Dokdo: The San Francisco Peace Treaty, International Law on Territorial Disputes, and Historical Criticism

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The San Francisco Peace Treaty is constitutive, and some of its provisions have an effect erga omnes (rights or obligations toward all). But its territorial clause does not purport to define Korea’s boundaries in any detail and does not mention Dokdo, a group of some ninety islets in the East Sea, or Sea of Japan, that are contested by Korea and Japan. In determining what course of action should be taken in light of this development, a study of the status and connotation of these words in modern international law must be rooted in an approach to the Korean territorial dispute in contrast to an approach based on a formalistic reading of the peace treaty. The term “historical criticism approach,” which appeared in a recent judgment of the International Court of Justice, is an encouraging indicator. International lawyers should be inspired to employ this approach when dealing with territorial issues that involve Korea. Keywords: San Francisco Peace Treaty, Dokdo (Tokto/Takeshima) dispute, International Court of Justice, international law, East Asia territorial disputes.

DOKDO (TAKESHIMA TO THE JAPANESE) IS A GROUP OF SMALL ISLANDS and reefs in the East Sea (Sea of Japan to the Japanese) that is claimed by both Korea and Japan. As one of the most important territorial issues facing Korea, sovereignty over Dokdo at first blush seems to rest largely on an interpretation of the San Francisco Peace Treaty, which referred to Korean territory in relation to Japan’s renunciation of territory it gained unlawfully. However, recent decisions by the International Court of Justice (ICJ) reveal that this territorial issue should not only include a close examination of the San Francisco Peace Treaty but also the colonial context of Japanese acquisition of Korean territory. Doing so allows for the legal argument behind Korea’s claim of sovereignty over Dokdo to be restructured largely into four
stages. The first stage would involve a “single unit” approach: proving the historical title of Dokdo prior to the official incorporation into Japan’s Shimane Prefecture in 1905 while emphasizing its subordinate relationship to Ullungdo (another island in the East Sea or Sea of Japan). The second stage would consist of a legal and historical criticism of the process of Japanese colonization of Korea from 1905 until Korea’s liberation in 1945. In the third stage, emphasis would be on Korean independence following World War II and the disposition of territories by the Allied powers, from 1945 to 1952. This stage would also embrace the indeterminacy of title over Dokdo. The fourth stage would be Korea’s exercise of sovereignty over Dokdo, from declaration of the Peace Line in 1952 until today.¹

Determining the weight and validity of such a restructured approach to the Dokdo issue requires an evaluation of Korea’s claim of sovereignty on several matters. First is an evaluation of the Ullungdo Dispute in the seventeenth century, or an evaluation of the status of Dokdo in Korean-Japanese diplomatic relations regarding Ullungdo. Second, a determination is needed as to whether the island Seokdo mentioned in Japan’s Imperial Order no. 41 of October 25, 1900, is actually Dokdo. Third is the question of whether the incorporation of Dokdo into Japan in 1905 should be understood as having been part of the process of annexation of Korea that began in 1904. Fourth, we need to understand the attitude of the Allied powers in their disposition of Japanese territory in order to conclude the San Francisco Peace Treaty.² Lastly, Korea’s exercise of sovereignty over Dokdo after 1952 and the role of that critical date must be assessed. Upon evaluation, one can discover a number of themes that are common to these issues, such as the probative value of the evidence, positivism, and the importance of colonial and other history. The status and connotation of these words in modern international law are critical to an approach to the Korean territorial dispute, in contrast with an approach to the issue based simply on a formal reading of the San Francisco Peace Treaty (see Figure 1).

The San Francisco Peace Treaty and Its Relevance to the Sovereignty of Dokdo

When Japan agreed in Article 2 of the San Francisco Peace Treaty to renounce all right, title, and claim to Korea, including the islands