

A Study on Territorial Sovereignty over Dokdo in International Law

– Refutation to the Japanese Government’s
Assertions of the Occupied Territory –

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I. Introduction

Dokdo (also spelled : Dok-Do, dok-do, Tokdo, Tok-Island, or Dok-Do island), with Ullungdo, has been an integral part of Korean territory together since the 13th year of King Chijung of Shilla(512 A.D.).

Dokdo, located 49 nautical miles east of Ullungdo in the East Sea and 86 nautical miles west of Japan’s, Oki Island, is composed of two main islets, East and West, as well as 32 surrounding small rocks and reefs. It is the Republic of Korea’s territory, entered into the register with its location at san-42 to san-76 Todong, Nammyon, Ullunggun, Kyongsangbukto, Korea.

When the Republic of Korea government announced “the

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Presidential Declaration on Sovereignty over the Adjacent Seas” on January 18, 1952, the Japanese Ministry of Foreign Affairs protested on the 28th of the same month that “the Republic of Korea’s declaration seems to have the territorial rights over the islets known as Takeshima, but the Japanese government dose not recognize such a claim by the Republic of Korea.” Thus started a issue over Dokdo between Korea and Japan.

As the issue became heated through the exchange of memoranda and counter-memoranda over the territorial sovereignty of Dokdo, the Korean government and many scholars have presented historical proofs as well as legal grounds that the territorial sovereignty over Dokdo belongs to the Republic of Korea, not to Japan.

This paper attempts to point out the invalid nature of the Japanese government’s assertions.

The Japanese government’s assertions are divided into “the assertion of inherent territory” and “the assertion of occupied territory.” However, this study intends to investigate the invalid nature of “the assertion of occupied territory.”

II. Contents of the Japanese Government’s Assertions

As indicated above, one of the legal basis of the Japanese government’s assertions concerning the territorial sovereignty over Dokdo is “acquisition of territory by occupation.”

The Japanese government maintains that Japan has acquired Dokdo by occupation of a terra nullius. In the note verbale dated February 10, 1954, the Japanese Government maintains that Japan acquired Dokdo by occupation and that one of the requisite conditions for occupation, i. e. the intention of the state to acquire the territory, was met in the following way :

With regard to the requirements for acquisition of territory under modern international law, it should be mentioned that the intention of the State to acquire the territory was confirmed as a result of the decision made at a Cabinet meeting on January 28, 1905, for the adding of Takeshima to the territory of Japan and that on February 22, 1905, a public announcement of the intention of the State to acquire the territory was made by a notification issued by Shimane Prefectural Government.

As this was in accordance with the practice followed by Japan at that time in announcing her occupancy of territory, the above measure taken for the public announcement of the intention of the State has satisfied the requirement under international law in this respect.¹

¹ "Note Verbale" of the Japanese Government dated February 10, 1954, Views of the Japanese Government in refutation of the position taken by the Korean Government in the Note Verbale of the Korean Mission in Japan, September 9, 1953, Concerning Territoriality over Takeshima" (The Japanese Government's Views 2), para. 4.

As mentioned above, the Japanese government claims that it acquired its territorial sovereignty by occupation of Dokdo.

III. Refutation to the Japanese Government's Assertions

Concerning the view of the Japanese government's assertion of occupation, the following legal items should be taken into consideration.

- (i) Dokdo was not a terra nullius which could be an object of occupation.
- (ii) The Japanese government has never effectively occupied Dokdo.
- (iii) The Japanese government has not fulfilled the obligation of notification of occupation.
- (iv) The Japanese government first advanced the theory of occupation of a terra nullius and then switched its claim to inherent territory.

However, in this study, (i) and (iii) will be dealt with.

1. Refutation to the Assertion of the terra nullius

A territory subject to occupation must be a "terra nullius"². "Terra nullius" is a territory which is not under the control of

² Ian Brownlie, *Principles of Public International Law*, 3rd. (Oxford : Clarendon, 1979), p. 142.

an international person or a subject of international law.³ In other words, a “terra nullius” has never belonged to any State, and is not a territory abandoned by a sovereign state.⁴ The abandonment of territorial right requires not only the non-exercise of power over the territory, but also the expression of the intention to abandon the territory.⁵

It was confirmed by the Clipperton Island Case(1931).⁶ The polar regions are terra nullius but are excluded from the object of occupation.⁷ It is an established principle of international law that the object of occupation must be a “terra nullius.”

A. Scholars Views

That the object of occupation must be an ownerless territory is maintained by many scholars, and on this point, there is no objection.

According to L. Oppenheim :

Only such territory can be the object of occupation as belongs to no State, whether it is entirely uninhabited for instance, an

³ Georg Schwarzenberger and E. D. Brown, *A Manual of International Law*, 6th ed. (Milton : Professional Books, 1976), p.97.

