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Special

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Why Japan has no leg to stand on

On Feb. 22, 2005, Shimane Prefecture in Japan designated that day as "Takeshima Day" every year marking the 100th anniversary of Japan's claim to sovereignty over Dokdo. That sparked an unprecedented series of protests in Korea.

On July 9, 2007, Japan included Dokdo as its territory in a Defense White Paper, and on July 14 of this year, the Japanese government released a revised educational guideline manual for middle school teachers that describes the islets as part of its territory. This triggered a fresh public uproar here.

The new guideline is full of ominous implications, as it will have a significant impact on young people in Japan. The Korean nation felt deep resentment and frustration as the announcement was made in the wake of President Lee Myung-bak's bold suggestions regarding a new course for improved ties between the two countries. Expressing concern, Lee eloquently pointed out that Japan has been taking slow but steady steps to turn Dokdo into an international territorial dispute.

"We need to take long-term and strategic countermeasures as far as Dokdo is concerned. We will consolidate our practical control of the islands," Lee said.

Regrettably, the recent Japanese claims to Dokdo amount to a denial of Korean independence from Japanese colonial rule and a withdrawal of the apologies which Japanese leaders have made for Japanese crimes against this country.

Japan continues to provoke Korea. It claims that Dokdo is an integral part of Japan's territory historically and under international law, and that Korea is illegally occupying the islets. It maintains that, by the middle of the 17th century at the latest, it had established sovereignty over Dokdo based on



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the principle of effective rule, and that, in 1905, as a modern - nation state, Japan could effectively assume sovereignty over Dokdo based on a cabinet decision.

Japan`s claim is not legitimate. Korea has established a stronger claim to Dokdo, insofar as this country has manifested greater sovereignty over the islets. Korean sovereignty, which dates back to the year 512, has been abundantly documented. Korea`s claims can be substantiated by historical facts, old maps and a wide range of official documents issued by both the Korean and Japanese governments. Korean sovereignty over Dokdo is beyond question.

Japan`s claims can also be refuted based on international law, in addition to historical records. The key legal issues regarding ownership of Dokdo can be examined from two perspectives. One is by evaluating the evidence of the discovery and occupation of Dokdo. This is related to the question of whether Dokdo was so - called "terra nullius" - a no - man`s land - when Japan incorporated it into the Shimane Prefecture in 1905, based on Shimane Prefecture Notice No. 40, which is an important legal basis for Japan`s claim.

Japan has long referred to this administrative measure as fundamental to its challenge to Korea`s claim. Japan insists that it legitimately incorporated Dokdo into its territory because the island had previously been terra nullius. However, there is plenty of evidence that Dokdo was not terra nullius when Shimane Prefecture issued its Notice No. 40 and that this was not a valid act of state in acquiring territorial sovereignty, for the following reasons.

First, the Japanese government had already recognized the Korean title of Dokdo in the form of the Dajokan (Council of the State) Directive of 1877; second, on Oct. 25, 1900, Korea`s King Gojong promulgated Imperial Ordinance No. 41, taking a significant step in reaffirming Korean sovereignty over Dokdo; third, Japan made no attempt to notify Korea of its intention to acquire Dokdo. Notification is an important requirement for territorial acquisition by means of occupation. A historical precedent was set when the Japanese government gave notification to the consular offices of the United States, France and Germany in Tokyo before incorporating Ogasawara Shoto (the Bonin Islands) in 1876. By contrast, these notifications and verification procedures were conspicuously ignored in the case of Dokdo.

In arguing the legitimacy of its incorporation of Dokdo, Japan asserts

that Korea did not expressly protest the Japanese measure. However, Korea was unable to make an effective protest because Shimane Prefectural Notice No. 40 was issued without proper notification. The Koreans did not learn of the existence of the notice until a full year later.

