

Legal Nature of the 1905 Measures to Incorporate Takeshima into Shimane Prefecture of Japan

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1 Introduction

On January 28, 1905 the following Cabinet decision was issued by the Japanese government.

“As regards the attached proposal from the Minister of Home Affairs on the matter of the jurisdiction over an uninhabited island (omitted) ..., it is clear from the related documents that this person, named Yozaburo NAKAI, since 1903, has moved to the island and engaged in fishery activities. We recognize the fact of its occupation under international law, and therefore we consider that there would be no obstacle to regard the island as belonging to Japan and to bring it under the jurisdiction of the Director of the Oki Islands branch office of the Shimane Prefectural Governmentke.”¹

The Minister of Home Affairs then issued an instruction to the Governor of Shimane Prefecture, based on the above Cabinet decision, that, “[the islands] are hereby named ‘Takeshima,’ and shall come under the jurisdiction of the Director of the Oki Islands branch office of the Shimane Prefecture. You are instructed to proclaim this matter in your jurisdiction.”² Then, on February 22, 1905, the Governor of Shimane Prefecture issued the same instruction to Oki Island branch office,³ and also released a prefecture-wide notice to the effect that Takeshima would become a part of the prefecture, under the jurisdiction of the Director of Oki Islands branch office.⁴ On February 24, the San-in Shimbun and Shoyo Shimpō newspapers reported on this

notice, under the respective headlines, “New Oki Islands,” and “Takeshima Newly Come Under Shimane Prefecture Jurisdiction.”⁵

The Japanese government considers that, with the above-mentioned Cabinet decision, it “reaffirmed its sovereignty over Takeshima.”⁶ Accordingly, the Cabinet decision “does not indicate or imply that prior to [the Cabinet decision] Japan did not hold sovereignty over Takeshima, or that sovereignty was held by some other State,” and what is more, the subsequent measures that were taken to incorporate Takeshima were “also published in the newspapers of the day, and were implemented effectively, without any recourse to clandestine measures.”⁷ In response, the government of the Republic of Korea (ROK) asserts that, “To state that Japan reaffirmed its sovereignty over its own territory is an impossible defense under international law and one for which there is no precedent.”⁸ In addition, the ROK government contends that the fact an attempt was made to incorporate Dokdo by an official notice issued by Shimane Prefecture indicates that the “Japanese Government consistently acknowledged that Dokdo was non-Japanese territory.”⁹ In any event, the ROK government asserts that the stipulations of *Imperial Edict No. 41*, which was issued in 1900, “clearly demonstrate the fact that...[Korea] had continued to govern Dokdo and exercised Korea’s sovereignty over Dokdo.” What is more, the measure by Japan to incorporate the islands “was not only an illegal act that infringed upon Korea’s long-standing and undeniable sovereignty over the island, but also null and void under international law.”¹⁰ In addition, the ROK government argues that “The notice issued by Shimane Prefecture is nothing

- 1 “The uninhabited island, located 85 nautical miles northwest of Oki Island, would be named Takeshima and it would come under the jurisdiction of the Head of the Oki Island branch office of Shimane Prefecture.” A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905000000101/t1905000000101-p02.pdf>
- 2 “Instruction No. 87.” A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905021500101/t1905021500101-p02.pdf>
- 3 “Shimane Prefecture General Affairs No. 11.” A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905022200201/t1905022200201-p02.pdf>
- 4 “Shimane Prefectural Notice No. 40.” A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905022200301/t1905022200301-p02.pdf>
- 5 “New Oki Islands” (San-in Shimbun). A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905022400102/t1905022400102-p02.pdf>
“Takeshima Islands Newly Come Under Shimane Prefecture Jurisdiction” (Shoyo Shimpō). A digitized sample of the original document can be viewed here on Takeshima Archives Portal. <https://www.cas.go.jp/jp/ryodo/shiryotakeshima/detail/t1905022400202/t1905022400202-p02.pdf>
- 6 Ministry of Foreign Affairs of Japan, “Japanese Territory: Incorporation of Takeshima into Shimane Prefecture; 2.” Available to view here: https://www.mofa.go.jp/mofaj/area/takeshima/g_hennyu.html
- 7 “View of the Government of Japan Concerning Takeshima,” July 13, 1953. Tsukamoto Takashi, “Views of the Japanese and Korean Governments on Territorial Rights over Takeshima,” *The Reference*, (National Diet Library, June 2002 Edition; hereafter cited as “Tsukamoto, *The Reference*”), p. 60.
- 8 Northeast Asian History Foundation, “Rebuttal to Assertions made by the Ministry of Foreign Affairs of Japan Concerning the Sovereignty of Dokdo,” p. 11. The document is available on the website of the ROK Embassy in Japan: https://overseas.mofa.go.kr/jp-ja/brd/m_1055/view.do?seq=665752&srchFr=&srchTo=&srchWord=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm=
- 9 Ministry of Foreign Affairs, ROK, “Dokdo: Beautiful Island of Korea” pamphlet, p. 8. Available to download here: <https://dokdo.mofa.go.kr/jp/pds/pdf.jsp>
- 10 Ibid. pp. 8-9.