⁴ Hersch Lanterpacht (ed.), *Oppenheim's International Law*, 8th ed., Vol.1 (London : Longmans, 1955), pp.555-56.

⁵ Brownlie, *op. cit.*, *supra* n.2, p.142.

⁶ *A. J. I. L.*, Vol.26, 1832, p.394.

⁷ Robert Jennings and Arthur Watts(ed.), *Oppenheim's International Law*, 9th ed., Vol.1 (London : Longman, 1992), p. 692.

island, or inhabited by natives whose community is not to be considered as a State.⁸

This view is also maintained by I. C. MacGibbon,⁹ Hans Kelsen,¹⁰ R. Y. Jennings,¹¹ Ian Brownlie,¹² Robert Jennings and Arthur Watts,¹³ Santiago T. Bernardez,¹⁴ J. G. Starke,¹⁵ David H. Ott,¹⁶ Oscar Svarlien,¹⁷ Georg Schwarzenberger and E. D. Brown,¹⁸ and Isagani A. Cruz.¹⁹ Also, an ownerless territory includes the region abandoned by the former owner state, and the abandonment requires not only the non-exercise of authority in the region but also the

⁸ Lauterpacht, *op. cit.*, *supra* n. 4, p. 555.

⁹ I. C. MacGibbon, 'The Scope of Acquiescence in International Law,' *B. Y. J. L.*, Vol. 31, 1954, p. 167.

¹⁰ Hans Kelsen, *Principles of International Law*, 2nd ed. (New York : Holt, 1967), p. 314.

¹¹ R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester : Manchester University Press, 1963), p. 23.

¹² Brownlie, *op. cit.*, *supra* n. 2, p. 142.

¹³ Jennings and Watts, *op. cit.*, *supra* n. 7, p. 686.

¹⁴ Santiago T. Bernardez, 'Territory, Acquisition,' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 10 (Amsterdam : North-Holland, 1987), p. 500.

¹⁵ J. G. Starke, *Introduction to International Law*, 9th ed. (London : Butterworth, 1984), p. 155.

¹⁶ David H. Ott, *Public International Law in the Modern World* (London : Pitman, 1987), p. 105.

¹⁷ Oscar Svarlien, *An Introduction to the Law of Nations* (New York : McGraw-Hill, 1955), p. 170.

¹⁸ Schwarzenberger and Brown, *op. cit.*, *supra* n. 3, p. 97.

¹⁹ Isagani A. Cruz, *International Law* (Quezon : Central Lawbook, 1992), pp. 109~111.

expression of its intention of abandonment.²⁰

B. Judicial Precedents

That the object of occupation must be a terra nullius is accepted by many judicial decisions.

(1) The Clipperton Island Case

In the Clipperton Island Case (1931) between France and Mexico, Arbitrator Victor Emmanuel passed judgment that Clipperton Island belonged to France and described reason as follows :

Consequently, when France expressed its sovereignty for Clipperton Island, the Island was in the legal situation of territorium nullius, and therefore there is a basis for accepting that France was in a position to carry out occupation.²¹

And in this case, the judge ruled that the abandonment of territorial right for an area which had belonged to the sovereignty of a state requires the expression of “animus of

²⁰ Jennings and Watts, *op. cit.*, *supra* n.7, p.688, n.6 ; Bernardez, *op. cit.*, *supra* n.14, p.500 ; Brownlie, *op. cit.*, *supra* n.2, pp.148-49 ; D. P. O'Connell, *International Law*, Vol.1(London : Stevens, 1970), p.444 ; Michael Akehurst, *A Modern Introduction to International Law*, 4th ed.(London : George Allen, 1984), p.142 ; Charles C. Hyde, *International Law*, 2nd ed., Vol.1(Boston : Little Brown, 1947). p.394.

²¹ *A. J. I. L.*, Vol.26, 1932, p.393.

abandoning,” in addition to non-exercise of authority on the area.²²

In short, the Clipperton Island Case reconfirmed that the object of occupation must be a territory without owner.

(2) The Legal Status of Eastern Greenland Case

In the Eastern Greenland Case (1933) between Denmark and Norway, Norway declared occupation of Eastern Greenland on July 10, 1931, and asserted that Eastern Greenland was a territory without owner.²³ The International Court of Justice ruled as follows :

In the event that it is acknowledged as impossible to reconcile Denmark's theory of sovereignty and Norway's theory of a terra nullius, it is necessary to restrict negotiations to an agreement which enables rules.²⁴

The problem of sovereignty and the problem of terra nullius are a problem outside the Convention of July 9, 1924. It is the fact that Norway did not make any reference on this matter in the Convention.²⁵

Thus, the Permanent International Court of Justice recognized as the conditions for prior occupation that the territory

²² *Ibid.*, p. 394.

²³ P. C. I. J., *Series NB*, No. 53, 1933, p. 44.

²⁴ *Ibid.*, p. 73.