On March 28, 1906, officials of the Shimane Prefecture who were visiting Ulleungdo informed the Korean governor of Ulleung County of Japan's incorporation of Dokdo. In fact, since being forced to sign the Korea - Japan Protocol in February 1904, Korea had been under Japanese military administration, and by signing the Korea - Japan Agreement in August 1904, Korea's diplomatic and financial affairs had come under the control of foreign advisors appointed by Japan. In addition, following the November 1905 signing of the Treaty of Protectorate, under duress, Korea was deprived of the right to autonomously conduct diplomatic affairs.

It was thus virtually impossible for Korea to deliver any meaningful diplomatic protest. Nonetheless, Korean opposition to the Japanese act was clearly expressed in major Korean newspapers such as the Daehan Maeil Sinbo (May 1, 1906) and the Hwang Seong Shinmun (May 9, 1906), both of which declared that the Japanese measure was completely invalid. Korea was then under the colonial rule of Japan until Japan's defeat in World War II in 1945.

The other major aspect of the legal issues involves the interpretation of the territorial clause of the 1951 San Francisco Peace Treaty. After Japan annexed Korea in 1910, contention over the status of Dokdo became meaningless. After the Second World War, Korea was liberated and regained its entire territory. Japan was obligated by the 1943 Cairo Declaration to renounce all the territories it had "taken by violence and greed." In the 1945 Potsdam Declaration, the Allied Powers declared that "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine."

When it surrendered to the Allied Powers in 1945, Japan accepted this declaration unconditionally. The Allied Powers did not include Dokdo among "such minor islands" whose sovereignty was to be determined. Instead, in 1946 the Supreme Commander for the Allied Powers explicitly separated Dokdo from Japanese territory proper by issuing SCAP Instruction No. 677, which provides that "Japan is defined to include the four main islands of Japan and the approximately 1,000 smaller adjacent islands ... excluding Ulleungdo and the Liancourt Rocks (Takeshima)."

Why and by what process the SCAP decided to exclude Japanese involvement with Dokdo throughout the occupation is unknown. Although it also recognized that the question of territorial sovereignty was outside the supreme commander's authority, the policy of excluding Dokdo from Japanese fishing areas and administrative control

was sustained throughout the occupation. The Korean side maintains that this policy was a strong indication of how the Allied Powers intended to handle the issue.

In contrast, Japan claims that SCAPIN No. 677 was nothing more than a suspension of its administrative authority for the convenience of the Allied Powers` occupation management. In making this argument, Japan cites Article 6, which states that "nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration." Based on this clause, Japan maintains that the peace treaty of 1951 was the final step taken concerning treatment of the territory.

On March 17, 1947, the SCAP presented the idea of concluding the peace treaty with Japan by announcing that "the time has come for us to have peace talks with Japan." As the work for drafting the treaty was underway, the early conclusion of the peace treaty with Japan was discussed between the United States and Great Britain. From Sept. 4 to 8, 1951, a conference was held in San Francisco, and on the last day, 48 member countries of the Allied nations (the Soviet Union demurred) and Japan signed the peace treaty.

That treaty, among other things, stipulated the disintegration of the Japanese empire, and dealt with the areas restored to Japan and the disposition of territories vis - a - vis Korea. The treaty is crucial, as it dealt with Dokdo. Regrettably, however, no mention of Dokdo was made in the final text of the treaty. Instead, Port Hamilton (Geomundo) was added. Article 2 provides that "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet."

According to the Japanese interpretation, Japan regained its sovereignty over Dokdo by this omission. The Japanese government argues that the peace treaty did not explicitly include Dokdo among the islands to be returned to Korea. If one follows the Japanese interpretation of the treaty, only three Korean islands would have been returned to Korea. Given the fact that there are more than 3,000 Korean islands, such an interpretation is obviously fallacious. This clause was intended to name only three islands for illustrative purposes, rather than resorting to an exhaustive enumeration of the islands to be returned to Korea.

