rocks by a US military plane on 15 September 1952, complained about that affair, and in so doing stated that the Liancourt Rocks "*is a part of the territory of the Republic of Korea.*" The United States replied that preparations were being expedited to dispense with the use of the Liancourt Rocks as bombing range, and that its understanding of the territorial status of the island was stated in Mr. Rusk's letter of 10 August 1951.<sup>224</sup> The Headquarters of the Far East Command also responded that:

*The question of international sovereignty is, of course, outside General Clark's authority. However, I should like to point out that in all instructions (SCAPINs) to the Japanese Government regarding authorization of areas for Japanese fishing*

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<sup>219</sup> USDOS 1950c.

<sup>220</sup> 208 U.N.T.S. 255

<sup>221</sup> SCAP, *supra*, note 91

<sup>222</sup> USDOS 1952c.

<sup>223</sup> *Id.*; USDOS 1952a.

<sup>224</sup> USDOS 1954b.

*and whaling which were established under SCAP, there appeared a statement reading essentially, "the present authorization is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in area concerned or in any other area."*<sup>225</sup>

Nonetheless, the Joint Committee subsequently decided that the Liancourt Rocks no longer be used as a bombing range<sup>226</sup> due to the following reasons: the series of complaints lodged by Korea; existing danger derived from the continued usage of the Liancourt Rocks as a live bombing area; the growing concerns over the fact that the United States might be involved in a territorial dispute as well as adverse publicity and/or legal action in the event that fishermen, who used the Liancourt Rocks occasionally, were killed or injured by bombs;<sup>227</sup> and, the fact that the decision to use this isolated pile of rocks as a bombing target was made in Tokyo, and since continued use of the islands for this purpose had potentially explosive political implications.<sup>228</sup>

As to the allegation of the Korean Defence Minister to the effect that the United States recognised Korean sovereignty over the Liancourt Rocks, citing an alleged note from General Weyland, Commanding General of the United States' Far Eastern Air Force (CGUSFEAF), declaring that in future no practice bombings would be made around the island, the US Embassy in Korea denied any knowledge of the alleged Weyland letter, and reiterated the previous US position that the Liancourt Rocks were not subject to Korean jurisdiction.<sup>229</sup> The US Embassy in Korea further noted that ownership of the Liancourt Rocks was in dispute and therefore felt that clarification of its exact status would depend initially on the outcome of negotiations between Korea and Japan.<sup>230</sup>

The United States also opined that the US acceptance of the Liancourt Rocks from Japan as a "facility and area" under the Administrative Agreement would not seem of significance in committing the United States to the view that Japan retained the island, in light of the fact that after Korean protests against "our dropping bombs on the island, we informed the Koreans that we were dispensing with the use of the Liancourt Rocks as a bombing range."<sup>231</sup>

Beyond the incidents derived from designating the Liancourt Rocks as a bombing target mentioned earlier, there were a series of incidents around the Liancourt Rocks in which Korean police allegedly fired on Japanese vessels after 1953 when a group of Korean voluntary forces started to permanently station on the islands. There were also a series of correspondences between Korea and Japan as to these firing incidents. Japanese Foreign Office was usually used to deliver notes to the Korean mission: One protested the incident and

<sup>225</sup> USDOS 1952a; *See also*, USDOS 1952f.

<sup>226</sup> USDOS 1953b.

<sup>227</sup> USDOS 1952a.

<sup>228</sup> USDOS 1952g.

<sup>229</sup> USDOS 1953c. *See also*, USDOS 1953d. (Exhaustive search by Department and Defense reveals no record alleged Weyland letter); USDOS 1953b (in any event there has been no official US statement recognising Republic of Korea sovereignty over islands).

<sup>230</sup> USDOS 1952h; *See also*, US Embassy in Korea 1952.

<sup>231</sup> USDOS 1954b.

demanded immediate withdrawal of Koreans from the islands; the other gave detailed explanation of Japanese claim to sovereignty, including historical argument, provisions of the San Francisco Peace Treaty, and the fact that the Liancourt Rocks was previously included in the list of facilities required by US forces.<sup>232</sup> Upon receiving the notes of protest from Japan regarding the Liancourt Rocks, Korea also responded in the same manner.