²⁵ *Ibid.*, p. 74.

becoming an object for occupation must be a terra nullius.

(3) The Western Sahara Case

In the Western Sahara Case(1975), when Spain tried to give independence to Western Sahara which had been its colony since the 19th century, Morocco and Mauritania each claimed the title to Western Sahara.

Concerning the title to Western Sahara, the United Nations General Assembly asked the International Court of Justice for an advisory opinion.²⁶ The International Court of Justice expressed its opinion as follows :

The expression, “terra nullius,” is a legal term used in connection with prior occupation, which is one legal method for acquiring sovereignty over a territory- That the territory must be a terra nullius territory belonging to no one - is one of the cardinal conditions for an effective occupation.²⁷

By the opinion, the international Court of Justice made it plain that the object of occupation must be a terra nullius.

In customary international law, a territory subjected to occupation needs to be a “terra nullius.” Dokdo, together with Ullungdo, was not a terra nullius but had belonged to Korea ever since the era of Silla, and this is proven by many

²⁶ I. C. J. *Reports*, 1975, p.12.

²⁷ *Ibid.*, p. 39.

historical data. The vacant island policy did not mean the abandonment of territorial right to Dokdo. Therefore, Dokdo did not become a “terra nullius,” that is to say, an object of occupation. If Japan claims the occupation of Dokdo, Japan must prove that Korea had the intention of abandoning Dokdo.

2. Refutation to the Assertion of the Notification

The Japanese government maintains that the external notification of occupation is not a requisite for occupation in international law.

However, the Japanese government asserts that its intention to acquire the territory was officially announced by the “notification” by Shimane Prefecture. This was countered by the Korean government as follows in the note verbale dated September 25, 1954 :

The Korean Government cannot recognize the propriety of the Japanese Government’s argument that Japan has satisfied “the condition of the public announcement of the intention of the state under international law regarding occupancy.” The alleged notification by the Shimane Prefectural Government was so stealthily made that it was not known even by the general public of Japan, not to speak of foreign countries. Therefore, it can by no means be considered as public announcement of the intention of one country.²⁸

²⁸ “Note Verbale” of the Korean Government dated September 25, 1954, “The Korean Government’s View (2) Refuting the Japanese Government’s View of the Territorial Ownership of Dokdo

Thus, the notification by Shimane Prefecture in 1905 was to inform the local people of the intention of a local administrative organ and could not be construed as an external expression of intention of the state under international law.

The Japanese government's note verbale dated September 20, 1956, asserts:

In connection with the aforementioned public announcement, there is a question of notification to foreign countries. In this respect, most of international jurists agree that there is no principle in international law which regards such notification as above as an absolute requirement for acquisition of territory. In the cases of the Island of Palmas of 1928 and of Clipperton Island of 1931, moreover, the Permanent Court of Arbitration gave decisions making it clear that no notification to foreign countries is required for the acquisition of territory. The principle followed in the above two cases was asserted by the United States at the time of its occupancy of the Guano Islands.²⁹

Relating to the notification of occupation, the Japanese

Takeshima) Taken in the Note Verbale No. 15/A2 of the Japanese Ministry of Foreign Affairs dated February 10, 1954" (The Korean Government's Views 2), Part III, para. 2.

²⁹ "Note Verbale" of the Japanese Government dated September 20, 1956, "The Japanese Government's Views on the Korean Government's Version of Problem of Takeshima dated September 25, 1954" (The Japanese Government's Views 3), Part III.

government views that external notification of occupation is not a requisite for occupation under international law.³⁰ This is tantamount to admitting that “the Shimane Prefecture Public Notice No. 40” dated February 22, 1905, was not the external notification by international law. It is necessary to examine whether notification is one of the requisites for occupation under international law.

A. Scholars' Views

Concerning the notification as a requisite condition for occupation, the Japanese government maintains :

In this respect, most of international jurists agree that there is no principle in international law which regards such notification as above as an absolute requirement for acquisition of territory.³¹

³⁰ This view is held by Japanese scholars such as Minagawa Ko, “Takeshima Dispute & International Precedent,” *Maehara Mitsuo kyōju kanreki kinen kokusaihogaku no shamondai* (Various Problems in International Law in Commemoration of the Sixtieth Birthday of Prof. Maehara Mitsuo) (Tokyo : Keio Tsushim, 1963), p.367 ; Ueda Katsuo, “Japan-Korea Dispute over Annexation of Takeshima,” *Hitotsubashi Collection of Thesis*, Vol. 54, No. 1, 1965, p.30. However, this is a mode of “classic, imperialist-type prior occupation of *terra nullius*” and cannot be applied to Dokdo. Kim Chong-gyun, “Toso bunjaeng saraewa dokdo munjae” (precedents of dispute over islands and the question of Dokdo), *K. J. I. L.*, Vol. 25, 1980, p.40.

³¹ “Note Verbale” of the Japanese Government, *op. cit.*, *supra* n.29, part III.

