



PUBLICATIONS ON OCEAN DEVELOPMENT

DOKDO

**Historical Appraisal and
International Justice**

**edited by
Seokwoo Lee
and Hee Eun Lee**

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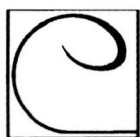
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Dokdo



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*A Series of Studies on
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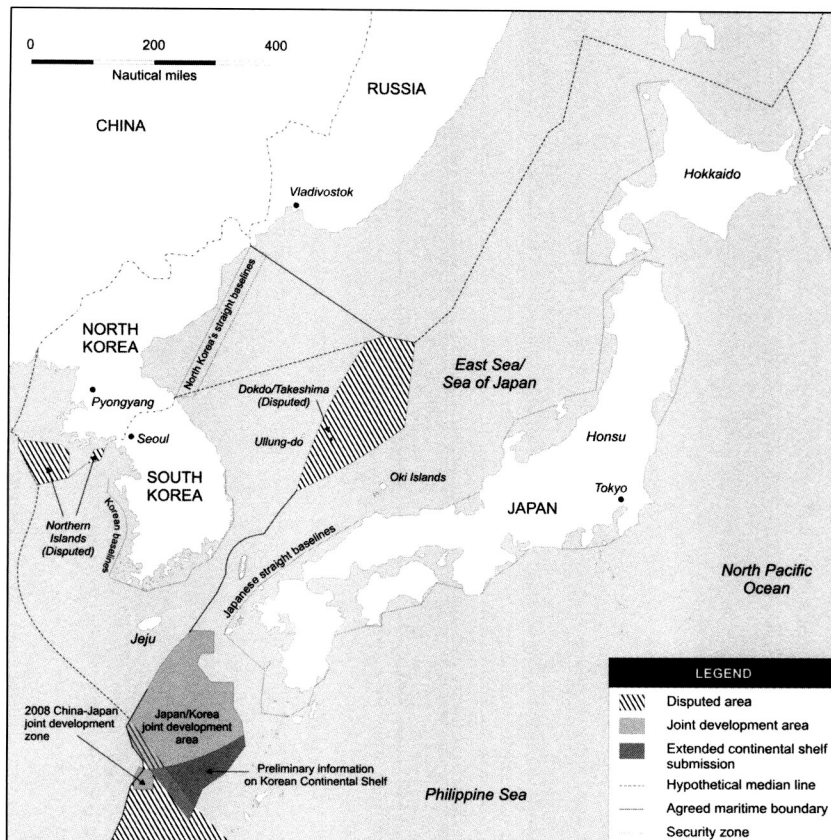
To Yoon, my best friend and loving wife
– Seokwoo Lee

*To Grace, my best friend and loving wife, and to our two boys,
Jae Deok and Jae Huel*
– Hee Eun Lee

Preface

This book is based on selected papers from two international conferences on Dokdo. Dokdo is the rocky islet in the East Sea (Sea of Japan) which is currently disputed between Korea and Japan as both claim sovereignty over Dokdo. It is 87.4 kilometers (km) from the Korean island of Ulleungdo and 157 km from the Oki Islands of Japan and located 215 km from the Korean mainland and 211 km from the Japanese main island, Honshu at N 37°14", E 131°52". Formed from volcanic activity, Dokdo is comprised of two large rocky masses that are referred to by Korea as Dongdo (East Island) and Seodo (West Island) which are surrounded by thirty-two smaller outcroppings having a total area of 180,902 m².

As Director of the Inha International Ocean Law Centre, Inha University (Incheon, Korea), Professor Seokwoo Lee undertook two international conferences on Dokdo. The first was held in Seoul in 2007; and a second in Seoul in 2008. The title of the 2007 conference was "Towards a Framework for the Resolution of the Territorial Dispute between Korea and Japan over Dokdo," and the 2008 conference was entitled "Dokdo: Historical Appraisal and International Justice." The title of this book was named after the 2008 conference. Professor Seokwoo Lee and Professor Hee Eun Lee of Handong International Law School (Pohang, Korea) co-edited this volume.



Territorial Disputes over Islands in East Asia

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Chapter I

Overview – “Dokdo: Historical Appraisal and International Justice”

Seokwoo Lee and Hee Eun Lee***

Since the conclusion of World War II, the legacy of Japanese militarism and colonialism in East Asia has left many unresolved conflicts, dividing parts of the region. There are currently three territorial disputes over islands in East Asia in which Japan is a disputant: against Russia, Japan continues to claim sovereignty over the Kurile Islands (Northern Territories); against China and Taiwan over the Senkaku Islands (Diaoyudao); and against Korea over Dokdo (Takeshima).¹ Deep-rooted historical bitterness between Japan and the other disputants impedes the resolution of these territorial disputes and still deeply influences international relations in this region.