### 3.6 Appraisal

It is admitted, under certain conditions, that events occurring after the critical date may be admissible;<sup>233</sup> therefore, to formulate and decide the critical date is not always a clear-cut matter operating in watertight compartments, thus calling into question the idea of generalising the concept of critical date.<sup>234</sup> Thirlway also declares:

*In the event of a dispute over a territory which had been the subject of a treaty or an arbitral award, the issue would presumably be what was the precise effect, or the correct interpretation, of the treaty or the award[.] Thus the possible effect, as acts of asserted sovereignty over the territory, of events before or after the treaty or the award, would not be in question, and no 'critical date' would be needed to distinguish those which could be taken into account and those which could not.*<sup>235</sup>

The 1966 award in the *Arbitration between Argentina and Chile*,<sup>236</sup> followed in the *Eritrea-Yemen Arbitration*,<sup>237</sup> accordingly examined all available evidence, irrespective of the date of the acts to which such evidence relates.<sup>238</sup>

In the case of the Liancourt Rocks, however, the critical date should be 1905 when Japan incorporated the Liancourt Rocks, independently of the fact that: first, recent developments in which Korea has taken advantage of its actual occupation of the Liancourt Rocks after the proclamation of the Rhee Line of 18 January 1952; second, the period of Japanese colonisation of Korea between 1910-1945, and its related period beginning from 1904; and third, the period during which US armed forces controlled the Liancourt Rocks and used them as a bombing range following Japan's surrender, between 1945-1953. This is the more so that the territorial clause on the Liancourt Rocks in the *San Francisco Peace Treaty* can not be construed in an unswerving manner due to the sharply contradictory descriptions in its drafts, despite the fact that the drafters viewed that the treaty left the Liancourt Rocks to Japan at the later stage.

<sup>232</sup> USDOS 1953e.

<sup>233</sup> Brownlie 2000: 3; Brownlie 1998: 128.

<sup>234</sup> Jennings 1963: 31-5.

<sup>235</sup> Thirlway 1995.

<sup>236</sup> *Argentina v. Chile* (Dec. 9, 1966), 16 *R.I.A.A.* 111, 115; 38 *I.L.R.* 16, 20 (1969).

<sup>237</sup> *Eritrea-Yemen Arbitration*, *supra*, note 75, para.95.

<sup>238</sup> However, it should be recalled that in the *Eritrea-Yemen Arbitration*, the arbitrators discounted enormous historical records and, instead, relied more on recent events; an approach which Brownlie has reservations about. *Eritrea-Yemen Arbitration*, *id.*, paras.450, 503, 522; Brownlie 2000: 9-10.

In conclusion, the question which claimant has lawful territorial sovereignty or ownership over the Liancourt Rocks takes us back to the question whether the Liancourt Rocks belonged to Korea prior to Japan's alleged 1905 incorporation. In other words, again, it is the issue of the degree of probative value of historical evidence produced by Korea, which outweighs that of Japan.

#### **4. Further Observations on the Territorial Dispute over the Liancourt Rocks**

##### **4.1 The United States' Response to the Territorial Dispute over the Liancourt Rocks**

Despite the US view that the *San Francisco Peace Treaty* left the Liancourt Rocks to Japan, and had so informed the Korean Ambassador in Washington,<sup>239</sup> it was also evident that the United States was aware of the fact that its status was unsettled and in dispute.<sup>240</sup> Accordingly, it seemed highly doubtful that the United States would wish to become involved in the controversy by taking a position as to whether Korea or Japan had sovereignty over the Liancourt Rocks. Thus:

*There can be no question that the United States has committed itself to an attitude in this matter. However, I fail to see that the commitment carries with it the obligation to intervene between two contestants who are now sovereign nations and who have available to them ample machinery for settlement of such disputes. I cannot believe that a dispute of such essentially unimportant nature will lead to a situation serious enough to justify an intervention by us which could only create lasting resentment on the part of the loser. This is certainly no time to exacerbate our relations with either country. I think that this hands-off position should be maintained regardless of the validity of the claim of either party. I think that the Department is on firm grounds in maintaining that the United States Government is "not legitimately involved in this matter" as has already been pointed out in the Department's note to the Embassy.<sup>241</sup>*

Although the United States proclaimed that it would not become involved in any territorial dispute arising from the Liancourt Rocks, in view of the position already taken by SCAP, by the Assistant Secretary of State Dean Rusk in Note dated 10 August 1951 to Korean Ambassador in Washington D.C.,<sup>242</sup> and by designating these rocks as Japanese facility by a US-Japan Joint Committee,<sup>243</sup> the United States is already "*inescapably involved*" in the

<sup>239</sup> USDOS 1951r.

<sup>240</sup> USDOS 1952c.