However, the above view of the Japanese government is not correct. There are different views on whether external notification is one of the requisite conditions for occupation. The majority of jurists do not accept this as the Japanese government does ; rather they consider notification required.

(1) Positive Views

A positive view on notification is asserted by Oscar Svarlien. He mentioned :

Furthermore, the French proclamation of sovereignty over Clipperton was dated November 17, 1858, a fact which rendered the subsequent Act of Berlin inapplicable. As to the question of proper notification on the part of the French government, the Arbitrator held that the publication in a Honolulu journal of the fact that sovereignty over Clipperton Island had been assumed by France, and the communication of the accomplishment to the government of Hawaii by the French Consulate, were sufficient under the then existing law. Here again the special provisions relative to such notification contained in Article 34 of the Act of Berlin were held to be without application.³²

On the basis of these main premises, the Arbitrator arrived at the conclusion that Clipperton Island was legitimately

³² Svarlien, *op. cit.*, *supra* n.17, pp.172~73.

acquired by France on November 17, 1858.

Thus, Svarlien regards notification as a necessary condition for occupation, since Clipperton Island was legitimately acquired by France by its notification of the fact of occupation of the island.

George G. Wilson is also positive on this point. He asserted :

Discovery cannot become title, but discovery must be followed by occupation or other act which could be interpreted as similar to occupation and the General Act of Berlin Conference in Chapter 6 Article 34 made a special stipulation concerning the acquisition of land on the coast of the African continent.³³

Thus, Wilson feels that discovery alone does not generate title and cites Article 34 of “the 1885 General Act of Berlin Conference. He brings our attention to the Institute of International Law that in 1888 proposed a draft of “obligatory declaration” concerning occupation.³⁴

John Westlake also takes the same position and cites Lord Stowell that in the newly discovered territory where title is to be recognized, some act of possession can be consummated by notification of the fact or proclamation thereof.³⁵ He

³³ George G. Wilson, *Handbook of international Law*, 3rd ed. (St. Paul, Minn : West Publishing Co., 1939). pp.77~78.

³⁴ *Ibid.*, p. 78.

³⁵ John Westlake, “Discovery and Occupation as International Titles,” in *The Collective Papers of J. Westlake on Public International Law*,

states that “the Act of Berlin” did not make any further development from “the principle of publicity.”³⁶ This could be interpreted that “the Act of Berlin” does not carry any weight since international law generally makes notification the necessary condition for occupation.

As Westlake, William E. Hall also argues that “the Act of Berlin” is not only valid for the contracting parties, but should be considered as having a general binding power under international law. He says :

an agreement, made between all the state which are likely to endeavour to occupy territory, and covering much the largest spaces of coast, which, at the date of the declaration, remained unoccupied in the world, cannot but have great influence upon the development of a generally binding rule.³⁷

Westlake feels that a general international law requiring notification was codified by “the Act of Berlin” while Hall considers the Act became a general international law. John B. Moore also advocates the obligation of notification by citing Hall’s above-mentioned argument.³⁸ M. F. Lindly

L. Oppenheim, ed. (London : Cambridge University Press, 1914), pp.163~64.

³⁶ *Ibid.*, p.166.

³⁷ William E. Hall, *A Treaties on International Law*, 6th ed. (Oxford : Clarendon, 1909), pp.115~16.

³⁸ John B. Moore, *Digest of International Law*, Vol. 1 (Washington, D. C. : U. S. G. P. O. 1906), p.268.

viewed it proper to regard notification and effective occupation as the necessary conditions for occupation, before and after the signing of the 1885 Berlin Act. He states as follows :

According to views adopted by Britain, Germany, France and the United States, at the time of before and after the Berlin conference, there were no colonial states which took exception to the application of new rule of occupation, and it seems to be justified to say that all recent acquisition of territory obeys to this rule irrespective of whether it is the African coast or not.³⁹

Lindley says that notification and necessary conditions for effective occupation defined in “the Act of Berlin” do not apply only to “the African coasts” and the contracting parties to the Act, but also apply to all areas and all states. This is the same as Hall’s view.

According to Charles de Visscher, “the Act of Berlin” of 1885 is not a treaty valid simply for individual countries concerned with the Act, but it is a collective measure for establishing the structure of international law. He states emphatically as follows :

The Act itself can not be seen as a simple treaty of

³⁹ M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London : Longmans, 1926), p.157.

acknowledging the creation only of individual relationships between its signatories of the Act. This Act was devised to set up a legal rule relating to occupation of ownerless territory while guaranteeing benefit of peace, protection of indigenous people and freedom of trade. This is clearly a collective and normative act establishing a highly internationalized legal regime.⁴⁰

Thus, Visscher also regards “the Act of Berlin” as general international law having validity beyond the scope of its signatories. He maintains the same position as Hall and Lindley on the point that the obligation of notification became general international law through “the Act of Berlin.” Also, Quincy Wright says that the Declaration of the West Africa Conference, namely Articles 34 and 35 of “the Act of Berlin” were “generally accepted” and that it is a “present law.”⁴¹

Charles C. Hyde says that Articles 34 and 35 of the 1885 “Act of Berlin” defined notification and effective occupation as the necessary conditions for occupation on the African coasts and that this definition does not restrict its application to specific areas of Africa.⁴²

⁴⁰ Charles de Visscher, *Theory and Reality in Public International Law*, trans. by P. E. Corbett (Princeton : Princeton University Press, 1956), p. 321.

