The essential facts to understand Takeshima (3)

The Takeshima Dispute and International Law

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Cover photo: International Court of Justice (owned by the Takeshima Data Room of the Shimane Prefectural Government)

1. Introduction

Takeshima is a group of islands comprising two islands called Mejima Island (Higashijima Island) and Ojima Island (Nishijima Island) as well as dozens of small islands surrounding them. Takeshima is located in the Sea of Japan approximately 158 kilometers northwest of Oki Islands, at 37 degrees 14 minutes north latitude and 131 degrees 52 minutes east longitude, and belongs to Okinoshima-cho, Shimane Prefecture. Takeshima has a total area of 0.21 square kilometers, and each island of the archipelago is a volcanic island towering from sea level and surrounded by cliffs and precipices. In addition, Takeshima lacks vegetation and drinking water(1).

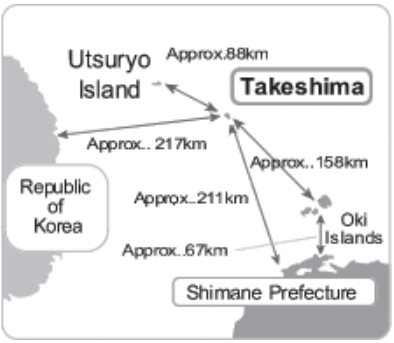
Takeshima is called "Dokdo" in the Republic of Korea (ROK). Currently, the ROK is shutting Japanese vessels and fishing boats out of waters surrounding Takeshima by permanently stationing armed policemen on the island. The ROK has been making the following assertions as the basis for such actions.

"Dokdo is an integral part of Korean territory, historically, geographically and under international law. No territorial dispute exists regarding Dokdo, and Dokdo is not a matter to be dealt with through diplomatic negotiations or judicial settlement.

The government of the Republic of Korea exercises Korea's irrefutable territorial sovereignty over Dokdo. The government of the Republic of Korea will deal firmly and resolutely with any provocation and will continue to defend Korea's sovereignty over Dokdo(2)."

In response, Japan has retorted as follows:

"Takeshima is indisputably an inherent part of the territory of Japan,



Surrounding Area

Location Map

Detailed Map
(All based on the website of the Ministry of Foreign Affairs of Japan
(https://www.mofa.go.jp/region/asia-paci/takeshima/index.html))

in light of historical facts and based on international law. The Republic of Korea has been occupying Takeshima with no basis in international law. Any measures the Republic of Korea takes regarding Takeshima based on such an illegal occupation have no legal justification.

Japan will continue to seek the settlement of the dispute over territorial sovereignty over Takeshima on the basis of international law in a calm and peaceful manner.

Note: The Republic of Korea has never demonstrated any clear basis for its claims that it had taken effective control over Takeshima prior to Japan's effective control over Takeshima and reaffirmation of its territorial sovereignty in 1905[3]."

As seen above, at least from the standpoint of Japan, "The dispute over the territorial sovereignty over Takeshima" (hereinafter referred to as "the Takeshima Dispute") has arisen because Japan and the ROK have made conflicting assertions over Takeshima. Japan is trying to settle the dispute "on the basis of international law[4]." Japan also cites "international law," along with historical facts, as the basis for its assertion that Takeshima is "an inherent part of the territory of Japan." International law is defined as "a set of laws governing relations within an international community whose main members are nations[5]." Then, how is international law related to the Takeshima dispute?

(1) The Ministry of Foreign Affairs of Japan, "Takeshima Information" (available at https://www.mofa.go.jp/a_o/na/takeshima/page1we_000014.html).
(2) The Ministry of Foreign Affairs of the Republic of Korea, "The Korean Government's Basic Position on Dokdo" (available at https://dokdo.mofa.go.kr/eng/dokdo/government_position.jsp).
(3) The Ministry of Foreign Affairs of Japan, "Japan's Consistent Position on the Territorial Sovereignty over Takeshima" (available at https://www.mofa.go.jp/region/asia-paci/

takeshima/index.html).

(4) This position has been clarified repeatedly in the Diet as well. For example, see (Answers by Shimokawa, the government's unsworn witness No.1, the Third Subcommittee, the Budget Committee, the 189th House of Representatives, dated March 10, 2015).

(5) ASADA Masahiko ed., *Kokusaihou*, Dai San-han (*International Law*, Third Edition), Toshindo, 2016, p. 4.

2. International Law and State Territory

The coverage of international law today indeed extends to every single issue that arises in the international community. With respect to the Takeshima Dispute, first of all, important rules relate to the scope of state territory and the definition of a state.

State territory comprises land territory, the territorial waters, and air space. State territory composed of these three portions represents one of the components of a state. Article 1 of the Convention on the Rights and Duties of States (Montevideo Convention), concluded by 16 nations of the Americas in 1933, defines a state as an entity that possesses a defined territory, a permanent population, government and capacity to enter into relations with the other states as the requirements of a state[6]. In other words, even when a group proclaims itself to be a "state," international law does not recognize it as a "state" unless a certain number of the population continue to live in a certain range of areas (land) – "territory" – and there exists a government that can govern the territory and population and establish diplomatic relations with other states[7].

Thus, in principle, a state without territory cannot exist in the international community. The fundamental element of state territory is the land territory. Since a certain sea area surrounding the territory is termed as territorial waters and the sky above the territory and territorial waters is termed as airspace, the territorial waters and airspace cannot exist without the land territory. In the first place, if there is not any land territory, "permanent population," another component of a state, have no place to live in[8].

The state sovereignty extends to state territory. Sovereignty is the authority that can govern and control all people and things that exist in

state territory and also the authority to act without being subject to other authorities[9]. Of sovereignty, rights related to state territory, such as the right to govern and the right to dispose of state territory, are called "Ryouiki Shuken" in Japanese, or territorial sovereignty[10].

And now, as seen in 1, Japan says that "the dispute over 'territorial sovereignty' over Takeshima" has arisen. "Ryouyuuken" is the Japanese term translated from the English term territorial sovereignty[11]. In other words, "Ryouyuuken" and "Ryouiki Shuken" have the same meaning. While "Ryouyuuken" is widely used as an everyday term, the term of "territorial sovereignty" seems to be often translated as "Ryouiki Shuken" or simply as "Shuken." In this booklet, we use the translated term of "Ryouiki Shuken," except for the case of direct quotes.

In light of rules of international law seen above, "the dispute over territorial sovereignty over Takeshima" is, in essence, the issue over the attribution of state territory, or the issue of which of Japan or the ROK Takeshima belongs to. It can be paraphrased as the issue over the scope of state territory and the extent to which the territorial sovereignty extends.

(6) As the provisions of the Convention apply only to the states that agreed to be bound by the Convention (the Parties to the Convention), this provision setting the definition of a state should essentially be observed only by the 16 signatory states of the Americas. However, originally, this provision is thought to be the written form of what had been recognized by the international community as a whole, made up of states at the time. Therefore, it is now "widely accepted as what has properly represented the eligibility requirements of a state." Asada, *supra* note 5, p. 83.

(7) YANAGIHARA Masaharu, *Kokusaihou (International Law)*, The Open University of Japan Foundation, 2014, p. 62.

(8) *Ibid.*, p. 98.

(9) Japanese Society of International Law ed., *Kokusai Kankeihou Jiten*, Dai Ni-han (*Dictionary of International Law for International Relations*, Second Edition), Sanseido,

2005, p. 455 (Written by TAKANO Yuichi).

(10) *Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II (1949), p. 838. Having said that, the territorial sovereignty that covers the territory, internal water and airspace and the territorial sovereignty that extends to territorial waters are not the same thing. For there is the system of the right of innocent passage for foreign vessels for territorial waters, not recognized for other territories. Yanagihara, *supra* note 7, p. 99.

(11) "Takeshima no ryouyuuken wo meguru mondai" is translated as "the dispute over territorial sovereignty over Takeshima," and "Ryouyuuken wo saikakunin" is translated as "reaffirmation of its territorial sovereignty." The Ministry of Foreign Affairs of Japan, "Japan's Consistent Position on the Territorial Sovereignty over Takeshima" (available at https://www.mofa.go.jp/region/asia-paci/takeshima/index.html). Incidentally, the ROK uses the translated term of "Ryoudo Shuken." The Ministry of Foreign Affairs of the Republic of Korea, The Korean Government's Basic Position on Dokdo" (available at http://dokdo.mofa.go.kr/jp/dokdo/government_position.jsp).

3. International Law Rules Concerning the Attribution of State Territory

(1) The Traditional Modes of Title to Territory

Then, what rules does international law set forth with respect to the issue of the attribution of state territory?

International law has responded to this issue by mainly developing rules for title to territory. Title to territory means facts that serve as a cause or basis for enabling the effective exercise of territorial sovereignty. Based on this title, a certain area belongs to a certain state, and the said state exercises sovereignty over there[12]. When the land becomes territory based on title to territory associated with the land, the waters surrounding the land become territorial waters, and the sky above the territory and territorial waters are to be regarded as airspace[13].

Titles to territory include the following forms.

a) Original Title or Historical Title

First of all, state territory that existed at the time of the formation of international law[14] is obviously recognized as territory of the said state. It is because international law is presumed on states already existing and was established as the "law of nations" that govern relations among those nations. The territories of the U.K. and France were explained as such[15]. The title in this sense is called "original title" or "historical title[16]."

In relation to the Takeshima Dispute, Japan, "in light of historical facts," and the ROK, "historically," assert that Takeshima/Dokdo is its own territory. This is interpreted as meaning the acquisition of title under the original title or historical title[17]. More specifically, this is the logic that Takeshima/

Dokdo was the land that belonged to Japan or the ROK even before modern international law born in Europe was accepted in East Asia and was recognized as its territory in the process of Japan and the ROK being incorporated into the modern international law order[18].

b) Occupation

Occupation means that a state, with an intention of possession, extends its effective control to an area over which no other state has extended its territorial sovereignty (*terra nullius*). The intention of the possession is expressed in such forms as a declaration by a state to incorporate a territory and a legislative or administrative measure. With respect to the effective control, the General Act of the Berlin Conference of 1885 provided that for the occupation to be held "effective," a state should establish authority in a region occupied sufficient to protect existing rights and freedom of trade and transit[19]. However, at present, the physical occupation to colonize and use the land in question is not always required but the social occupation where the state function is exercised on a daily basis[20]. The intention of the possession and the effective control both must be expressed or conducted by a state, and it is not sufficient for them to be expressed or conducted by a private individual[21].