<sup>241</sup> USDOS 1953f; *See also*, USDOS 1952h.

<sup>242</sup> This position has never been formally communicated to the Japanese Government. USDOS 1953g.

<sup>243</sup> USDOS 1952i; USDOS 1952j; USDOS 1954c. (Minister Shigenobu Shima, Japanese Embassy in Washington, DC, noted that the US military forces in Japan had listed Liancourt Rocks as a military facility granted for their use under the Administrative Agreement and had later returned this facility to



Liancourt Rocks dispute.<sup>244</sup> Furthermore, under certain circumstances, if and when it should appear necessary for the United States to take a position on this issue, the position of the United States was to publicise the Rusk note and disclaim any desire to intervene in this matter.<sup>245</sup>

Both Korea and Japan, the two disputants, were well aware of the United States' hands-off policy toward the territorial dispute over the Liancourt Rocks. However, efforts to rely on the influence of the United States had continuously been attempted especially by Japan. The United States itself explored, particularly at the instance of Japan, several scenarios in the event that the need arose for it to play an active role in the resolution of the dispute. These included a request for US mediation, submission to the ICJ, submission to the UN Security Council, and even request for US military intervention based on security treaty.

This scenario was closely related with Japanese foreign policy, as the disputed Liancourt Rocks have been the subject of considerable discussion in the Japanese Diet. The following discourse in the Japanese Upper House Foreign Affairs Committee on 8 September 1954, provided the substance of an exchange on the Liancourt Rocks issue, with Ino Dan of the Liberals asking questions, as follows:

*Dan: The ROK's fired on a Japanese vessel from the Takeshima shore August 23. Did the Foreign Office protest this incident and what form did the protest take?*

*Nakagawa, Chief, Foreign Office Asian Bureau: The Foreign Office protested the invasion of Japanese territory, demanded an apology for the shooting incident and punishment for those responsible, and reserved the right to claim damages. The ROK Mission had already rejected the protest saying that the island was Korean territory; when the Japanese vessel failed to heed the warning to leave, the Koreans had been forced to open fire, the ROK Mission said.*

*Dan: What comes next?*

*Akiyama, Parliamentary Vice Minister for Foreign Affairs: Takeshima is of course Japanese territory. However, the use of force is undesirable and we hope to seek a settlement of the dispute by peaceful means, perhaps through a third country.*

*Dan: Suppose that doesn't work?*

*Akiyama: We are considering submitting the dispute to the International Court of Justice.*

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Japanese control. Mr. Shima said this appeared to constitute US recognition of the validity of Japan's claim.).

<sup>244</sup> USDOS 1953f; USDOS 1954c, *id.* (Mr. Sebald, Deputy Assistant Secretary, Far Eastern Affairs, expressed the view that it was important for Japan to keep its claim alive and not to permit its rights to be prejudiced by default. He suggested that a note to Korea or other periodic formal statements would serve this purpose.).

<sup>245</sup> USDOS 1953f, *id.*

*Dan: Such slow, ineffective methods accomplish nothing and help create the impression that Takeshima is actually Korean territory. I understand that the lighthouse which the Koreans have built on Takeshima has already been marked on US navigation charts.*

*Akiyama: This was merely done for safety's sake and has no relation to the question of territorial sovereignty over the island. We hope to settle the problem satisfactorily but as yet nothing concrete has developed.*

*Dan: What does the National Defense Agency think of this invasion of Japanese territory by foreign troops?*

*Makoto Yamada, Chief, Defence Bureau, NDA: We are consulting with other agencies concerned. It appears however that ROK units on Takeshima are police rather than "troops." It thus appears to be a problem of "illegal entry" rather than "invasion." And "police action" rather than "defensive measures" seems appropriate.*

*Dan: Whether the Korean forces are police or soldiers is irrelevant. The fact is that a Japanese vessel has been fired upon.<sup>246</sup>*

In the event that Japan requested the United States to act as mediator, the United States expected that it had to be with the concurrence of Korea.<sup>247</sup> Moreover, the United States would be placed in the embarrassing position, notwithstanding the facts in the case, of seeming to choose between Korea and Japan. In the circumstance, having regard to US commitments to both countries, the US would prefer to extricate itself from the dispute to the greatest extent possible.<sup>248</sup>

It is not unusual that various disputes concerning interpretation and enforcement of a peace treaty arise following its conclusion. Therefore, as is the case here, an article is included providing that such disputes which cannot be settled by diplomatic negotiations or other means shall be referred for decision to the ICJ at the request of any party to such disputes.<sup>249</sup> In respect of the option relating to the submission of the dispute to the ICJ, the United States believed that the difficulty with this plan would seem to be whether Japan could obtain the concurrence of Korea to join with Japan in presenting the dispute to the ICJ.<sup>250</sup>

Korea finds a reference to the ICJ unnecessary, since its position is that there is no question that Liancourt Rocks is Korean territory. It is interesting to note here that once a Korean diplomat was asked why, if Korea has such a good case, it is unwilling to submit the dispute to

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<sup>246</sup> USDOS 1954d.