⁴¹ Quincy Wright, “Territorial Propinquity,” *A. J. I. L.*, Vol. 12, 1918, p. 552.

⁴² Hyde, *op. cit.*, *supra* n. 20, p. 342.

Hyde also points out that “the Declaration of the Institute of International Law” does not approve as valid occupation by sovereignty without official notification of taking possession and regards Westlake’s view that the Declaration is seen as having unified views of the existing situation.⁴³

Similar to Hyde, Charles G. Fenwick expresses his view on notification of occupation as follows :

The provisions of the Berlin convention showed the desirability of formulating a general rule of international law upon the subject. In consequence, the question was taken up by the Institute of International Law, which offered in 1888 a Draft of an International Declaration Regarding Occupation of Territories.⁴⁴

As shown above, Fenwick considers it desirable to regard as a general rule of international law “the Act of Berlin” of 1885 which defined notification as the necessary condition for occupation. And he regards “the Declaration of Institute of International Law” of 1888 as its result. Consequently, he considers notification the necessary condition for occupation in general international law. As Westlake did, he views “the Act of Berlin” as codification of general international law.

In addition to the above-mentioned scholars, Travers Twiss

⁴³ *Ibid.*, p. 343.

⁴⁴ Charles G. Fenwick, *International Law*, 4th ed. (New York : Appleton-Century-Crofts, 1965), p. 410.

s,⁴⁵ Paul Fauchille,⁴⁶ Charles Rousseau,⁴⁷ Julius Hatschek,⁴⁸ George Friedrich Martens,⁴⁹ F. V. List,⁵⁰ Mitsuo Maebara,⁵¹ Akira Ozawa,⁵² Taoka Ryoichi⁵³ also regard notification as the necessary condition for occupation.

(2) Negative Views

A negative view on notification of occupation is asserted by Alf Ross. He held that external notification is not an absolute requirement for occupation. He mentioned :

On the other hand, a formal declaration of occupation or notification is not required, but of course is often to be recommended by way of proof.⁵⁴

⁴⁵ Travers Twiss, *The Oregon Question Examined* (London : np. 1846), pp. 1547~58.

⁴⁶ Paul Fauchille, *Traite de droit international public*, t. 1 (Paris : Rousseau, 1925), pp. 738 ff.

⁴⁷ Charles Rousseau, *Droit international Public* (Paris : Sirey, 1953), p. 246.

⁴⁸ Julius Hatschek, *Volkerrecht* (Leipzig : Erlangen, 1923), S. 170.

⁴⁹ George Friedrich Martens, *Recueil des principaux traites* (etc.), t. 7 (Gottingen : Dietrich, 1831), p. 426.

⁵⁰ F. V. List, *Völkerrecht Systematisch Dargestellt*, 12Auf., ed. M. Fleishmann (Berlin : np. 1925), S. 160.

⁵¹ Maebara Mitsuo, *Kokusaiho kogian* (A Draft Lecture on International Law) (Tokyo : Keio Tsushin, 1974), p. 86.

⁵² Ozawa Akira, *Heiji Kokusaiho, (International Law : Peace)* Part (Tokyo, Nihon Hyoron-sha, 1937), pp. 236~40.

⁵³ Taoka Ryoichi, *Kokusaiho koza, A Lecture on International Law*, Vol. (Tokyo : Yuhikaku), p. 338.

⁵⁴ Alf Ross, *A Textbook of International Law*, General Part (London :

Despite his negative view on notification, Ross thinks it becomes the proof of prior occupation. Ian Brownlie also concurs with Ross :

Notice of a territorial claim or an intention to extend sovereignty to other governments constitutes evidence of occupation, but is not a condition for acquisition. As between the contracting parties, conventions may provide for notification of claims.⁵⁵

Oppenheim holds that external notification is not an absolute requirement :

No rule of Law of Nations exists which makes notification of occupation to other States a necessary condition of its validity. As regards all future occupations on the African coast the parties to “the General Act of the Berlin Conference” of 1885 stipulated that occupation should be notified to one another. But this Act has been abrogated so far as the signatories of the Convention of St. German of September 10, 1919 are concerned.⁵⁶

Lord McNair,⁵⁷ Green H. Hackworth,⁵⁸ T. Guggenheim,⁵⁹

Longmans, 1947), p.147.