However, at present, there are few *terra nullius* on the face of the earth, and in the future as well, *terra nullius* should exist only in extremely rare cases such as the emergence of an upthrusting new island on the high seas, the acquisition of title to territory through occupation is quite unlikely to occur.

Incidentally, Japan in modern times incorporated into Japanese territory through occupation of the Ogasawara Islands (October 1876), Ioto Island (September 1891), Kume Akashima Island, Kuba Island and Uotsuri Islands

(the Senkaku Islands) (January 1895), Minami-Torishima Island (July 1898), Oki-Daitojima Island (September 1900), and Nakanotorishima Island (August 1908)[22].

c) Prescription

Prescription means that a state effectively controls a territory of another state for a certain period of time peacefully and continuously. Occupation is intended for *terra nullius*, while prescription is intended for a territory of another state.

How long does it take for the expiry of prescription period? The Civil Code of Japan provides that "A person that possesses the property of another for 10 years peacefully and openly with an intention to own it acquires ownership thereof if the person was acting in good faith and was not negligent at the time when the possession started." But international law does not have any provision equivalent to this. Therefore, since the transfer of the title is thought to take place by the fact that the Parties concerned acquiesce in it, not by a lapse of time, there exists a view that does not recognize prescription as the title to territory[23].

d) Cession

Cession means that a state transfers a part of its territory to another state under a treaty. Forms of cession include a peace treaty (the cession of Taiwan to Japan under the Sino-Japanese Peace Treaty (1895)), donation (Congo in 1907), trade (Alaska in 1867, the Philippine Islands in 1898), and exchange (the Treaty of Saint Petersburg (1875))[24]. However, under modern international law, because of the prohibition of the use of force, in principle, a treaty concluded as a result of an action in violation of this principle is rendered null

and void *ab initio*[25]. Therefore, even when the cession was provided under such treaty, the treaty becomes null and void *ab initio*, and the title would not be transferred[26].

e) Annexation

Annexation means that a state transfers the entire portion of a territory to another state. Annexation may take place under an agreement but may also take place forcibly. However, like cession, when the annexation takes place under a treaty concluded in violation of the principle of the prohibition of the use of force, the title would not be transferred. When annexation takes place forcibly, it is interpreted as a broadly defined conquest (to be explained below), and it is considered to be null and void *ab initio* due to the prohibition of the use of force[27].

f) Accretion

Accretion means the title to territory to be acquired as a new land area is formed within state territory to increase a land area. Not only the case of the formation of a new land area as a result of a natural phenomenon, but also the formation of a land area by artificial means, such as coastal reclamation and construction of an island is recognized as accretion. By the way, as explained above, when an island emerges on the high seas that are not territory of any state, it becomes subject to occupation as *terra nullius*[28].

g) Conquest

Conquest means that a state, by using force, controls a part or all of the territory of another state. The requirement of conquest is the effective and definite control of another state's territory with an intention of possession.

In the modern international community where the use of force is regarded as illegal, conquest by the illegal use of force is not recognized[29].

(2) Potential New Title to Territory

A state that acquired title to territory by satisfying any of the modes of title to territory cited in (1) became able to turn a land area to which it had the title into its "territory" and exercise its territorial sovereignty over that territory. For example, when a certain land area is *terra nullius*, only the state that occupied it first can acquire the title to it. The traditional modes of any title to territory is the "system under which the title and title holder sets a single title to the territory in question[30]," and thus it was not assumed that the titles of several states "compete" between them and give rise to a dispute[31]. However, actually, the claims for the competing titles and disputes occurred as seen in the Takeshima Dispute. Moreover, facts involved are often complicated and varied, and disputes are often being caused by such complicated and varied facts. For example, in the case where occupation is claimed, it is generally extremely difficult to find facts necessary to determine whether the disputed land area was *terra nullius* or the territory of another state, or which state had exercised the effective control[32]. "Territorial disputes arise amid the competing titles simply because the titles to territory invoked by (the disputing Parties) as the basis for their territorial sovereignty are anything but unmistakably absolute and certain[33]."

As seen above, the traditional modes of acquiring title to territory does not necessarily provide a legal standard for eliminating a situation where the claims for title to territory compete over a certain land area, like the case of the Takeshima Dispute. This can be seen in the fact that an international court, when asked to help settle territorial disputes, did not necessarily depended on

the traditional title to territory but came up with its own standards to seek settlements in determining to which state the areas subject to the competing claims for title to territory should be attributed[34]. For example, in the *Island of Palmas case* of 1928, which is said to have great impact on posterity, the attribution of the disputed island was exercise or decided by ruling that "the continuous and peaceful exercise of the territorial sovereignty" is equivalent to title to territory and determining the superiority/inferiority in light of evidence submitted by the disputing Parties[35]. Also, in the *Eastern Greenland case* of 1933, the court held that the disputed area attributed to Denmark, based on the objective circumstance of Denmark's continuous and peaceful exercise or display of its territorial sovereignty as well as the subjective circumstance of the approval by Norway, of Denmark's exercise of its sovereignty[36]. "The continuous and peaceful exercise or display of territorial sovereignty" is equivalent to effective control, one of the requirements of the aforementioned occupation. However, neither of the above-cited award and judgment found that the disputed land area was "*terra nullius.*" In other words, the court and tribunal in these two cases did not decide the attribution on the basis of occupation.

As seen in the above cases, the international court and tribunal, instead of "regarding (traditional) titles to territory as absolute and drawing either one of them for applying to settle the territorial disputes, but rather by relativizing title to territory[37] and taking out elements at the core of them and comparing the conflicting views[38]," attributed the disputed areas to the states that presented the relatively more powerful arguments[39].

Then, what sorts of legal arguments presented are determined as "relatively more powerful"? Though there are many relevant judicial precedents, we cannot simply take up all of them because of limited space. Thus, below, we take up the *Minquiers and Ecrehos case*, which, it is pointed

out, has similarity to the Takeshima Dispute and to which references are made occasionally. We seek to close in on the actual points regarded as important in ICJ.

(12) Japanese Society of International Law ed., *supra* note 9, pp. 877-878 (Written by USUKI Tomohito).

(13) Yanagihara, *supra* note 7, p. 101. See also Marcelo G. Kohen and Mamadou Hébié, 'Territory, Acquisition', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, Oxford University Press, 2012, p. 888, para. 1.

(14) It is believed that "modern international law was gradually formed as the law governing relations among sovereign… modern states established following the collapse of medieval Christendom politically and spiritually unified by universal authority represented by the Pope and the Holy Roman Emperor." This happened roughly from the latter half of the sixteenth century to the early seventeenth century. TABATA Shigejiro, *Kokusaihou I*, Shinpan (*International Law I*, New Edition), Yuhikaku Publishing, 1973, pp. 14-15.

(15) Yanagihara, *supra* note 7, pp. 100-101. Aside from this, though we did not touch on this because it is not applicable to the Japan-ROK relations, there may be a case where a new state is established. Since the land territory controlled by the new state is regarded as the state territory, its attribution is determined without depending on the traditional title to territory. *ibid*., p. 101.

(16) Ian Brownlie, *Principles of Public International Law*, Seventh Edition, Oxford, p. 142.

(17) Ha Younsu, "'Takeshima Funso' Saikou – Ryouiki Kengen wo Meguru Kokusaihou no Kanten kara – (Rethinking of 'the Dispute on Takeshima Islands' – From the Viewpoint of International Law –)," *Ryuukoku Hougaku*, Volume 32, No.2, p. 228; Pae Keun PARK, "Nihon ni yoru Tousho Sensen no Shosenrei – Takeshima/Dokutou ni Taisuru Ryouiki Kengen wo Chuushin toshite – (Some Observations on the Territorial Incorporation of Islands by Japan with Special Reference to the Territorial Title over Liancourt Rocks (Takeshima/Dokdo))," *Journal of International Law and Diplomacy*, Volume 105, No.2, p. 176. Japan is believed to have asserted that "Takeshima is an inherent part of the territory of Japan since olden days. The most decisive factor in determining whether it is an inherent part of the territory or not is whether it was effectively controlled and managed," claiming "the existence of the original title and the acquisition of the title by the relatively strong, effective control and preoccupation." Ha, *op. cit*, pp. 232-233. This position is maintained even today, and a series of measures from "the cabinet decision dated January 28, 1905" to "the Shimane Prefecture Announcement dated February 22, 1905" were explained to have been taken as the

"reaffirmation" of the intention of the possession. The Ministry of the Foreign Affairs of Japan, "10 Points to Understand the Takeshima Dispute, p. 11. (available at https://www.mofa.go.jp/files/000092147.pdf). On the other hand, there is the view that there is no basis sufficient to conclude that the series of measures taken by Japan had such intention in comparison with the precedents of the incorporation of other islands by Japan, though it is "logically possible" for Japan to take the additional measures "in order to ensure territorial title to Takeshima/Dokdo in light of modern international law." Park, *op. cit*, pp. 188-189. "The precedents of the incorporation of other islands" means the measure to incorporate the Ogasawara Islands to be discussed below (see Note 22). Since Takeshima is not included in them, the aforementioned conclusion was reached.