more than a notice from a provincial government, and it was not notified to the government of Korea at the time through official diplomatic procedures. What is more, as it was issued secretly, not even normal Japanese citizens, let alone other countries, were aware of its content. Accordingly, it can in no way be regarded as a public announcement of a nation's intentions."¹¹

As can be seen from the above, the two countries' claims relating to the Cabinet decision and subsequent incorporation measures are diametrically opposed. However, the ROK's claims have absolutely no basis in international law. The purpose of this paper is to demonstrate this point. To do so, it would be advisable to first take a look at the background leading to the Cabinet decision.

2 Background leading to the Cabinet decision

Yozaburo NAKAI was from Ogamo Village, Tohaku County in Tottori Prefecture and resided in Saigo Town, Suki County in the Oki Islands at the time of his request for the lease of Takeshima. From 1903, he invested his own funds in setting up a fishing hut on Takeshima, which was referred to at that time as the "Lyanko Islands," and in hunting sea lions there. Although he initially incurred tremendous losses, from 1904 onwards, prospects for business started to improve. However, given that it looked as if the business would be viable, many other people started their own sea lion hunting operations, leading to a crash in the sea lion population around Takeshima due to over-hunting. It was in response to this situation that NAKAI devised a plan to eliminate competition and establish a monopoly for his business. He travelled to Tokyo on September 29, 1904, where he submitted an application to lease Takeshima in its entirety.¹² NAKAI's petition was successful and he received a response from officials responsible at the Ministry of Foreign Affairs to the effect that "incorporation of the islands should be expedited."¹³ Upon receiving a request from the Ministry of Foreign Affairs, the Meiji government decided to collect opinions from Shimane

prefectural government. The Shimane government in turn sought the opinion of the Director of the Oki Islands branch office,¹⁴ who indicated that he had no objection to Takeshima being incorporated under the jurisdiction of the Oki Island branch office.¹⁵ The Shimane government reported this back to Tokyo, and the proposal as tabled by the Minister of Home Affairs was duly approved by the Cabinet.

3 Evaluation under international law

(1) Legal nature of the 1905 Cabinet decision

The Japanese government's position is that "Japan had established sovereignty over Takeshima by the mid-17th century (early Edo period) at the latest."¹⁶ So why did Japan "reaffirm its sovereignty" over Takeshima through a Cabinet decision, if its sovereignty had already been established? The reason was that historical titles¹⁷ that had previously been recognized through common understanding since ancient times needed to be "substituted"¹⁸ or "replaced"¹⁹ with titles as required by modern international law.

In the East Asian world order to which Japan belonged, there was no concept that would equate to that of "territory," which formed the basis for the European international order. The basis for the East Asian world order was the "domain."²⁰ That is why, when Japan came to accept and apply modern international law of European origin based on the concept of "territory," it became necessary to "substitute" or "replace" historical titles that were considered to have been held in "domains" with "territorial titles."²¹

The necessity for such "reaffirmation" has also been pointed out in international courts. In the *Minquiers and Ecrehos* case, the International Court of Justice noted that even if the kings of France did have an original feudal title to the islets in dispute, such an alleged original feudal title could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement.²² This is because the court was of the opinion that, "What is of decisive importance, is not

11 "Rebuttal by the Government of Korea to the View of the Government of Japan Concerning Takeshima dated July 13, 1953," September 9, 1953. Tsukamoto, *The Reference* (supra note 7), pp. 60-61.

12 "Request for incorporation into the territory and lease of Lyanko Islands." A digitized sample of the original document can be viewed here on Takeshima Archives Portal.

<https://www.cas.go.jp/jp/ryodo/shiryō/takeshima/detail/t1904092900101/t1904092900101-p02.pdf>

Tamura Seizaburo, *New Research on Takeshima, Shimane Prefecture* (reprinted and revised edition), pp. 40-43.

13 For details on the background to this decision see Okuhara Hekiun, *Takeshima and Utsuryo Island* (Reprinted edition), (Harvest Publishing), pp. 55-56; and Naito Seichu and Kim Byeong-Ryeol, *Historical Verification of Takeshima/Dokdo*, (Iwanami Shoten, 2007), p. 84.