⁵⁵ Brownlie, *op. cit.*, *supra* n.2, p.148.

⁵⁶ Lawterpacht, *op. cit.*, *supra* n.4, p.559.

⁵⁷ Lord McNair, *International Law Opinions*, Vol.1(Cambridge : Cambridge University Press, 1956), p.286.

⁵⁸ Green H. Hackworth, *Digest of International Law*, Vol.1(Washington,

R. Y. Jennings,⁶⁰ I. C. MacGibbon.⁶¹

As examined above, the majority view of scholars consider notification necessary even without a specific treaty such as “the Act of Berlin.”

Therefore, the Japanese government’s claim that “most of international jurists agree that the principle by international law making notification as an absolute condition for acquiring territory does not exist⁶² is incorrect.

Even those scholars who do not regard notification as the necessary condition for occupation accede that the usefulness of notification⁶³ should be taken into consideration.

B. Judicial Precedents

(1) The Island of Palmas Case

The Japanese government asserted that the arbitration trial of the Island of Palmas Case ruled clearly that notification to foreign countries is not required. “The

D. C. : U. S. Government Printing Office, 1940), pp.408~409.

⁵⁹ T. Guggenheim, *Traite de droit international public*, t. 1(Geneva : George, 1954), p. 441.

⁶⁰ Jennings, *op. cit.*, *supra* n.11, p. 39.

⁶¹ MacGibbon, *op. cit.*, *supra* n.9, p. 176.

⁶² “Note Verbale” of the Japanese Government, *op. cit.*, *supra* n.29, part III.

⁶³ Ross recognizes the value of notification as “proof.” Ross, *op. cit.*, *supra* n.54, p.147 ; Brownlie also recognizes this. Brownlie, *op. cit.*, *supra* n.2, p.148 ; Lauterpacht says notification is required by “the comity of nations,” Lauterpacht, *op. cit.*, *supra* n.4, p. 559.

Japanese Government's Views on the Korean Government's Version of Problem of Dokdo" dated September 25, 1954, mentioned as follows :

In the cases of the Island of Palmas of 1928, ... moreover, the Permanent Court of Arbitration gave decisions making it clear that no notification to foreign countries is required for the acquisition of territory.⁶⁴

In order to investigate the problem of notification, it is necessary to review the Island of Palmas Case. The case was submitted to the Permanent Arbitration Trial over the territorial right of Palmas Island between the United States and Holland. This case started when General Leonard Wood, who was Moro State Governor in the Philippines, then under the control of the United States, found the Dutch flag hoisted on Palmas Island during an inspection tour on January 21, 1906 and reported it to the U. S. Government. The case was brought before the Permanent Arbitration Court in 1925 and ended with Holland winning the case.⁶⁵

Palmas Island is located about 20 miles inside boundary shown in the peace treaty and is two miles long and less than one mile wide, and there were less than 1,000

⁶⁴ "Note Verbale" of the Japanese Government, *op. cit.*, *supra* n.29, Part III.

⁶⁵ D. J. Harris, *Case and Materials on International Law*, 2nd ed. (London: Sweet and Maxwell, 1979), p.174.

inhabitants than.

The Philippine Islands were ceded to the United States by Spain under the peace treaty concluded on December 10, 1892, as a result of the U. S. – Spanish War.

The U. S. government asserted that Palmas Island was ceded to it by the peace treaty, while the Dutch government countered that the island was a part of the East Indian in Holland's possession since the days of the East India company and that Holland had exercised sovereignty on the island continuously and peacefully.⁶⁶

In passing judgment on the case, Arbitration Judge Max Huber states:

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority, some of which have been discussed in the United States Counter-Memorandum, the following must be said: The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. An obligation for the Netherlands to notify to other Powers... the display of sovereignty in these territories did not exist. Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply de plano to other regions...⁶⁷

⁶⁶ Herbert W. Briggs. *The Law of Nations, Case, Documents and Notes*, 2nd ed. (New York : Appleton Century, 1952), p.239 ; Harris, *op. cit.*, *supra* n.65, p.174.

As shown above, in the Island of Palmas Case, notification to foreign countries was recognized as the condition of legality for the Netherlands' act on Palmas Island, like any other formal act. It was ruled that the obligation of notification stipulated in the 1885 Protocol on occupancy on the African continent does not exist where a clandestine exercise of State authority over an inhabited territory like Palmas Island seems to be impossible.⁶⁸

In short, it only pointed out that the 1885 protocol on the African continent does not apply to Palmas Island, and clearly acknowledged that “notification is the condition of legality like other formal acts.”

(2) Clipperton Island Case

The Japanese government argues that in the Clipperton Island Case in 1931 notification to foreign countries was not required. “The Japanes Government's Views on the Korean Government's Version of Problem of Dokdo” dated September 25, 1954, wrote as follows:

In this respect most of international jurists agree that there is no principle in international Law which regards such notification as above as an absolute requirement for acquisition

⁶⁷ *Ibid.*, p. 180.