(18) Park, *supra* note 17, pp. 176-177. Perhaps from such a viewpoint, Japan asserted that "the requirements of the acquisition of territory under international law are the intention of the possession of the territory as a state, a public announcement of the said intention and the establishment of a proper governing authority. However, since international law was not applicable to Japan prior to the opening of the state to the world, in those years, it is recognized as sufficient to claim the possession of Takeshima if Japan actually saw it as Japan's territory and treated it as Japan's territory and no other state disputed it." TSUKAMOTO Takashi, "Takeshima Ryouyuuken wo Meguru Nikkan Ryoukokuseifu no Kenkai (The Views of the Japanese and Republic of Korea Governments on the Territorial Sovereignty over Takeshima)," *The Reference*, June 2002, p. 60; TAIJUDO Kanae, "Takeshima Funsou (The Takeshima Dispute)," in TAIJUDO Kanae, *Ryoudo Kizoku no Kokusaihou (International Law on the Attribution of Territory)*, Toshindo, 1998, p. 143; SERITA Kentaro, *Nihon no Ryoudo (The Japanese Territory)*, Chuko Sosho, 2002, p.153.

(19) The General Act of the Berlin Conference was a treaty concluded by European states seeking to acquire colonies to adjust their conflicts of interest over Central Africa. FUJITA Hisakazu, *Kokusaihou Kougi*, Dai Ni-han (*The Lecture on International Law*, Second Edition), University of Tokyo Press, 2010, p. 241.

(20) *Ibid*., p. 242; Dong-hoon Kim et al., *Hoonbukku Kokusaihou*, Sai Kaitei Ban (*Hornbook International Law*, Re-revised Edition), Hokuju Shuppan, 1998, p. 84 (Written by SERITA Kenterou).

(21) Malcom N Shaw, *International Law*, Eighth Edition, 2017, Cambridge University Press, p. 372.

(22) Yanagihara, *supra* note 7, p. 103. It was later confirmed that Nakanotorishima is non-existent. *ibid*.

(23) *Ibid*. However, in the *Kasikili/Sedudu Island case*, the Parties (Botswana and Namibia) agreed on the acquisitive prescription being recognized under international law and the

conditions enabling the acquisition of the title to territory pursuant to the prescription. The Parties differed in their views on whether the conditions were satisfied in this case. The court held that since all facts of the case showed that the conditions were not satisfied, there is no need to pay attention to what status the prescription would have under international law or the conditions under which the title to territory could be acquired pursuant to the prescription. *Kasikili/Sedudu Island (Botswaana/Namibia), Judgment, I. C. J. Reports 1999*, pp. 1103-1105, paras. 94-97.

(24) KOTERA Akira, IWASAWA Yuji and MORITA Akio ed., *Kougi Kokusaihou*, Dai Ni-han (*International Law*, Second Edition), 2010, Yuhikaku Publishing, p. 245 (Written by YANAGIHARA Masaharu); TSUKAMOTO Takashi, "Kokusaihou kara Mita Takeshima Mondai (The Takeshima Dispute from the Perspective of International Law)," FY2008 *Takeshima Mondai wo Manabu (Learn about the Takeshima Dispute) Kouza (Lecture)*, the Transcript of the Fifth Lecture, p. 4.

(25) Article 52 (Coercion of a State by the threat or use of force) of the Vienna Convention on the Law of Treaties provides: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

(26) Fujita, *supra* note 19, p. 245; Kotera et all ed., *supra* note 24; Tsukamoto, *supra* note 24.

(27) Dong-hoon Kim et al., *supra* note 20, p. 85.

(28) Fujita, *supra* note 19, p. 250.

(29) *Ibid*., p. 245; Dong-hoon Kim et al., *supra* note 20, p. 84.

(30) Sookyeon Huh, "Ryouiki Kengen Ron Saikou (Ichi) (The Acquisition of Territory in International Law (1))," *The Journal of the Association of Political and Social Sciences,* Volume 122, No. 1/2, p. 36.

(31) Yanagihara, *supra* note 7, p. 106; SAKAI Hironobu, "Kokusai Saiban ni Yoru Ryouiki Funsou no Kaiketsu (Settlement of Territorial Disputes by International Courts and Trials)," *International Affairs*, No. 624, p. 11; Sookyeon Huh, "Ryoudo Kizoku Houri no Kouzou – Kengen to effectivité wo Meguru Gokai mo Fukumete (The Structure of Legal Principles for Territorial Attribution – Including the Titles and the Misunderstanding about *Effectivité*)," *ibid*., No. 624, p. 23; HAMAKAWA Kyoko, "Senkaku Shotou no Ryouyuu wo Meguru Ronten (Issues on the Title of the Senkaku Islands)," *Issue Brief*, No. 565, p. 2. It is believed that title to territory can be understood as "the absolute title" or "the *erga omnes* title" that have the recognizable "legal consequences of the attribution to territory and the exercise of territorial authority," as long as the requirements are satisfied. Kotera et al. ed., *supra* note 24, p. 261.

(32) Yanagihara, *supra* note 7, p. 106; Taijudo, *supra* note 18, pp. 139-140.

(33) Sakai, *supra* note 31, p. 11. For similar points noted, Kotera et al., ed., *supra* note 24, p. 262.

(34) G. Distefano, "The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law," *Leiden J.I.L.*, Vol. 19 (2006), p. 1048.
(35) *Island of Palmas Case*, *supra* note 10, p. 839.
(36) *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45-51, 73
(37) 'In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger.' *ibid.*, p. 46.
(38) SAKAI Hironobu, TERAYA Koji, NISHIMURA Yumi and HAMAMOTO Shotaro, *Kokusaihou (International Law)*, Yuhikaku Publishing, 2011, pp. 190-191.
(39) Shaw, *supra* note 21, p. 364.

4. Criteria for the Settlement of Territorial Disputes Presented in the International Court of Justice – Concerning the Minquiers and Ecrehos Case

There is no treaty that provides the attribution of Takeshima between Japan and the ROK[40]. And both States have asserted that they have possessed Takeshima/Dokdo since a long time ago. Thus, the Takeshima Dispute is described as "similar to the Minquiers and Ecrehos Case" before the International Court of Justice (ICJ) "in the sense that the contesting states are making competing claims by invoking historical facts"[41]. Therefore, some take the view that in order to settle the Takeshima Dispute, in line with the ruling in this case, there is no other way but to determine which of Japan or the ROK is presenting more powerful legal arguments[42].

We would choose this case from among a large number of judicial precedents because it has been previously pointed out that the Minquiers and Ecrehos Case has similarity and relevance with the Takeshima Dispute and that it is deemed to be an extremely important judicial precedent for Japan, which continues to "seek the settlement of the dispute over

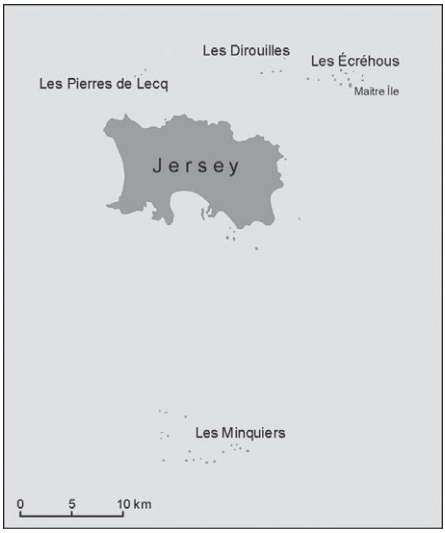


Chart: Locations of the Minquiers and Ecrehos (Detailed) (Based on the website Wikipedia (https://ja.wikipedia.org/wiki/チャンネル諸島#/media/File:Jersey-islands.png))

Chart: Locations of the Minquiers and Ecrehos (Broad Area)
(Based on the website Wikipedia (https://ja.wikipedia.org/wiki/イギリスの王室属領#/media/File:Wyspy_Normandzkie.png))

territorial sovereignty over Takeshima on the basis of international law in a calm and peaceful manner."

By the way, the ICJ has the function to decide in accordance with international law such disputes as are submitted to it (Statute of the International Court of Justice Article 38 (1)). Then, what sort of "international law" did the ICJ apply to pass its judgment on this particular case?

(1) Facts

The Minquiers and Ecrehos are a group of islets islands located between the Isle of Jersey included in the British Channel Islands and mainland France. Each of them comprises two or three habitable small islands, many of even smaller islets and hosts of rocks. The Ecrehos is located northeast of the Isle of Jersey and is the closest to the Isle of Jersey, 3.9 nautical miles measured from the rocks that are above the water at all times, and 6.6 nautical miles from the coast of France. The Minquiers is located south of the Isle of Jersey, 9.8 nautical miles from the same rocks and 16.2 nautical miles from mainland France. The Minquiers is located 8 nautical miles from the Chausey Islands which belong to France(43).

The United Kingdom (U.K.) and France had been in dispute over the attribution of the Minquiers and Ecrehos since the end of the nineteenth century. In December 1950, the U.K. and France concluded the Special Agreement, under which they agreed to settle the dispute at court. First of all, in the Special Agreement, the two states confirmed that differences have arisen between them as a result of claims by each of them to sovereignty over the islets and rocks in the Minquiers and Ecrehos groups and that they desire that these differences should be settled by a decision of the ICJ. On this basis, "The Court is requested to determine whether the sovereignty over the islets

and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic[44]."

The U.K. asserted that it is entitled under international law to full and undivided sovereignty over all the islets and rocks of the Minquiers and the Ecrehos groups. In response, France claimed that sovereignty over the islets and rocks of the Minquiers group and the Ecrehos group respectively belongs, in so far as these islets and rocks are capable of appropriation, to the French Republic. In consideration of such claims by both Parties, the Court stated at the outset that the Court has to determine which of the Parties has produced the more convincing proof of title to one or the other of these groups, or to both of them[45].

(2) The Nature of the Dispute

Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The Court, therefore, finds that the present case does not present the characteristics of a dispute concerning the acquisition of sovereignty over "*terra nullius*[46]."