14 "General Affairs No. 1073," A digitized sample of the original document can be viewed here on Takeshima Archives Portal.

<https://www.cas.go.jp/jp/ryodo/shiryō/takeshima/detail/t1904111500101/t1904111500101-p02.pdf>

15 Naito Seichu, "Issues Surrounding Japan's Incorporation of Takeshima," *Study of Cultures in Northeast Asia*, Vol. 24 (2006), p. 13.

16 Matsui, *op. cit.* (supra note 17), p. 115. The "domain" was a concept that was valid in the "international" normative order of East Asia." Park Pae-Keun, "Precedent Cases of Occupation of Islands by Japan: Focusing on Territorial Claims on Takeshima/Dokdo," *The Journal of International Law and Diplomacy*, Vol. 105, No. 2 (2006), pp. 32-33.

Ministry of Foreign Affairs of Japan, "Japanese Territory: Sovereignty over Takeshima; 4," available to view here:

https://www.mofa.go.jp/mofaj/area/takeshima/g_ryoyu.html

17 Matsui Yoshiro, *International Law Perspective on the Senkaku Islands Dispute*, (Nippon Hyoronsha, 2014), p. 50 *1.

18 Minagawa Takeshi, "The Takeshima Dispute and International Judicial Judgments," in Prof. Mitsuo Maehara 60th Birthday Commemoration Anthology Committee ed., *Various Issues in International Law (Prof. Mitsuo Maehara 60th Birthday Commemoration)*, (Keio Tsushin, 1963), p. 363.

19 Taijudo Kanae, "The Takeshima Dispute," (first published 1986), in *International Law of Territorial Sovereignty*, (Toshindo, 1998), p. 143.

20 Matsui, *op. cit.* (supra note 17), p. 115. The "domain" was a concept that was valid in the "international" normative order of East Asia." Park Pae-Keun, "Precedent Cases of Occupation of Islands by Japan: Focusing on Territorial Claims on Takeshima/Dokdo," *The Journal of International Law and Diplomacy*, Vol. 105, No. 2 (2006), pp. 32-33.

21 Matsui, *op. cit.* (supra note 17), p. 118.

22 *The Minquiers and Ecrehos case, Judgment of November 17th, 1953: I.C.J. Reports 1953*, p. 56.

indirect presumptions deduced from events in the middle ages, but the evidence which relates directly to the possession” of the islets in dispute.²³ An arbitral tribunal in a dispute between Eritrea and Yemen made similar observations.²⁴

The *Minquiers and Ecrehos* case was between the United Kingdom and France, both part of the European international order, while the Eritrea-Yemen arbitral tribunal case was one between countries adhering to the Islamic international legal system, and both of these cases had origins in legal systems that were wholly different to the modern international legal system. Accordingly, the opinions expressed in these court judgments are also valid when making the transition from the East Asian world order to the traditional international legal order.²⁵ In short, modern international law does not prohibit countries that belonged to the East Asian world order from taking “reaffirmation” or similar measures in order to strengthen claim to or put beyond doubt any historical titles that had already been established in the process of accepting modern international law and being incorporated into the European international order.²⁶ It is rather the case that modern international law required to clearly express intent to claim sovereignty, to “substitute” or “replace” the title in effect at the time, and to exercise effective control, with just such a method.

(2) Method of expression of intent to claim

The notice issued by Shimane Prefecture was not issued “in a secretive manner,” and the contents of the notice were known to “normal Japanese citizens.” This is because, as noted above, the notice was issued throughout Shimane Prefecture and also reported in the newspapers of the day (see Section 1 above).

Next, it is indeed a fact that it was a “notice by a single provincial government” and that “the government of Korea at the time was not notified through official diplomatic procedures.” However, with regard to the former, under international law, there is no fixed format for expressing territorial intentions. It is not even necessary to do so explicitly, since the intent to claim can be presumed if state functions are peacefully and continuously displayed on the territory in question.²⁷ In any event, the method of notification through the offices of local government was commonplace at the time,²⁸ and the attribution of Takeshima is clearly indicated by a national institution, constituting an appropriate expression of the intent to claim.