⁶⁸ L. C. Green, *International Law through the Case* (London : Stevens, 1951). p. 369.

of territory. In the cases of the... Clipperton Island of 1931, more over, the Permanent Court of Arbitration gave decisions making it clear that no notification to foreign countries is required for the acquisition of territory.⁶⁹

The Clipperton Island Case is involving Mexico and France over territorial rights to the Clipperton Island, which is located 670 mile southwest of Mexico and is less than three miles in diameter.

Coat de Kerweguen, a French naval officer, discovered Clipperton Island during a voyage on November 17, 1858, and reported it to the French consul in Honolulu, who in turn notified the Hawaiian government, and it was published in the Honolulu news paper, the Polynesian, on December 8, 1858, that France proclaimed sovereignty on the island.⁷⁰

On November 25, 1897, France announced that the commander of the French Fleet in the Pacific found three Americans hoisting the American flag on Clipperton Island and collecting guano.

The United States responded on November 24, 1897, that the United States had no intention to exercise sovereignty on Clipperton Island. Mexico dispatched a warship to the island on December 13, 1897 and had the three Americans lower

⁶⁹ "Note Verbale" of the Japanese Government, *op. cit.*, *supra* n.29, Part

III.

⁷⁰ *A. J. I. L.*, Vol.26, 1932. p.391.

the American flag and hoisted the Mexican flag. This incident was brought to the Court of Arbitration and concluded with France winning the case.⁷¹

In the case, the arbitration judge clarified in the ruling that there was no obligation of notification as follows:

The regularity of the French occupation has also been questioned because the other Powers were not notified of it. But it must be observed that the precise obligation to make such notification is contained in Art. 34 of the Act of Berlin which is not applicable to the present case.⁷²

Above decision does not deny obligation of notification in general, but it points out the incapability of such notification as contained in Art. 34 of the Act of Berlin to that particular case. Naturally, France is a party to the Act of Berlin, concluded in 1895, but the island was occupied earlier, in 1858. So, France had no such obligation under the Act of Berlin.⁷³

The notification was served to the Hawaiian government by the French consul and at the same time, the establishment of French sovereignty over the island was publicly announced in the newspaper, the Polynesian, in Hawaii, This is made clear in the court decision :

⁷¹ *Ibid.*, pp. 391-92.

⁷² *Ibid.*, pp. 394.

⁷³ Svarlien, *op. cit.*, *supra* n.17, p. 172.

There is good reason to think that the notoriety given to the act, by whatever means, sufficed at the time, and that France provoked that notoriety by publishing the said act in the manner above indicated.⁷⁴

Therefore, the Japanese government's claim that "the judgment was made to clarity that notification to foreign countries is not required" is not justified.⁷⁵

As examined above, the majority view of scholars and international precedents consider notification necessary even without a specific treaty such as the Act of Berlin. Merely, there is a difference of views over whether the Act of Berlin has become general international law or vice versa.

The "Draft of an International Declaration Regarding Occupation of Territories" by the Institute of International Law clearly stated in 1888 that notification is a necessary condition for occupation. Therefore, the Japanese government's note verbale of September 20, 1956, has no legal basis in international law.

3. Refutation to the Assertion of the Intention

The Japanese government asserts that the intention of Japan to acquire Dokdo and its official announcement were

⁷⁴ *A. J. I. L.*, Vol. 26, 1932, p. 394.

⁷⁵ "Note Verbale" of the Japanese Government, *op. cit.*, *supra* n.29, Part III.

taken by “the Shimane Prefecture Public Notice No. 40” on February 22, 1905, in international law. The Japanese government’s note verbale dated February 10, 1954 maintains as follow :

We cannot but mention that the intention of the State to acquire territory and its public announcement on February 22, 1905, were taken by the notification announced by Shimane prefecture. As this was in accordance with the practice followed by Japan at that time in announcing her occupancy of territory, the above measure taken for public announcement of the intention of the State, has satisfied the requirement under international law in this respect.⁷⁶

It is not clear whether “the public announcement of the intention of the State” means the public announcement of the intention of the State under domestic law or under international law. But, it seems to mean the public announcement of the intention of the State “by international law” since it said that the notification by Shimane prefecture satisfied “the necessary condition by international law.”

If so, can “the Shimane Prefecture Public Notice No. 40” be regarded as the public announcement of the intention of the State by international law. To examine this point, one must study (i) whether the Shimane Prefecture Governor is an organ of the State capable of making the public announcement

⁷⁶ “Note Verbale” of the Korean Government, *op. cit.*, *supra* n.1, para.4.

of the intention of the State under international law, and (ii) whether “the Shimane Prefecture Public Notice” has the character of notification by international law.