(3) Points at Issue

a) An Ancient Title

The U.K. Government derives the ancient title invoked by it from the conquest of England in 1066 by William, Duke of Normandy[47]. By this conquest, England became united with the Duchy of Normandy, including the Channel Islands (including Minquiers and Ecrehos), and this union lasted until 1204, when King Philip Augustus of France drove the Anglo-Norman

forces out of Continental Normandy in 1202-1204. But the U.K. Government submits the view that all of the Channel Islands remained, as before, united with England and that this situation of fact was placed on a legal basis by subsequent treaties concluded between the English and French Kings[48].

In response, the French Government asserted that when the Duchy of Normandy was dismembered in 1204, the Ecrehos and Minquiers came to be held by the King of France, citing the same medieval Treaties as those invoked by the U.K. Government as the basis for its assertion[49].

As both Parties relied on the same treaties to make the conflicting claims, the Court examined whether these treaties contain anything which might throw light upon the legal status of the Ecrehos and the Minquiers. As a result, the Court held that common to all these treaties is the fact that they did not specify which islands were held by the Kings of England and France and that the Court would therefore not be justified in drawing from them any conclusion as to whether the Ecrehos and the Minquiers at the time were held either by the English or by the French King[50].

On the other hand, the Court focused its attention on the following facts. In 1200, the King of England issued a Charter granting to one of his Barons "to have and to hold" some islets of the Channel Islands "as fees." In 1203, this Baron granted to the Abbey of Val-Richer "the island of Ecrehos in entirety," stating that the King of England "gave me the islands." According to the Court, "this shows that he treated the Ecrehos as an integral part of the fief of the Islands which he had received from the King." Relying on other old documents and treaties, the U.K. Government submits the view that the Channel Islands in the Middle Ages were considered as an entity, physically distinct from Continental Normandy, stating that even after the dismemberment, the Ecrehos and the Minquiers were attributed to England

as part of the Channel Islands. In view of historical facts[51], the Court admits that there appears to be a strong presumption in favor of this British view. The Court does not, however, feel that it can draw from these considerations alone any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers, since this question must ultimately depend on the evidence which relates directly to the possession of these groups[52].

b) Original Title

Next, the Court considered France's assertion. The French Government claims that it derives the original title invoked by it from the fact that the Dukes of Normandy were the vassals of the Kings of France, and that the Kings of England after 1066, in their capacity as Dukes of Normandy, held the Duchy in fee of the French Kings[53]. The French Government further relies on a Judgment of 1202 of the Court of France and contends that the King of England was thereby condemned to forfeit all the lands which he held in fee of the King of France (including the whole of Normandy).

In response, the U.K. Government contends that the feudal title of the French Kings in respect of Normandy was only nominal. It also contests the validity, and even the existence, of the Judgment of 1202 cited by France, and asserts that even if such a judgment was validly pronounced against the English King, it could not have the alleged consequences.

These opposing contentions are based on more or less uncertain and controversial views, and on this point, it is, in the opinion of the Court, not necessary to solve these historical controversies. "The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following

years." Such an alleged original feudal title of the Kings of France in respect of the Channel Islands "could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement."

With regard to the Judgment of 1202 invoked by France, it is the opinion of the Court that, whatever view is held as to its existence, validity, scope, and consequences, it was not executed in respect of the Channel Islands, as the French Kings have failed to obtain possession of these Islands except for only brief periods.

As seen in a), France asserted that when Continental Normandy was occupied by the King of France and the Duchy of Normandy was dismembered in 1204, the Ecrehos and the Minquiers were attributed to France and have since remained with France. Noting that the Channel Islands were occupied temporarily by French forces during some years immediately following the events in 1204, and that Continental Normandy was reconquered by the English King and held by him for a long period in the fifteenth century, the Court states that it is difficult to see why the dismemberment of the Duchy of Normandy in 1204 should have the legal consequences attributed to it by the French Government. "What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups(54)."

c) Effects of the Fishery Convention

The Court examined three issues before considering the directly related evidence.

The first issue is an effect on the attribution of the Ecrehos and the Minquiers of a convention on fishery (particularly the oyster fishery between

the Island of Jersey and the neighboring coast of France) concluded by the Parties on August 2, 1839. It is common ground between the Parties that this convention did not settle the question of sovereignty over the Ecrehos and the Minquiers. But the French Government has submitted contentions that the islets and rocks of the Ecrehos and the Minquiers groups, being within the common fishery zone as so defined by the fishery convention, were subjected by the Parties to a regime of common user for fishery purposes, without the territorial sovereignty over these islets and rocks being otherwise affected by the said convention. Thus, the French Government asserts that the acts performed by each Party on the islets and rocks after the conclusion of the fishery convention are consequently not capable of being set up against the other Party as manifestations of territorial sovereignty, with the result that such sovereignty belongs today to that one of the Parties to whom it belonged before the date of the conclusion of the fishery convention.

The Court states it cannot admit that "such an agreed common fishery zone should necessarily have the effect of precluding the Parties from relying on subsequent acts involving a manifestation of sovereignty in respect of the islets." It says that since the fishery convention refers to fishery only and not to any kind of user of land territory, the Parties could equally have acquired or claimed exclusive sovereignty after 1839 and relied upon subsequent acts involving the manifestation of sovereignty.

The Court further points out that the above-mentioned contention of France as to exclusion of acts subsequent to 1839 is not compatible with the attitude which the French Government has taken since that time. France not only claimed sovereignty over the Ecrehos in 1886 and over the Minquiers in 1888, and later, but it has, in order to establish such a sovereignty, itself relied on measures taken subsequent to 1839, as referred to in related documents.

The Court notes that the Special Agreement of 1950 between the Parties requested the Court to determine to which Party sovereignty over the Ecrehos and Minquiers belongs at present, but France asserts the Court should determine to which Party sovereignty belonged in 1839, the assertion that the Court finds is not consistent with the Special Agreement. The Court concludes that it is therefore unable to accept the above-mentioned contentions as to the effects of the fishery convention of 1839 on the question of the sovereignty over the Ecrehos and Minquiers groups[55].

d) Critical Date

Another is the issue concerning the "critical date." The U.K. Government submits that, though the Parties have for a long time disagreed as to the sovereignty over the Ecrehos and Minquiers groups of islets and rocks, the dispute did not become "crystallized" before the conclusion of the Special Agreement of December 1950, and that therefore, this date should be considered as the critical date, with the result that all acts before that date must be taken into consideration by the Court. The French Government, on the other hand, contends that the date of the conclusion of the fishery convention of 1839 should be selected as the critical date, and that all subsequent acts must be excluded from the Court's consideration.

The Court recognizes that France for the first time claimed sovereignty over the Ecrehos and the Minquiers in 1886 and 1888, respectively and a dispute as to sovereignty over these groups of islets and rocks did not arise before those years. The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that matter to the issue of sovereignty over the Ecrehos and the Minquiers. Thus, at the time of the conclusion of the fishery convention, no dispute as

to the sovereignty over the Ecrehos and Minquiers groups had yet arisen. Having said that, however, in view of the special circumstances of the present case, the Court states that subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. Activity in regard to the Ecrehos and Minquiers groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner. In such circumstances, in the opinion of the Court, there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively(56).

e) Dependencies

Third, the Court examines the U.K. assertion that the Minquiers and Ecrehos are "dependencies of the Isle of Jersey" and as such the English sovereignty extended to these groups of islets and rocks. The U.K. Government has endeavored to show that the groups must be considered as dependencies of the Isle of Jersey by invoking several treaties that provided, "The terms 'British Islands' and 'United Kingdom,' employed in this Convention, shall include the Islands of Jersey, Guernsey, Alderney, Sark and Man, with their dependencies."

The Court states that these various clauses indicate that there are islands or islets which are dependencies of such Channel Islands as are enumerated, but dismisses the U.K. claim by saying that no evidence is produced showing that it was the intention of the contracting Parties to include the Ecrehos and Minquiers groups within the terms "British Islands" or "dependencies" or, on the other hand, to exclude the groups from these terms(57).

Based on this, the Court will now consider the claims of both Parties to sovereignty over the Ecrehos and begins with the evidence which relates

directly to the possession of the Ecrehos and Minquiers groups, considered to be "of decisive importance" by the Court.

f) Evidence that Relates Directly to the Possession of the Ecrehos

(i) "The English King treated the Ecrehos as an integral part of his fief"

First, the Court confirms that based on the aforementioned Charters of 1200 and 1203, the English King treated the Ecrehos as an integral part of his fief.

With respect to this point, the French Government contends that after the baron donated the Ecrehos to the abbey, the feudal link between the baron and the abbey was severed and that the Ecrehos no longer formed a part of the fief of the Channel Islands. According to France, the Ecrehos remained subject to the Duke of Normandy through the intermediary of the abbey situated on the French mainland, and that, when the King of France succeeded to the rights of the Duke of Normandy after the occupation of Continental Normandy in 1204, the abbey "passed under his protection, as did the Ecrehos, whose overlord he became."

In response to this assertion by France, the Court points out the following facts. It appears clearly from the Grand Coutumier de Normandie of the thirteenth century that such a grant did not have the effect of severing feudal ties. Thus, the donating baron continued to hold the Ecrehos as a part of his fief of the Channel Islands, together with the abbot as his vassal and the King of England as his overlord, and the King continued to exercise his justice and levy his rights in the donated land. This can be affirmed from the records of court proceedings conducted in 1309. The numerous court proceedings were designed to enquire into the property and revenue of the English King, and persons summoned were called upon to justify their possession of property[58]. The abbot was also summoned to answer regarding the investiture

(*advocatio*)[59] of the priory of the Ecrehos as well as rent. According to this ancient Norman custom, such a right of a patron to presentation of an ecclesiastical office was considered and treated as a *jus in rem*, inherent in the soil and inseparable from the territory of the fief to which it was attached[60]. When, therefore, the abbot was summoned before the King's Justices in Jersey to answer for this advocatio, it must have been on the ground that the Ecrehos, to which the advocatio was attached, was within the domain of the English King. And when the prior of the Ecrehos appeared as the abbot's attorney in answer to the summons, jurisdiction in respect of the Ecrehos was exercised by the Justices, who decided that "it is permitted to the said prior to hold the above-mentioned property (*premissa*) as he holds them as long as it shall please the lord the King."