The ongoing territorial disputes in East Asia, in particular over Dokdo, involve intertwined political and legal issues. Though it is not always easy to dichotomize 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.

As to Dokdo, Japan specifically affirmed its claim to Dokdo by officially incorporating it into Shimane Prefecture in 1905. Japan opines that Dokdo was *terra nullius* in 1905 and therefore subject to occupation. Korea asserts that historical documentation proves that Dokdo belonged to Korea prior to Japan's alleged 1905 incorporation, thereby attacking Japan's contentions that

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¹ The names of these territories are also subject to dispute: Russia refers to the islands as the “Kurile Islands” while Japan denotes the area as the “Northern Territories;” China and Taiwan use the terms “Diaoyudao,” “Diaoyutai,” or “Diaoyu Islands” while Japan refers to it as the “Senkaku Islands;” and finally, “Dokdo” is the Korean designation while Japan refers to it as “Takeshima”. Dokdo is also referred to by some as the “Liancourt Rocks”. The editors of this volume acknowledge that each chapter author either uses both names designated by each country or uses only one designation.

the Liancourt Rocks were *terra nullius*. Korea regained its independence in the aftermath of the Second World War, and Japan specifically renounced its claims to several named islands in the East Sea (Sea of Japan) when it signed the San Francisco Peace Treaty. However, the treaty did not specifically address the status of Dokdo. Thus, for almost sixty years the two sides have exchanged unilateral declarations of sovereignty over the tiny islands.

The determination of Dokdo's ownership is, however, not the sole purpose of this book. Beyond the question of ownership of Dokdo, this book will provide a broad framework for better appreciation and resolution of the territorial disputes that bedevil the East Asian region, and the bilateral relationship between the claimants in particular. Thus, a need has long been felt among international lawyers, historians, and policymakers in Korea, Japan, and in Asia and beyond, for a resolution of the territorial dispute between Korea and Japan over Dokdo. In such circumstances, it is imperative to clarify the relevant historical facts and develop new norms to address the very nature of the Dokdo dispute. This will be critical for formulating a broader framework for the appreciation of the nature of the territorial dispute over Dokdo.

For this purpose, it is well worth noting that there is no denying the undeniable fact that the legacy of the past looms large in our thinking when we look back over the history of the territorial dispute over Dokdo. A few points will illustrate these crucial factors:

- From Korea's perspective, as a past victim of Japanese aggression, the Japanese claim to a right to Dokdo can be construed as its intention to invade or to carry out a second act of aggression.
- During the Russo-Japanese War, Japan incorporated Dokdo into its own territory. Indeed, it denied Dokdo to Korea with the use of its military power.
- Korea has a tremendous amount of evidence that Korea had occupied and effectively controlled Dokdo historically. However, what is more important is the historical fact that Japan incorporated Dokdo into its territory for military purposes.
- Considering the provocative nature of a series of acts by Japan, including homage at the Yasukuni Shrine, distortion of history textbooks and the Dokdo issue, these acts project a nationalistic tone of the Japanese government and its efforts to justify past aggression. It can also be understood from a historical perspective as a challenge to the future order of Northeast Asia.

Recently, groups of scholars have proposed ideas to resolve the Dokdo issue based on their understanding of the nature of the dispute. These proposals can be categorized into the following four approaches: first, a practical approach which includes the separation of the sovereignty issue from the allocation of maritime zones and other salient issues; second, an approach which looks to

Japanese territorial disputes involving the Kurile and Senkaku Islands to address the Dokdo issue; third, an approach which emphasizes the U.S. role for resolving the Dokdo issue; and fourth, an approach which stresses the historical background of Japanese colonialism over Korea and its linkage with the Dokdo issue.

Among the abovementioned approaches, the papers presented in this book are based on the first three approaches. However, the approach that emphasizes the historical background of Japanese colonialism over Korea and its connection with the Dokdo issue is not fully reflected here. This largely comes from learned Japanese scholars who have addressed different aspects of the historical legacy of Japanese colonialization on the Dokdo dispute. Given their importance, we summarize them below.