Furthermore, with regard to the latter point, there is no obligation to notify foreign governments of the intent to claim

unless there is an explicit legal stipulation that requires otherwise.²⁹ An example of such a legal stipulation is the General Act of the Conference of Berlin of 1885. Article 34 of this act stipulates that a condition of occupation is that “the Power shall accompany the respective act with a notification thereof.” However, the effect of this act was limited to the coastal regions of Africa³⁰ and does not apply to East Asia. An eminent scholar of international law once predicted “there is no doubt that in time this rule will either by custom or by treaty be extended from occupations in Africa to occupations everywhere else.”³¹ His prediction proved not to be the case and international law did not develop in the way that he had anticipated.³²

4 Conclusion

The above considerations clearly demonstrate that there is absolutely no basis in international law for the assertions made by the ROK government. Accordingly, as the Japanese government explains, the series of incorporation measures that were taken following the Cabinet decision were in accordance with international law of the day, and this “does not indicate or imply that prior to [the Cabinet decision] Japan did not hold sovereignty over Takeshima, or that sovereignty was held by some other State,” and the measures were “also published in the newspapers of the day, and were implemented effectively, without any recourse to clandestine measures.”

A final point should be made concerning the assertions of the ROK government that, “In any event, the stipulations of *Imperial Edict No. 41*, which was issued in 1900, “clearly demonstrates the fact that...[Korea] had continued to govern Dokdo and exercised Korea’s sovereignty over Dokdo.” What is more, the measures by Japan to incorporate the islands, “was not only an illegal act that infringed upon Korea’s long-standing and undeniable sovereignty over the island, but also null and void under international law.” (See Section 1 above). *Imperial Edict 41* was issued for the purpose of changing the name of Utsuryo Island (Ulleungdo) to Utsu Island (Uldo), and to promote the island administrator to county magistrate. The ROK government asserts that Article 2 of the edict clearly states that “all of Ulleungdo as well as Jukdo and Seokdo (Dokdo)” shall be placed under the jurisdiction of Uldo county.³³ However, given that in the original document there is no mention of “(Dokdo),” this raises the question, if “Seokdo” was today’s Takeshima

23 *Ibid.*, p. 57. See also, *Sahara occidental, avis consultative, C.I.J. Recueil 1975*, p. 43, para. 93.

24 *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, Reports of International Arbitral Awards, Volume, XXII*, 245, para. 131, p. 268, para. 239.

25 Matsui, *op. cit.* (supra note 17), p. 124.

26 Park, *op. cit.* (supra note 20), p. 38.

27 Taijudo, *op. cit.* (supra note 19), p. 144.

28 “View of the Government of Japan in Response to the View of the Government of the ROK Concerning Takeshima dated September 25, 1954,” (September 20, 1956), Tsukamoto, *The Reference* (supra note 7), p. 62.

29 *Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, Reports of International Arbitral Awards*, Vol. II, p. 868.

30 *Affaire de l’île de Clipperton (Mexique contre France)*, 28 janvier 1931, *Reports of International Arbitral Awards*, Vol. II, p. 1110.

31 L. Oppenheim, *International Law: A Treatise*, 1905, §224., pp. 278-279.

32 M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, 1926, p. 295.

33 Ministry of Foreign Affairs of the ROK, *op. cit.* (supra note 9), p. 9.

(“Dokdo”), why did the Imperial Edict not use the name “Dokdo” and instead use “Seokdo” as the name of the island?³⁴ Even if such doubts could be overlooked and it was established that Seokdo refers to Takeshima, there is no evidence of effective control of Takeshima by the Korean Empire before or after the promulgation of the edict, so it cannot be stated that territorial rights by Korea had been established. Even in a hypothetical scenario in which the ROK possessed some kind of historical title to Takeshima, this was not substituted for a title based on effective control. In contrast, “The incorporation of Takeshima in 1905 by the Japanese government, and the subsequent continued manifestation of state functions there served to adequately replace Japan’s title, which is thought to have been validly established in the 17th century, and largely in conformity with international law of the time, and make it compliant with contemporary demands.”³⁵ Accordingly, the incorporation measures could in no way be described as “an illegal act that infringed upon Korea’s sovereignty.” They were measures with international legal effect that were conducted in strict accordance with the rules of modern international law.

34 Ministry of Foreign Affairs of Japan, op. cit. (supra note 16), (“Q4: Prior to the Japanese government’s incorporation of Takeshima in 1905, is there any proof that Korea owned the islands?”) p. 24. Available to download here: https://www.mofa.go.jp/mofaj/area/takeshima/pdfs/takeshima_point.pdf

Also see, Ministry of Foreign Affairs of Japan, “Japanese Territory: Incorporation of Takeshima into Shimane Prefecture; 6,” available to view here: https://www.mofa.go.jp/mofaj/area/takeshima/g_hennyu.html

35 Taijudo, op. cit. (supra note 19), p. 143.