The prior of the Ecrehos became involved in three other legal proceedings in Jersey in the years 1323 and 1331, and they show that there was a close relationship between the Ecrehos and Jersey at that time. And, in 1337, shortly before the outbreak of the Hundred Years War between England and France[61], the English King granted the letters of protection to ten priors of Jersey and Guernsey, including the prior of the Ecrehos, who was described as the "Prior of the Isle of Jersey *Acrehowe* (*Prior de Acrehowe de Insula de Iereseye)*." Such protection was apparently accorded to the prior of the Ecrehos because the priory of the Ecrehos was under the authority of the English King[62].

As seen above, it was confirmed that the Ecrehos was under English control up to the first half of the fourteenth century. On this basis, the Court proceeded with the examination of the manifold facts invoked by the U.K. Government. The Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation[63].

(ii) The exercise of criminal jurisdiction

According to the Court, while the relationship between the Ecrehos and Jersey became tenuous since the latter half of the fourteenth century, but from the beginning of the nineteenth century, the connection between the Ecrehos and Jersey became closer again because of the growing importance of the oyster fishery in the waters surrounding the Ecrehos(64). Of events that occurred in this period, the Court first of all focused on the exercise of criminal jurisdiction.

From 1826 to 1921, several criminal proceedings were instituted before the Royal Court of Jersey against crimes committed by persons of Jersey. According to the evidence submitted by the U.K., the Royal Court did not have jurisdiction against criminal offences committed outside the Bailiwick of Jersey, even when suspects were the U.K. subject residents in Jersey. Therefore, the Court recognizes that the Jersey authorities took action in these cases because the Ecrehos were considered to be within the Bailiwick of Jersey and that these facts show that Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years(65).

(iii) Exercise of Local Administration

Next comes the implementation of local administration. According to the evidence submitted, since about 1820, and probably earlier, persons from Jersey have erected and maintained some habitable houses or huts on the islets of the Ecrehos, where they have stayed during the fishing season. Some of these houses or huts have, for the purpose of parochial rates, been included in the records of the parish of Jersey, which have been kept since 1889, and they have been assessed for the levying of local taxes. The U.K. produced the rating schedules for 1889 and 1950 as evidence.

Furthermore, a register of fishing boats for the port of Jersey shows that the fishing boat belonging to a Jersey fisherman, who lived permanently on an islet of the Ecrehos for more than forty years, was entered in that register in 1872, the port or place of the boat being indicated as "Ecrehos Rocks," and that the license of that boat was cancelled in 1882 for the reason of unintended use. According to a letter from 1876, from the Principal Customs Officer of Jersey, an official of the Isle of Jersey visited occasionally the Ecrehos for the purpose of endorsing the license of that boat.

In addition, since 1863, it has been established that several contracts of sale relating to real property on the Ecrehos islets have been passed before the competent authorities of Jersey and registered in the public registry of deeds of that island.

In 1884, a custom-house was established in the Ecrehos by Jersey customs authorities. The islets had been included by Jersey authorities within the scope of their census enumerations, and in 1901, an official enumerator visited the islets for the purpose of taking the census.

The Court recognizes that these various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time(66).

(iv) Legislation

By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehos Rocks" were included within the limits of that port. The Court states that this legislative act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this act derogated from the fishery convention of 1839.

But this protest could not deprive the act of its character as a manifestation of sovereignty (The reason for that will be explained in g) *infra*)[67].

(v) Construction of Facilities

Of other facts, the Court states that it should be mentioned that Jersey authorities have made periodical official visits to the Ecrehos since 1885, and that they have carried out various civil engineering works and constructions there, such as a slipway in 1895, a signal post in 1910 and the placing of a mooring buoy in 1939[68].

(vi) Responses by France

The French Government has invoked the fact that the States of Jersey in 1646 prohibited the inhabitants of Jersey from fishing without special permission at the Ecrehos and the Chausey Islands, and that they restricted visits to the Ecrehos in 1692 because of the war between England and France. This shows, it is contended, that the Ecrehos were not considered as British territory. But the Court does not consider that this is the natural inference to be drawn from these facts.

The Court attached importance to the responses of France. In the course of the diplomatic exchanges between the two Governments in the beginning of the nineteenth century concerning coastal fishing, the French Ambassador in London addressed to the Foreign Office a Note, dated June 1820, attaching two charts purporting to delimit the areas within which the fishermen of each country were entitled to exclusive rights of fishery. In these charts, a line marking territorial waters was drawn around some parts of the Minquiers and the Ecrehos to indicate them as British. The other part of the Ecrehos apparently treated as *res nullius*, because, as described above, when the French

Government in 1876 protested against the British Treasury Warrant of 1875, it did not itself claim sovereignty over the Ecrehos, and sought to treat the Ecrehos as *res nullius*. A decade later in 1886, the French Government claimed for the first-time sovereignty over the Ecrehos[69].

In light of these facts, the Court recognized the following points and concluded that the sovereignty over the Ecrehos belongs to the U.K.

- The Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Islands which were held by the English King.
- In the beginning of the fourteenth century, the Ecrehos group continued to be under the dominion of the English King.
- British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the Ecrehos group.
- The French Government, on the other hand, has not produced evidence showing that it has any valid title to the Ecrehos group[70].

g) Evidence Relating Directly to the Possession of the Minquiers

(i) Exercise of jurisdiction

The U.K. asserted that as the manorial court in Noirmont took up several cases involving certain objects shipwrecked around the Minquiers between 1615 and 1617, the Minquiers group was part of the fief of Noirmont in Jersey.

Referring to the Grand Coutumier de Normandie, the Court states that as the jurisdiction of a local court such as the manorial court in Noirmont must have been strictly territorial and, in cases concerning wreck, limited to wreck found within the territory of its jurisdiction, it is difficult to explain its dealing with these cases unless the Minquiers were considered to be a part of

the fief of Noirmont, acknowledging the U.K. claim[71].

(ii) Implementation of Local Administration

On this matter, the Court recognized almost the same facts as with the Ecrehos, acknowledging that Jersey authorities have in several ways exercised ordinary local administration in respect of the Minquiers during a long period of time[72].

(iii) Construction of Facilities

With respect to this point as well, the Court recognized almost the same facts as with the Ecrehos[73]. Of other facts, the Court notes that Jersey authorities had made periodical official visits to the Minquiers since 1885, and that they have carried out various civil engineering works and constructions there, such as a slipway in 1895, a signal post in 1910, and a mooring buoy in 1939.

The evidence thus produced by the U.K. Government shows in the opinion of the Court that the Minquiers in the beginning of the seventeenth century were treated as a part of the fief of Noirmont in Jersey, and that British authorities during a considerable part of the nineteenth century and in the twentieth century have exercised State functions in respect of this group[74].

(iv) Responses by France

By his Note of 1820 to the Foreign Office, the French Ambassador in London transmitted a letter from the French Minister of Marine to the French Foreign Minister, in which the Minquiers were stated to be "Possessed by England (possédés par l'Angleterre)," and in one of the charts enclosed, the Minquiers group was indicated as being British territory. It is argued by the French Government that this admission cannot be invoked against it, as it was made

in the course of negotiations which did not result in agreement. However, the Court notes that it was a statement of facts, and the French Ambassador did not express any reservation in respect thereof, acknowledging that this statement must therefore be considered as evidence of the French official view at that time. As the fact to support that, the Court cited an official letter sent by the British Embassy in Paris to the French Foreign Minister in 1869. The British Embassy had complained about alleged theft by French fishermen at the Minquiers and referred to this group as "this dependency of the Channel Islands." France refuted the accusation against French fishermen but made no reservation in respect of the statement that the Minquiers group was a dependency of the Channel Islands. It was not until 1888 that France for the first time made a claim to sovereignty over the Minquiers.

In 1929 a French national commenced the construction of a house on one of the islets of the Minquiers in virtue of a lease to which French authorities consented. After the U.K. Government protested, the construction of the house was stopped. That it was stopped at the instigation of the French Government appears to follow from a 1937 official note from the French Ambassador to the Foreign Office, where it was noted that "the French Government, in spite of the slight distance between the Minquiers islands and the Chausey islands, did not hesitate, a few years ago, to prevent the acquisition of land on the Minquiers by French nationals."

The French Government invoked facts that it has assumed the sole charge of the lighting and buoying of the Minquiers, it constructed provisional signal lamps in the Minquiers, and the French Prime Minister and the Air Minister traveled to the Minquiers in order to inspect the buoy management, as the evidence directly relating to its possession. However, the Court does not find that these facts are sufficient to show that France has a valid title to the

Minquiers. As to the above-mentioned acts by France, such acts can hardly be considered as sufficient evidence to prove "the intention of the French Government to act as sovereign" over the Minquiers nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.

Thus, the Court is of opinion that the sovereignty over the Minquiers also belongs to the U.K.[75]

(4) Summary

Now, we would like to sort out the discussions above here.

(i) The Parties invoked several treaties, but the ICJ states that as none of them had any provisions referring to the status of the Minquiers and the Ecrehos, they provide no basis sufficient to draw out any conclusion on their attribution.

(ii) The Court states that neither an "ancient title" nor an "original title" is decisive with only evidence that does not relate directly to the possession, and it does not go any farther than leading to "a strong presumption sufficient to support the view" of the U.K. Nonetheless, the Court found that the original title asserted by France must have lapsed considering the subsequent historical events and it should be replaced by "another title valid according to the law of the time of replacement." As no responsibility was imposed to the U.K. to substantiate this, at this stage, it can be argued that the U.K. had an upper hand. In that sense, it would be important to more accurately and in a more convincing manner than the other Party, describe historical facts not contradictory to widely known historical evidence. If this can be done, it would be possible to obtain a

presumption that the "ancient title" and the "original title" continued to be held. Furthermore, this presumption can be interpreted as not to be overturned even when there was the period when people stayed away from the disputed territory and it was not possible to learn much about the situation surrounding it (in this case, the period from the latter half of the fourteenth century and the beginning of the nineteenth century) (see f) (ii) above[(76)]).