Japan's colonial ambitions have shaped these scholars' perspectives on how to characterize Japan's actions regarding Dokdo in 1905. There has been a view expressed in Japan that the acquisition of Dokdo by the Meiji government as it was incorporated into Shimane Prefecture was for military reasons as a precursor to Japan's eventual annexation of the Korean peninsula.² After Dokdo was declared a part of Japanese territory in February of 1905, later that same year, Korea was forced by Japan to become its protectorate which was followed by annexation five years later.³ From a Korean point of view, it is quite reasonable to see a chain of events beginning with Japan's acquisition of Dokdo that led to a period of great suffering for Koreans at the hands of Japan. This view has led to an understanding in Japan that from Korea's perspective, the taking of Dokdo was the first step towards Japanese colonialization and thus, a potent symbol of Japan's conquest of the Korean peninsula.⁴

Given this perspective, these Japanese scholars have put forward calls for a more pragmatic approach on the part of the Japanese government to resolve the Dokdo dispute. They view Japan's claims over Dokdo as an impediment for Japan in attaining a number of important foreign policy objectives related to North Korea, including resolving the issue of Japanese citizens who were abducted by North Korea in the 1970s and 1980s, North Korea's nuclear program, and fishing rights around Dokdo.⁵ They see a need for cooperation with Seoul as more important than pursuing Dokdo, which only provoked South Korea to the detriment of Japanese interests. Others want both countries to

² Yoshibumi Wakamiya, *Who is smiling at the latest row?*, THE ASAHI SHIMBUN (July 30, 2008).

³ Yoshibumi Wakamiya, *Dare we dream of friendship island?*, THE ASAHI SHIMBUN (April 2–3, 2005).

⁴ Kentaro Serita, *The Takeshima Dispute: A Radical Proposal*, 34 JAPAN ECHO 32, 36 (2007); Wakamiya, *supra* note 2.

⁵ *Id.*

engage in dialogue as opposed to taking a confrontational stance on the question of sovereignty.⁶ There has also been a call for Japan to withdraw its claim to Dokdo and recognize Korean sovereignty “in the spirit of repentance” for Japan’s colonial rule over Korea.⁷

These scholars generally accept the Korean view that Dokdo was wrongfully taken by Japan in 1905. Considering the historical evidence of Korea’s sovereignty against the official Japanese position that Dokdo was legally acquired by balancing the historical and legal arguments taken by both countries on the question of sovereignty over Dokdo, these scholars seek to shift the nature of the dispute from the existing entrenched historical and legal arguments to a simpler, present-day calculation of cost and benefit. By doing so, the conclusion reached by these scholars is that the dispute over Dokdo is not worth the cost to Japan.

The insights offered by Japanese scholars on the Dokdo dispute add greatly to the other approaches taken by the authors below to understand some of complexities and challenges of this particularly vexing territorial dispute in East Asia. The second chapter is by Harry N. Scheiber of the University of California, Berkeley, School of Law who offers a moral perspective on the Dokdo issue that considers both law and the history of Japan’s unjust treatment of Korea and the Korean people during the first half of the twentieth century. He notes that this treatment began with annexation and subsequent colonial rule and includes Japan’s actions during World War II and the crimes against human rights perpetuated by Japan during the war.

From this perspective, Professor Scheiber evaluates two key elements of Japan’s claim to Dokdo. The first is the context and timing of Japan’s seizure of Dokdo in 1904 and its eventual acquisition, which he concludes, cannot be valid since Japan’s conquest of Korea precluded any effective response from Korea. He then goes on to discuss the second element, which he identifies as Japan’s literalist interpretation of the 1951 San Francisco Peace Treaty. He argues that Japan’s positions in arguing that the Treaty omitted Dokdo from among the territories it had to give up and the Japanese view that any claims of reparations from those who suffered under Japanese rule were waived by the Treaty must be understood in light of the United States government’s interest in securing an early conclusion to U.S. occupation of Japan and Allied backing of a peace treaty that would be generous to Japan along with the U.S. policies in the region spurred on by the Korean War and the Cold War. In his view, the Treaty should be viewed not as providing the highest level of immunity as Japan maintains, but setting forth the minimum set of obligations Japan owes

⁶ Shinichi Arai, *We Need Solutions by Dialogue*, Keynote Speech at International Conference: Dokdo: Historical Appraisal and International Justice, Seoul, Korea (Nov. 18, 2008).

⁷ Haruki Wada, *Let’s Resolve the Dokdo Issue*, HANKYOREH (March 21, 2005).

to Korea. In his conclusion, Professor Scheiber offers a compelling scenario whereby Japan would come to terms with its past by abandoning its claim to Dokdo in connection with a formal apology and restitution to those it harmed while Korea would respond by agreeing to limit its claim to a territorial sea around Dokdo and compromise on fisheries and other resources in the Exclusive Economic Zone (EEZ).