<sup>247</sup> USDOS 1954e. (The United States would willingly name a mediator if both sides request it and show willingness to negotiate in good faith).

<sup>248</sup> USDOS 1953g; USDOS 1954c.

<sup>249</sup> Article 22 of the San Francisco Peace Treaty. *See, infra*, note 262.

<sup>250</sup> USDOS 1953g.

the ICJ. Although the Korean diplomat answered that “[T]his was out of the question: it was as if Korea claimed sovereignty over Kyushu and then asked an impartial tribunal to mediate the case”, he was also quite anxious to know what, if anything, the United States intended to do about Liancourt Rocks.<sup>251</sup>

The other concern of the United States was that offering its support to any proposal for submission of the dispute to the ICJ would be interpreted as a reversal of the US position made known to Korea in an unpublished US note of 10 August 1951, to the effect that the island belongs to Japan.<sup>252</sup> This is particularly so in view of the strong Japanese position that by omitting Liancourt Rocks from territories in respect of which Japan expressly renounced its ownership in the *San Francisco Peace Treaty*, Japan retained the island. Additionally, the United States recognised Japanese interest by accepting Liancourt Rocks as “*facility and area*” under administrative agreements for bombing range. As a result, any contrary assertion could give rise to doubts about US intentions in these fundamental and basic documents.<sup>253</sup> Nevertheless, it is also evident that referring the Liancourt Rocks dispute to the ICJ was an alternatively desirable resolution idea for the United States.<sup>254</sup>

Japan was also considering the possibility of bringing before the Security Council the dispute over the Liancourt Rocks with a view to obtaining a Security Council recommendation that the dispute be taken to the ICJ.<sup>255</sup> Japan had in late September of 1954 formally suggested to Korea that the issue be taken to the ICJ for arbitration, and that in a Note Verbale of October 28, 1954 Korea had stated its refusal. Since the dispute cannot be brought before the ICJ without Korean consent, Japan thought a recommendation by the Security Council that the matter should be put before the ICJ would at least focus world opinion on the fact that Japan was willing to permit impartial consideration of the merits of the dispute, while Korea was not.<sup>256</sup>

As to this idea, Mr. William Jones of the US Department of State stated that the proposed Japanese action would serve little practical purpose and that any small satisfaction which Japan might gain on moral grounds would be far outweighed by the increased agitation in Korea-Japan relations. He added that it would be most unfortunate if Japan undertook any action now which might disturb the situation to Japan’s ultimate loss.<sup>257</sup>

Japan interpreted that the Korean occupation of the Liancourt Rocks and the capture of Japanese vessels around the area obviously constituted a violation of Japan’s sovereignty and would seem to occasion the invocation of the US-Japan Security Treaty and Administrative

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<sup>251</sup> USDOS 1954a.

<sup>252</sup> USDOS 1954b.

<sup>253</sup> USDOS 1953h.

<sup>254</sup> For example, one of the memoranda stated: “*Issue seems less acute at moment so perhaps no action on our part required. However in case issue revived believe our general line should be that this issue, if it cannot be settled by Japanese and Koreans themselves, is kind of issue appropriate for presentation International Court of Justice.*” in USDOS 1953i.

<sup>255</sup> USDOS 1954c.

<sup>256</sup> USDOS 1954f.