(iii) With respect to the fishery convention, both Parties acknowledged that it did not solve the issue of sovereignty over the Ecrehos and the Minquiers. However, since France requested that the acts after that not be considered in making judgment on the attribution issue, the Court considered its legal signification from this standpoint.

The Court rejected France's request, saying that the fishery convention did not concern the use of the land territory and that the French assertion is not consistent with the stance France has thus far taken. While the latter was the individual circumstances in this case, the former is worthy of attention as it showed the position of the Court on the relationship between the fishery convention and title to territory.

(iv) In settling a territorial dispute, it is important to set a date on which a dispute arose between the Parties concerned or the attribution of territorial sovereignty is deemed to have become definite. This date is called the critical date. Facts prior to this period are recognized as valid evidence sufficient to be the basis for title to territory and become subject to the Court's examination, but facts after this period are not to be considered[(77)].

The criteria for selection of the critical date include a date when a treaty was concluded or an event, that is the subject of a dispute,

occurred, a date when a settlement through negotiations and mediation as well as international courts and tribunals was proposed, a date when either of the Parties made a specific claim, and a date when a dispute became "crystallized[78]." The date when the dispute became "crystallized" means when "the Parties came into the state where they would no longer negotiate, protest or attempt to persuade the other Party[79]." The critical date is the concept that was advocated in order not to allow "first come, first served" and prevent any aggravation in the dispute.

In this case, the U.K. asserted that the critical date should be when the dispute was crystallized, i.e., when the Parties agreed to submit the dispute to the ICJ while France insisted that the critical date should be when the fishery convention was concluded. The Court found that the dispute over the territorial sovereignty arose when France claimed its sovereignty, i.e., over the Ecrehos in 1886 and over the Minquiers in 1888. In the opinion of the Court, up to then, the Parties had been in disagreement with regard to the exclusive right to fish oysters, but the territorial dispute had not yet arisen at the time of the conclusion of the fishery convention. While the Court states that it regards the date when either of the Parties made a clear claim as the "critical date," it believes that in view of the "special circumstances" of the present case, even acts that took place after the occurrence of the dispute should also be examined by the Court, "unless the measure in question was taken with a view to improving the legal position of the Party concerned." The "special circumstances" means that activity regarding the Ecrehos and Minquiers had developed gradually long before the dispute as to sovereignty arose and it has since continued without interruption and in a similar manner. With the Court taking such position, this case is regarded as the judicial

precedent where "a critical significance was not acknowledged in the selection of the critical date" on the condition of the existence of the "special circumstances[80]."

(v) Both Parties claimed that the Minquiers and Ecrehos are "dependencies" of nearby islets, but the Court rejected them due to the lack of evidence that clearly set forth said effect. Since this stance was maintained in subsequent cases, the claims of dependencies, it is believed, do not provide the ground that is enough to decide the attribution of the territorial sovereignty unless there exist documents such as treaties that expressly provided that the disputed islets are "dependencies of the island[81]."

(vi) As evidence directly relating to the possession, in addition to judicial records, tax imposition, land registration, enactment of relevant laws and construction of facilities, the Court refers to the responses by France. As we discussed each of them in detail above, we do not repeat them here, but there is one particular thing we would like to point out. It is that even if the same sorts of things such as construction of facilities were done, the Court states that those by France can hardly be considered as sufficient evidence that proves "the intention of the French Government to act as sovereign" or do not involve a manifestation of State authority. The Court came to this conclusion as France, based on earlier acts, is understood to have acknowledged the disputed territory as the U.K. territory. We suspect that the Court elected not to set the critical date as it apparently thought that by considering events that arose after the occurrence of the dispute, it could make its conclusions more convincing. At any rate, it should be noted that the Parties to the dispute must be prepared to be put to a considerable disadvantage if they took an action that acknowledges or

can be taken to acknowledge the sovereignty of the opposing Party.

(vii) In this case, sea charts that drew parts of the Minquiers and Ecrehos as the U.K. territory and those that drew the Minquiers as English territory were considered by the Court. However, the Court, rather than treating the sea charts themselves as evidence that directly relates to the possession, is believed to have given importance to the fact that France did not lodge a protest when the sea charts showed things disadvantageous to France(82).

By applying "international law" like this, the Court held that the territorial sovereignty over the Minquiers and Ecrehos is attributed to England. The Court did not say anything about the traditional title to territory such as occupation, due in part to the fact that the Parties did not refer to it in their assertions. Since the Parties did not raise any objection and instead, they made their respective assertions by taking this as a given, this can be considered as "international law" the Court applies to the settlement of a territorial dispute as in this case(83). If the Takeshima Dispute, which is similar to this case, is referred to the Court, the attribution of the territorial sovereignty will likely be decided in the same way.

(40) However, while the Treaty of Peace with Japan provides, "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet" (Article 2 (a)), the views are divergent as to whether the territories renounced by Japan include Takeshima. On this matter, see Taijudo, *supra* note 18, pp. 148-150; TSUKAMOTO Takashi, "Kokusaihouteki Kenchi kara Mita Takeshima Mondai (The Takeshima Dispute from the Perspective of International Law)," *Fujouri to Tatakau (Fight against Absurdity)*, Research Series, *Journal of Social Sciences*, Takushoku University, 2017, pp. 159-165.

(41) MINAGAWA Takeshi, "Takeshima Funsou to Kokusai Hanrei (Takeshima Dispute and International Law Precedents)," *MAEHARA Kyouju Kanreki Kinen Kokusai Hougaku no Shomondai (Festschrift in honor of Professor MAEHARA's 60th Birthday: Issues in*

International Law), 1963, p. 352; Taijudo, *supra* note 18, p. 140.

(42) *Ibid.*, pp. 140-141; Minagawa, *supra* note 18, p. 38.

(43) *The Minquiers and Ecrehos case, Judgment of November 17th*, *1953: I.C.J. Reports 1953*, p. 53.

(44) *Ibid.*, p. 49.

(45) *Ibid.*, p. 52.

(46) *Ibid.*

(47) This event is known as "The Norman Conquest of England." On October 14, 1066, the Norman forces, led by Guillaume, the Duke of Normandy, defeated the forces led by English King Harold in "the Battle of Hastings." After the battle, Guillaume, entered London, England, and assumed the throne as English King William I in the same year, creating the Anglo-Norman kingdom. William was the English King as well as the Duke of Normandy, and thus governed both regions by shuttling the English Channel, but his base remained to be Normandy. England came to be treated as the "dependency" of the Anglo-Norman kingdom. KAWAKITA Minoru ed., *Igirisu Shi (The History of England)*, Yamakawa Shuppansha, 1998, pp. 43-48; ASAJI Keizo, WATANABE Setsuo and KATO Makoto ed., *Chuusei Eifutsu Kankei Shi (The History of English-French Relations in the Middle Ages)*, Sogensha, 2012, pp. 14-20.

(48) *The Minquiers and Ecrehos case, supra* note 43, p. 53.

(49) *Ibid.*, pp. 53-54. In 1204, the Duke of Normandy and English King John was defeated by King Philip II of France, losing the good part of the territory of the Duchy of Normandy. However, the Channel Islands remained under control of the English King and became the dependency of the British Royal Household. YAKUBO Hiroshi, "Eikoku Chaneru Shoto Jaajiitou no Touchi Sisutemu – Jaajii Gikai no Kouzou (The Governing System of the Isle of Jersey of the British Channel Islands – The Structure of the Jersey Assembly)," *The Faculty Journal of Komazawa Women's University*, No. 18, p. 82.

(50) *The Minquiers and Ecrehos case, supra* note 43, p. 54.

(51) This means the fact that the English King, as "the Duke of Normandy," possessed the entire Normandy, including the Channel Islands. *ibid.*, p. 55. Also see *supra* note 47.

(52) *Ibid.*

(53) The Channel Islands were added to the fief of the Duke of Normandy when Guillaume I in 933 received them as his fief from the King of France, and it is said that he and his descendants pledged allegiance to the French King for the entire Normandy (including the Channel Islands). *ibid.*, p. 56.

(54) *Ibid.*, pp. 56-57.

(55) *Ibid.*, pp. 57-59.

(56) *Ibid.*, pp. 59-60.

(57) *Ibid.*, p. 60. France also asserted that the Minquiers are the islands belonging to the Chausey Islands. As the basis for its assertion, France stated that the bull of the Pope in 1179 cited the Chausey Islands and their "appurtenance" as one of the possessions of the abbey of Mont Saint-Michel. However, the Court turned down the French assertion by stating that it is possible to derive no inference about the status of the Minquiers from such general wording. *ibid*., p 70.

(58) This is what was called *Quo Waranto*. People who illegally held official powers or privileges or exercised them were required to justify on what authority they had such powers or privileges. Currently, this has been abolished. KOYAMA Sadao, *Eibei Houritugo Jiten (Koyama's Dictionary of Anglo-American Legal Terminology)*, Kenkyusha, 2011, p. 917.

(59) HIGASHIDA Isao, "Rondon Sei Maruchinusu Daikyokai to Kokuou Gyousei (Jou) (The King's Free Chapel of St. Martin's-le-Grand, London, and the King's Administration (Part One))," *The Annual Reports on Cultural Science*, Hokkaido University, No. 36 (1), p. 82.

(60) This means the direct and exclusive authority against a thing (*jus in rem*), the concept comparable to the right of claim against a specific person (*jus in personam*). In Japan's Civil Code, the former is called "real right," and the latter as "claim." *Houritsugaku Shoujiten*, Dai Gohan *(The Dictionary of Law*, Fifth Edition), Yuhikaku Publishing, 2016, pp. 1142-1143.