The omission of Dokdo in the peace treaty, which is still the main source of the Japanese territorial claim, was not due to the indeterminacy of the Allied Powers, especially the United States. Rather, it was due to Korea`s inappropriate diplomatic approach to U.S. policymakers at the time of the Korean War, and Japan`s strenuous lobbying to include Dokdo as its territory. It is a sheer absurdity to think that the United States omitted Dokdo from the areas separated

from Japan because the United States believed that Dokdo was Japanese territory.

Korea is in a much better position to claim title to the islets because it has successfully and continuously exercised its sovereignty over them since it regained title to them immediately after liberation from Japanese colonial rule. It stands to reason that Dokdo was already returned to Korea before the conclusion of the peace treaty. Many foreign scholars, including Japanese academics, have supported Korea's claim. For instance, Shimane University professor Naito Seitsu said that "there is substance to Korea's claim over the islets. Even within Japan, many books printed prior to World War II support the claim that the Dokdo islets are Korean territory. The Japanese foreign ministry just does not put such material on its website."

The historian Kajimura Hideki has also offered support for Korea's claim. "Contrary to the judgment of the Japanese government, the Korean side has considerably reasonable grounds on the Dokdo issue," he said.

Jon M. Van Dyke of Hawaii University argues that Korea's claim to sovereignty over the islets is substantially stronger than that of Japan, based on the historical evidence of Korea's exercise of sovereignty and the recognition of Korea's claim by Japanese cartographers.

Additionally, there were the dubious attempts by Japan to incorporate the islets, and the inability of Korea to protest effectively at that time because of Japanese military domination over this nation. There is the principle of contiguity (because the islets are closer to Korea's Ulleungdo than to Japan's Oki Islands).



Finally, there is the fact of Korea's physical control of the islets during the past half century. Korea has an enormous advantage over Japan

because it has de facto possession of Dokdo. Effective possession of Dokdo generally entitles Korea to the claim. Nonetheless, Japan argues that Dokdo has been part of Japan's territory based on historical title. And, as an alternative argument, it contends that the islets became Japanese territory via Japan's incorporation measures of 1905. These contradictory assertions imply that, no matter what, Dokdo should belong to Japan and that every burden of proof should be shouldered by Korea.

The Dokdo issue is not a conventional territorial dispute. It's one of the thorniest issues in Korea - Japan relations. Almost nobody in Korea is ignorant of the matter. Nor does anybody in Korea question Korea's title to Dokdo. Dokdo is not just a matter of territorial ownership, but of national pride for Koreans. Under no circumstances will Koreans concede sovereignty over Dokdo; there will be no compromise here.

More importantly, there should be absolutely no possibility of Japan gaining control of these islands either now or in the future. International law does not allow the use of force to settle the dispute. There is also little possibility of referring the issue to the international judicial tribunals such as the ICJ, unless the two countries agree to do so. It is nonsensical that any legitimate occupant would agree voluntarily to bring the issue before the ICJ. As the legal axiom "possession is nine-tenths of the law" implies, Korea simply needs to maintain the status quo as Dokdo's legitimate occupant.

Despite ups and downs in their relations concerning Dokdo, the two countries have made great progress in various respects. The recent reemergence of the Dokdo issue, however, threatens to undermine all these achievements. The Dokdo dispute has become a source of mutual antipathy, and this will hamper our relations in the future.

In this respect, it should be reiterated that Japan should face the facts. Unless Japan swiftly takes steps to stop the current torrent of anti-Japanese feelings and distrust among Koreans, the situation could deteriorate further. Self-righteous, right-wing Japanese politicians should avoid making provocative remarks and taking provocative action on this issue. Even more essential is that Japan undertake some soul-searching to become a responsible world leader, based on a thorough examination of its past actions. As one scholar aptly pointed out, Japan needs to be benign, reasonable, and farsighted, although realism is still the dominant paradigm in Japan.

The only viable way to end the standoff is for Japan to respect Korea's continuing and peaceful exercise of sovereignty over the islets.

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