<sup>257</sup> *Id.*

Agreement.<sup>258</sup> A request for possible US military intervention, however, was answered in the negative:

*The Liancourt Rocks case appears to have aspects in common with that of Shikotan Island, off the coast of Hokkaido, which was occupied by Soviet troops in 1945. We have publicly declared our view that this Island belongs to Japan, but no one in Japan or elsewhere seriously expects us to take military action under the Security Treaty to reclaim this Island for Japan. I think we need not feel undue anxiety even in the unlikely contingency that Japan should invoke the Security Treaty with respect to the Liancourt Rocks.*<sup>259</sup>

In sum, the United States maintained its position according to its preferential order as follows: first, the United States would take no action inasmuch as both governments would try to settle the dispute by direct negotiation; second, if the Japanese Government requested the US Government to act as a mediator in this dispute, the United States would refuse, and instead suggest that the matter might appropriately be referred to the ICJ. The United States could inform the Japanese Government that this procedure might be preferable to submitting it to the United Nations; and third, if the Japanese Government requested the legal opinion of the US Government on this question, the United States would make available to the Japanese Government the US position on the Liancourt Rocks as stated in the Rusk note of August 10, 1951,<sup>260</sup> and recommend adjudication by ICJ.<sup>261</sup>

## 4.2 Implications of the Treaty on Basic Relations between Korea and Japan

Korea was not a signatory to the *San Francisco Peace Treaty*, thus, for this reason there would appear to be no legal basis to take the position that the *San Francisco Peace Treaty* provides a mechanism for dealing with the dispute. In other words, it cannot directly invoke Article 22 of the *San Francisco Peace Treaty vis-à-vis* Korea, since Article 22 was intended only to provide for settlement of disputes between parties to that treaty, as it reads:

*If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated 15 October 1946, a general declaration accepting the jurisdiction, without special*

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<sup>258</sup> USDOS 1953j; USDOS 1953k; USDOS 1953l.

<sup>259</sup> USDOS 1953f.

<sup>260</sup> USDOS 1953g.

<sup>261</sup> USDOS 1961b; *See also*, USDOS 1953i.

*agreement, of the Court generally in respect to all disputes of the character referred to in this Article.*<sup>262</sup>

It was suggested that Japan might have grounds for raising its claim to the Liancourt Rocks under 'Exchange of Notes concerning the Settlement of Disputes between Korea and Japan',<sup>263</sup> the accompanying instrument with the *Treaty on Basic Relations* of 1965 for normalisation of diplomatic relations between Japan and Korea, which provided that both parties agreed to settle a dispute first through diplomatic channels, then arbitration if the former failed.<sup>264</sup> In light of this provision there might be grounds for a positive effort to impel Japan to negotiate meaningfully and constructively with Korea, though the expectations that Korea would agree with Japan is literally nil. Korea maintains the view that the issue of Liancourt Rocks was not taken as an agenda, and thus, there is no merit in linking the issue of the Liancourt Rocks with the *Treaty on Basic Relations*.

## 5. Conclusions

For Japan, the territorial dispute over the Liancourt Rocks is one of three disputes that she is currently engaged in. The implication of this multilateral character of the territorial dispute over the Liancourt Rocks, together with the domestic political influence linked with it, is most certainly an impediment, on Japan's part, to the resolution of the dispute. Indeed, a one-time Japanese Foreign Office's Asian Bureau Chief, Eiji Wajima, is reported to have remarked that Japan took a strong stand on the Liancourt Rocks issue on account of domestic political pressure, much of it stemming from a Diet member from Shimane Prefecture.<sup>265</sup> For Korea, its deep-rooted historical bitterness against Japan, and paralleling amount of nationalistic approach to the issue, impedes the resolution of the territorial dispute over the Liancourt Rocks.

Be that as it may, it is imperative that the disputants approach the issues through dialogue and a spirit of compromise. An all-or-nothing approach, which obviously does not reckon with the mutual interests of the disputants, will only aggravate an already precarious situation. Therefore, it is suggested that various confidence building measures (CBMs), including joint development of the disputed maritime zone for the mutual benefit of all the affected parties, should be engendered first, instead of a hasty emphasis on the question of ownership of the Liancourt Rocks. Finally, every effort should be made to determine the real worth of the

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<sup>262</sup> SF Peace Treaty, *supra*, note 23.

<sup>263</sup> Reprinted in 10 *Japanese Annual Int'l L.* 322-23 (1966).

<sup>264</sup> *Id.* ("... Unless otherwise agreed, the two Governments shall settle any dispute between the two countries primarily through diplomatic channels and, when they fail to do so, shall seek settlement by conciliation in accordance with procedures to be agreed upon between the two Governments. ...").

<sup>265</sup> USDOS 1953m; See also, USDOS 1953n (Mr. Wajima also apologised for the notes which the Japanese Foreign Office had been forced by domestic pressure to send, and hoped that the Korean Government would not be offended by the rather strong language which the notes contained.).

Liancourt Rocks instead of placing undue reliance, as is presently the case, on exaggerated notions of what is at stake.

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