(61) The war that arose between the English kings and the French kings in medieval Europe. As it continued over approximately 100 years from 1337 to 1453, including armistice periods in between, it is referred to as such. For details, see KIDO Takeshi, *Hyakunen Sensou: Chuusei Makki no Eifutu Kankei (The Hundred Years War: Anglo-French Relations in the Late Middle Ages)*, Tosui Shobo, 2010.

(62) *The Minquiers and Ecrehos case, supra* note 43, pp. 60-63.

(63) *Ibid.*, p. 65.

(64) During this period, there arose the incident in 1706 where Jersey authorities interrogated a French citizen brought from the Ecrehos by Jersey fishermen. England asserted that the incident showed the jurisdictional authority it exercised over the Ecrehos. However, the Court rejected the English assertion by stating that it was the measure naturally taken against a national of another State who fled that State to reach Jersey. The Court also states that the quarantine measure Jersey took in 1754 against vessels coming from France had nothing directly relating to the territorial attribution. *ibid.*, p. 64.

(65) Additionally, Jersey law set forth for several centuries that an inquest shall be conducted into the cause of death of a body found within its jurisdiction when it is not clear the death resulted from natural causes. In fact, such inquests were conducted in 1859, 1917

and 1948. The Court acknowledges that these inquests are collateral evidence sufficient to demonstrate that the jurisdiction was exercised over the Ecrehos. *ibid.*, p. 65.

(66) *Ibid.*, pp. 65-66.

(67) *Ibid.*, p. 66.

(68) *Ibid.*

(69) *Ibid.*, pp. 66-67.

(70) *Ibid.*, p. 67.

(71) *Ibid.*, pp. 67-68. In relation to this, England invoked a ruling handed down by the Royal Court of Jersey in 1692. The Royal Court apparently ordered that cargo shipwrecked at rocks of the Minquiers be trisected among the English King, the guardian of the seigneur of the fief of Samares in Jersey and sea rescuers, but England was unable to submit a document said to be the basis for this conclusion. Thus, the Court states that no conclusion can be derived from the ruling of the Royal Court of Jersey supportive of the English assertion about sovereignty over the Minquiers. *ibid.*, p. 68.

(72) *Ibid.*, p. 69.

(73) *Ibid.*

(74) *Ibid.*

(75) *Ibid.*, pp. 70-72.

(76) See, *Island of Palmas Case, supra* note 10, p. 855.

(77) YAMAMOTO Soji, *Kokusaihou*, Shinpan (*International Law*, New Edition), Sanseido, 1994, pp. 281-282; ANDO Nisuke, "Kokka Ryouiki no Tokusou – Tokuni 'Kengen' to Ryoudo Funsou ni Tsuite – (Acquisition or Loss of State Territory – In Paritcular, about 'Title' and Territorial Dispute –)," TERASAWA Hajime, UCHIDA Hisashi ed., *(Bessatsu Hougaku Kyoushitsu) Kokusaihou no Kihon Mondai ((Supplement Jurisprudence Classroom) The Fundamentals of International Law)*, 1986, p. 135.

(78) "Crystallized" in English and "Crystallisé" in French, the word often translated as "Kesshouka (crystallization)" in Japanese. However, the word may also be translated as "Gutaika (concretization)" in Japanese, and since this is deemed to be easier to understand, we adopted the translation of "Gutaika." NAKAMURA Osamu, "Ryouikui Kengen Toshiteno Jikkouteki Shihai (Effective Control as Title to Territory)," *Hanrei Kokusaihou*, Dai Ni-han (*International Law Judicial Precedents*, Second Edition), Toshindo, 2006, p. 134.

(79) Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-1954," 32 *BYIL* (1955-56), pp. 23-24; Sookyeon Huh, "Ryouiki Kengen Ron Saikou (Yon) (The Acquisition of Territory in International Law (4))," *The Journal of the Association of Political and Social Sciences*, Volume 122, No. 7/8, pp. 879, 903.

(80) TAIJUDO Kanae, "Mankie/Ekureo Jiken (The Minquiers/Ecrehos Case)," *Keesubukku*

Kokusaihou, Shinpan (*Casebook Internationanl Law*, New Edition), p. 110; HIGASHI Jutaro, "Mankie/Ekureo Shotou Jiken (The Minquiers/Ecrehos Islands Case)," *Kokusai Shihou Saibansho – Hanketsu to Iken*, Dai Ikkan (1948-63 Nen) (*International Court of Justice: Its Judgments and Advisory Opinions*, Volume I (1948-1963)), Kokusai Shoin, 1999, p. 158; Nakamura, *supra* note 78. There are some subsequent judicial precedents that note that "acts conducted after the date when the dispute was crystallized cannot be subject to examinations by courts," but this shall not apply to acts that are normally continuing since before the date when the dispute became crystallized and were not made "with a view to improving the legal position of the Party concerned." *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002*, p. 682, para. 135.

(81) *Ibid.*, pp. 674-675, para. 110.

(82) ITO Tetsuo, "Ryoudo Funsou to Kokka Kankatsuken – Kokusai Saiban ni Okeru 'Mokuji no Doui' to Hoppou Ryoudo Mondai – (Territorial Disputes and State Jurisdiction – 'Implied Consent' in International Courts and Trials and the Northern Territories Issue –)," *Kokka Kankatsuken (State Jurisdiction)*, Keiso Shobo, 1998, pp. 332-333. Judge Levi Carneiro, who expressed his individual opinion, states that "maps do not constitute a sufficiently important contribution to enable a decision to be based on them." *The Minquiers and Ecrehos case, supra* note 43, Opinion Individuelle de M. Levi Carneiro, p. 105, para. 20. For the position of the ICJ on maps, see *Différend frontalier, arrêt, C.I.J. Recueil 1986*, p. 554, para. 54.

(83) Article 38 (1) of the Statute of the International Court of Justice provides that the Court "shall apply" the following:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In other words, these constitute "international law." Thus, it is conceivable that "international law" applied in settling territorial disputes essentially has to be either of the above. However, d. is "subsidiary means for the determination of rules of law," no court ruling cannot be issued with this alone. SUGIHARA Takane, *Kihon Kokusaihou*, Dai Ni-han (*Basic Principles of International Law*, Second Edition), 2014, Yuhikaku Publishing, pp. 48-50. Since the Court states that there are no treaties applicable to this case, a. was not applied. Then, what was applied is either b. or c. However, as the Court did not say anything about this, it remains uncertain.

5. Examination of the Practice by Japan

(1) 1905 and Beyond

In January 1905, Japan named an uninhabited island "Takeshima" and had it "attributed to Japan" under a cabinet decision, and placed the island under the "jurisdiction of the Oki Islands branch office" of the Shimane Prefectural Government. The Minister of the Interior relayed the cabinet decision to the Shimane Prefectural Governor, who announced that Takeshima was put under the "jurisdiction of the Oki Islands branch office" of the Shimane Prefectural Government by the Shimane Prefectural Announcement No. 40.

The investigation and surveying of Takeshima were conducted at the instruction of the Shimane Prefectural Governor, and the governor of the Oki Islands in May 1905 reported to the Shimane Governor that Takeshima has an area of "23 cho 3 tan 3 se bu." Based on this, Shimane Prefecture registered Takeshima on the cadaster as government-owned land. In April, Shimane Prefecture revised its fishery regulation rules, putting seal lion hunting in Takeshima under the licensing system and gave the license to the "Takeshima Fishing and Hunting Limited Partnership Company" in June. In the following year, the company submitted a request to lease the Takeshima government-owned land, and the Shimane Governor provided it with a five-year written permission.

In 1939, under an administrative measure, Takeshima was incorporated into Goka Village, Oki County, Shimane Prefecture. In 1940, Takeshima became the naval land of the Maizuru Naval Station, and in November 1941, a directive was issued to permit Goka Village people to use the island to protect the capturing alive of sea lions and the taking and reproduction of seaweeds and shellfishes. In November 1945, under Article 2 of the Order for

Enforcement of the National Property Act, Takeshima was transferred from the Navy to the Ministry of Finance[84].

In 1953, Shimane Prefecture granted a license to the Oki Islands Federation of Industrial Fishing Cooperative Associations for the common fishery right in waters around Takeshima, and also in the same year, permitted two persons from Goka Village to hunt sea lions in Takeshima. In 1954, the Director of the Hiroshima Regional Bureau of International Trade and Industry permitted two persons to set the phosphate ore mining right in waters around Takeshima[85].

These measures are tantamount to the enactment and enforcement of relevant laws, registration of land and taxation, all of which can be described as acts related to the implementation of local administration and legislation that were highly valued as evidence directly relating to the possession in the Minquiers and Ecrehos Case. While there was nothing comparable to the exercise of jurisdiction, this does not seem to be an unfavorable element since it is highly unlikely that any crime is committed in Takeshima.

Therefore, in light of the practice in 1905 and onward, the Japanese position that its territorial sovereignty had been established under the series of these measures[86] can be interpreted as based on sufficient evidence[87].

(2) Prior to 1905

The Japanese Government has the following recognition about Takeshima from the seventeenth century to the eighteenth century.

"In 1618, Ohya Jinkichi and Murakawa Ichibei, merchants of Yonago, Hōki Province in Tottori Domain, received permission for passage to Utsuryo Island (then called "Takeshima" in Japan) from the shogunate via the lord of Tottori. Following that, the two families took turns in traveling to Utsuryo

Island once each year, and engaging in catching abalone, hunting sea lions and felling trees.

Both families engaged in fishing around Utsuryo Island using ships with the hollyhock crest of the ruling shogunate family on the sails, and usually presented the abalone they caught as gifts to the shogunate and others. Thus they monopolized the management of the island with the de facto approval of the shogunate.

During this period, Takeshima, on the route from Oki to Utsuryo Island, came to be used as a navigational port, docking point for ships, and rich fishing ground for sea lions and abalone.

As a consequence of the above facts, Japan had established sovereignty over Takeshima by the mid-17th century (early Edo period) at the latest(88)."