In chapter III, Professor Jon M. Van Dyke of the University of Hawaii School of Law assesses Korea's claim to Dokdo, applying the international legal standards utilized by international tribunals. He examines the issue of delimiting the maritime boundary between Korea and Japan in relation to Dokdo and offers a possible solution for Korea to resolve the dispute. He argues that Korea has a stronger claim than Japan in light of: (1) the acts of sovereignty Korea exercised over Dokdo prior to 1905; (2) the acknowledgement by the Japanese in the late 19th century that Japan did not possess Dokdo; (3) the recognition from Japan that it did not have sovereignty over Dokdo prior to 1905 as it deemed Dokdo to be "*terra nullius*;" and (4) Korea's continuous occupation of Dokdo since the early 1950s. He adds that Korea's claim is bolstered by Dokdo's geographical proximity to the Korea's Ulleungdo (88 km) versus its distance to Oki Island, the nearest Japanese territory (158 km).

Notwithstanding the strength of Korea's position on the issue of sovereignty over Dokdo, Professor Van Dyke explains that Dokdo should not be used as a point of reference in delimiting the maritime boundary between the two countries. Applying the United Nations Law of the Sea Convention (UNCLOS) and examples from state practice, he believes that Dokdo should be viewed as a "rock" that cannot generate an exclusive economic zone. He adds that even if Dokdo is determined to be an "island" rather than a "rock," an international tribunal tasked to deal with the issue of delimitation would not give it much weight because of its small size and relative insignificance. A review of cases from arbitral tribunals and the International Court of Justice (ICJ) reveals that islands are not given much consideration in deciding maritime delimitation. Thus, because Dokdo is small, essentially uninhabitable, and has limited economic value, Professor Van Dyke concludes that the boundary should be established equidistant between the two countries, more specifically, at the median line between Korea's Ulleungdo and Japan's Oki Island which would put Dokdo on the Korean side of the boundary. Even though international law supports the position that Dokdo is Korean territory, a speedier resolution of the dispute with Japan will require Korea to present a multifaceted deal in which Japan could be viewed to have prevailed on some issues while having given in on other issues such as Dokdo's sovereignty.

In Chapter IV, Professor Seokwoo Lee of Inha University Law School provides an analysis of the effects of the San Francisco Peace Treaty of 1951 on three current territorial disputes over islands in East Asia in which Japan is a

disputant: against Russia, over the Kurile Islands; against China and Taiwan, over the Senkaku Islands; and against Korea, over the Liancourt Rocks/Dokdo. He observes that the Treaty failed to define the “Kurile Islands,” and further to specify the entity in whose favor Japan had renounced sovereignty over the disputed islands. Additionally, specific mention of the Senkaku Islands and the Liancourt Rocks did not appear in the territorial clauses of the San Francisco Peace Treaty. As a result, while all the interested parties marshal support for their cases from historical sources, Professor Lee points out that it cannot be denied that much of the uncertainty surrounding the territorial demarcation is a by-product of immediate post-World War II boundary decisions and territorial dispositions. He contends that the territorial dispositions established by the Treaty were in large part a reflection of the Allied Powers’ policy in the post-World War II territorial arrangements in East Asia. He explains that the Allied Powers were concerned more about their own geo-political and strategic interests than the interests of the local rival claimants in East Asia and their claims to title over specific territories: these neglected issues resulted in outcomes perpetuating the current territorial disputes in the region.

Professor Lee goes on to provide a careful examination of the drafts of the Treaty that defined the Treaty’s final terms regarding these disputed islands in East Asia. In his view, the territorial clause regarding the Kurile Islands can be interpreted as follows: first, the Soviet Union is the only recipient of the Kurile Islands envisaged by the Allied Powers; second, there were no agreed definitions of the “Kurile Islands” among the Allied Powers; and third, there are strong indications that the Allied Powers preferred not to resolve the matter of the ultimate disposition of the Kurile Islands in the Treaty. Moreover, he adds that the Senkaku Islands were not included as either Chinese and Taiwanese or Japanese territory by the drafters of the San Francisco Peace Treaty, and Article 3 of the Treaty did not, to the point of specificity, define the territories that were placed within the area of the United Nations trusteeship with the United States as the sole administering authority. Regarding the Liancourt Rocks/Dokdo, he posits that the territorial clause could indicate that the San Francisco Peace Treaty assigns the Liancourt Rocks to Japan. However, Professor Lee concludes that due to the contradictory nature of the various drafts of the treaty, Korea may still be free to establish that the “Korea” renounced by the Japanese in the Treaty included the Liancourt Rocks/Dokdo.

Professor Atsuko Kanehara of Sophia University follows in Chapter V with a proposal to resolve the dispute over Dokdo/Takeshima taken from the perspective of the law of the sea. She points out that although the two nations have competing claims to the Dokdo/Takeshima Islands, their ability to resolve past instances of conflict arising from the dispute over the boundary of each country’s EEZ shows the potential for a practical solution utilizing UNCLOS. She points to several areas where the two sides have demonstrated cooperation