Objections to the Japanese Government's above-mentioned recognition have been brought forward from within Japan, beginning with the ROK(89). Many of them are related to the evaluation of historical facts, but Japan's explanations give a shade of uneasiness from the viewpoint of international law as well. More specifically, does the use of Takeshima as "a navigational port," "a docking point for ships" and "a rich fishing ground" serve as the basis for establishing "the sovereignty over Takeshima"? It must be said that they are so weak, when compared with the evidence English submitted to substantiate the existence of an "ancient title" in the Minquiers and Ecrehos Case(90).

Nevertheless, in the present circumstances, as it appears that the ROK cannot talk about history more convincing than the points raised by Japan(91), there exists the possibility that the Japanese explanations may be taken as having a relative advantage and the "ancient title" or the "original title" for Japan may be recognized. For example, in the case where Malaysia and

Singapore disputed the attribution of an island, since a) the disputed island is widely known as "an obstacle that poses a risk to the navigation of ships," and b) no other competing sovereignty claims have been made on the island, the kingdom, the predecessor of Malaysia, was recognized to have had the original title to the island. Based on a), as the kingdom's territorial domain extended to all the islands within the Singapore Straits at the time, the domain included the disputed island. Furthermore, the requirement of "the continuous and peaceful exercise or display of the territorial sovereignty (peaceful with respect to relations with other states)[92]" was satisfied, based on b)[93].

Considering in line with the above judgment, Japan will likely be judged to have held the original title to Takeshima if it can prove that Takeshima is "widely known" and no other state had asserted the sovereignty over Takeshima.

Evidence that directly relates to the possession or acts that are tantamount to a manifestation of State authority are not necessarily required always to the same extent[94]. According to the award in the Island of Palmas Case, the manifestation of State authority must be assessed in accordance with special circumstances of individual cases. The ICJ also states that "international law" acknowledges such treatment[95].

Such assessment, flexible at best but haphazard at worst, is accepted because, it is said, international law takes great pains to avoid an outbreak of international disputes by "peacefully separating" states. In other words, the scope to which territorial sovereignty extends is partitioned into the territory of each state so that they do not infringe on each other. Much of the substance of governance conducted within the state territory has been left to the discretion of each state. This is because a state is the only political organization that has effective governing power, and it was thought that the effective international order can be formed by governing relations between states. That

acts tantamount to a manifestation of State authority do not necessarily have to be the same extent reflects such historical backgrounds. With respect to uninhabited or very thinly populated places unsuitable for people to live in, ice-covered places in the Arctic Circle, or areas extremely difficult to approach, such as remote solitary islands, not much importance was given to whether there is a large number of evidence directly relating to the possession or acts tantamount to a manifestation of State authority. Even in the scarcity of such evidence, it is considered sufficient when territorial sovereignty is "peacefully" displayed in a continuous and peaceful manner without any protest by other states. That is because even that much of it would not create an obstacle to the maintenance and formation of an international order(96).

However, the possibility of the ROK holding convincing evidence is not nil. Japan needs to collect and analyze as many as possible materials relating to historical facts so that it can counteract whatever evidence the ROK comes up with. This is the challenge Japan should take up by all its might.

(84) Taijudo, *supra* note 18, p. 137; Kokusaihou Jirei Kenkyuukai (The Study Group on Internationanl Law Cases), *Ryoudo (Territory)*, Keio Tsushin (Keio Correspondence), 1990, p. 171.

(85) *Ibid.*, pp. 173-174.

(86) Tsukamoto, *supra* note 18.

(87) Taijudo, *supra* note 18, p. 143; Minagawa, *supra* note 41, p. 368; Tsukamoto, *supra* note 40, pp. 152-153. As we discussed in note 40, the interpretation of the provisions in Article 2 (a) of the Treaty of Peace with Japan remains open to debate. However, since the article does not explicitly state the attribution of Takeshima, if it is handled in the same manner as in the Minquiers and Ecrehos Case, it should not become an unfavorable element for Japan.

(88) The Ministry of Foreign Affairs of Japan, "Takeshima no Ryouyuu (Sovereignty over Takeshima)" (available at https://www.mofa.go.jp/a_o/na/takeshima/page1we_000058.html)

(89) For example, IKEUCHI Satoshi, *Takeshima Mondai towa Nanika (What Is the Takeshima Dispute)*, The University of Nagoya Press, 2012, pp. 14-36.

(90) It is pointed out that "if there is a weak point in the Japanese Government's claims concerning historical facts, it is that the Edo Shogunate at the time did not expressly display the intention of the possession of Takeshima and the manifestation of State authority was not that much clear." Taijudo, *supra* note 18, p. 142.

(91) *Ibid.*, p. 141; Tsukamoto, *supra* note 40, pp. 143-149.

(92) *Island of Palmas Case, supra* note 10, p. 839.

(93) *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, pp. 35-37. paras. 61-69.

(94) *Island of Palmas Case, supra* note 10, pp. 840, 855.

(95) *Sovereignty over Pedra Branca/Pulau Batu Puteh, supra* note 93, p. 36. para. 67.

(96) MURASE Shinya et al., *Gendai Kokusaihou no Shihyou (Indicators of Contemporary International Law)*, Yuhikaku Publishing, 1994, pp. 89-90.

6. Concluding Remarks

At the end of this paper, I would like to touch on a matter not much discussed until now. It concerns the critical date.

The Japanese Government and many academic theories appear to assume that when the Takeshima Dispute is referred to the ICJ, the Court is likely to set the critical date at the declaration of the establishment of the Syngman Rhee Line by the ROK in 1952 or 1954 at the latest, when the ROK began the occupation of Takeshima(97). As discussed earlier, once the critical date is set, only facts or acts that existed prior to the critical date are acknowledged to have the validity of evidence, in principle.

Therefore, if the critical date is set prior to 1954, in the eyes of Japan the "illegal occupation" of Takeshima being carried out by the ROK since then is not to be examined by the Court. From this viewpoint, therefore, it has been believed that "the probability of Japan wining the case is considerably large(98)." In other words, it has been argued that the critical date should be set prior to 1954 in order to "exclude all acts of the ROK relating to the control and possession of Takeshima after 1952(99)."

Judicial precedents in recent years regarded the day when differences of opinions on the attribution of a dispute area became clear as the date of the occurrence of a territorial dispute and set that date as the critical date(100). In light of such tendency, the right or wrong of the objective aside, it can be argued that the critical date is highly likely to be set prior to 1954.

Furthermore, as discussed above, in the Minquiers and Ecrehos Case where the critical date was not explicitly set, the date on which France asserted its sovereignty over the Ecrehos and Minquiers was considered to be the date when the dispute arose, and the Court states that "the measure taken with a

view to improving the legal position" of France since that date is not to be examined[101].

Therefore, even when the critical date is not set, "the measure taken (by the ROK) with a view to improving the legal position" of the ROK after 1952, when the differences of opinions between Japan and the ROK over the attribution of Takeshima became apparent, is likely to be excluded from the subject of the consideration.

However, even if the critical date is set for 1952, it appears that to what extent the measures and events since 1905 are to be considered remains as an issue to be separately examined.

With the Japan-Korea Treaty concluded in 1905, Japan came to "supervise and direct" the Korean diplomacy, almost completely depriving Korea of its diplomatic right[102]. And in 1910, the Treaty on the Annexation of Korea (Japan-Korea Annexation Treaty) was concluded. At least since 1910, Korea could not leave "evidence directly relating the possession" of Takeshima as it was annexed by Japan. One Party annexed the other Party, and the annexed Party could not demonstrate "the intention to act as sovereign" or take an action involving "a manifestation of State authority." Are these circumstances to be considered in deciding the attribution of territorial sovereignty? As there appears to be no judicial precedence, it is just a matter of speculation, but due consideration should be given to the possibility that measures that were taken or events that occurred after the only contesting state was made disappeared are not to be examined by the Court. In fact, academic theories that argue in favor of the ROK emphasize this possibility[103]. In addition, the possibility cannot be ruled out that measures and events after the conclusion of the Japan-Korea Treaty of 1905 will be treated in a similar manner.

As seen in the preceding chapter, even if that is the case, as long as we look at the assertions made by Japan and the ROK at this stage in light of international law presented in international courts and tribunals, it is highly possible that the Court will hand down a judgment that Japan has the territorial sovereignty over Takeshima. As long as there remain uncertain factors, however, it is necessary for Japan to demonstrate with solid evidence that Takeshima was the territory of Japan by 1905 by thoroughly collecting and analyzing historical documents on the assumption that no measure or event after 1905 is going to be considered by the Court.

(97) Prof. Minagawa sees the date when Japan lodged an official protest after the declaration of the establishment of the Syngman Rhee Line by the ROK (January 28, 1951) as the critical date. Minagawa, *supra* note 41, p. 354.

(98) Taijudo, *supra* note 18, p. 153.

(99) Ha, *supra* note 17, p. 276.

(100) *Sovereignty over Pulau Ligitan and Pulau Sipadan (IndonesialMalaysia), supra* note 80, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, pp. 698-701, paras. 118-131; *Sovereignty over Pedra Branca/Pulau Batu Puteh, supra* note 91, p. 28. paras. 33-36.

(101) Yamamoto, *supra* note 77, p. 282. *The Minquiers and Ecrehos case, supra* note 43, p. 59; *Sovereignty over Pulau Ligitan and Pulau Sipadan supra* note 80.

(102) For the process of concluding the Japan-Korea Treaty of 1905 and reactions of other states to it, see SAKAMOTO Shigeki, "Nikkan Hogo Jouyaku no Kouryoku (The Validity of the Japanese-Korea Protectorate Treaty)," *Jouyakuhou no Riron to Jissai (The Theory and Practice of the Law of Treaties)*, Toshindo, 2004, pp. 244-252.

(103) Jon. M. Van Dyke, "Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary," *Ocean Development & International Law*, Vol. 38, 2007, p. 165.

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