A. Legal status of the Government of Shimane Prefecture

In order to regard “the Shimane Prefecture Public Notice No. 40” as a public announcement of the intention of Japanese government to acquire Dokdo, it is necessary to examine legal status of Governor of Shimane Prefecture in international law.

Is the Government of Shimane Prefecture Japan’s external organ capable of taking such unilateral legal action as declaration or notification under international law? External relations of the State surely must be conducted by a state organ.⁷⁷ In other words, it is a general principle of international law that the State can exercise a legal act under international law only through an action by the State’s external organ.⁷⁸ Francis Deak holds that the State’s official external relations can be conducted only by the authorized state organs,⁷⁹ and L. Kopelmanas maintains that “the creative activity of the State can be conducted by international organs only.”⁸⁰

⁷⁷ Hyde, *op. cit.*, *supra* n. 20, p.1204.

⁷⁸ Svarlien, *op. cit.*, *supra* n.17, p. 229.

⁷⁹ Francis Deak, “Organs of State in their External Relations,” in Max Sorensen(ed.), *Manual of Public International Law*(London : MacMillan, 1968), p. 392.

This is recognized by many scholars,⁸¹ and it also was confirmed by the advisory opinion of the International Court of Justice, concerning the German Settlers in Poland Case(1923).⁸²

The State's external organs are the chief of State, the head of government, the foreign minister, the military commanders, diplomatic agents and plenipotentiaries,⁸³and the chief of State, the foreign minister and the military commander⁸⁴ have naturally the right to represent the State, and the diplomatic agents and plenipotentiaries require letters of credence.⁸⁵ The sovereign state decides who becomes the State's external organ, such as the chief of State, the head of government, the foreign minister, the military commanders, diplomatic agents and plenipotentiaries,

⁸⁰ Lazare Kopelmanas, "Custom as a Means of the Creation of International Law," *B. Y. I. L.*, Vol. 18, 1937, p.131.

⁸¹ Hans Kelsen, *General Theory of Law and State*, A. Wedberge (trans.)(Cambridge : Harvard University Press, 1949), pp.192~93 ; Hall, *op. cit.*, *supra* n. 37, p.290 ; Kelsen, *op. cit.*, *supra* n. 10, p.463 ; Werner Levi, *Contemporary International Law : A Concise Introduction* (Boulder : Westview Press, 1979), pp.101~102.

⁸² P. C. I. J. *Series B*, No. 6, 1923, p.22.

⁸³ Deak, *op. cit.*, *supra*, n. 79, p.383.

⁸⁴ The military commander has the rights to represent the state by international law. Kelsen, *op. cit.*, *supra*, n. 10, p.463 ; John Westlake, *International Law*, Part 2 (Cambridge : Cambridge University Press, 1913), p.92 ; Levi, *op. cit.*, *supra* n. 81, p.103.

⁸⁵ Deak, *op. cit.*, *supra* n. 79, pp.383~84 ; Fenwick, *op. cit.*, *supra* n. 44, p.522 ; Art. 7, 2, Para, of the Vienna Convention on the Law of Treaties.

and this is outside the realm of international law.⁸⁶

A unilateral act of declaration or notification is also one of the forms of interstate activity or action under international law⁸⁷ ; it is of course, conducted by a State's external organs.⁸⁸ It is because the intention of occupation should be the intention of the State organ.⁸⁹ The Governor of Shimane Prefecture who announced publicly "The Shimane Prefecture Public Notice No. 40" was undoubtedly not the rightful representative organ of the State under international law, nor a representative Japanese organ capable of making the external activity on behalf of the State.

Therefore, the Governor of Shimane Prefecture is merely an administrative organ which could announce publicly administrative action under Japan's domestic law, but cannot represent the State, in marking declaration or notification of the occupation of territory or the intention of sovereign occupation by the State under international law.

The public announcement by the Governor of Shimane Prefecture was not an act beyond power, but an act without

⁸⁶ Kelsen, *op. cit.*, *supra* n. 79, pp.383~84 ; Fenwick, *op. cit.*, *supra* n. 44, p.522 ; Art. 7, Para, 2 of the Vienna Convention on the Law of Treaties.

⁸⁷ Lord McNair, *The Law of Treaties*(Oxford : Clarendon, 1961), p. 32.

⁸⁸ Charles Fairman, "Competence to Bind the State to an International Engagement," *A. J. I. L.*, Vol. 30, 1936, p.446.

⁸⁹ Brownlie, *op. cit.*, *supra* n. 2, p.143 ; Ozawa Akira, *Kokkaryoikito sono hendo(State Territory & Its Changes)*. *Kokusaiho koza (Lecture on International Law)*, Vol. 1 (Tokyo : Yuhikaku, 1953) pp.219~20.

power.

But whether could it eventually be recognized as an action of the State as it is an action beyond authority under international law? An act of so-called ultra vires being reverred to an act of the State could be considered only when “the State’s representative organ” takes a representative action beyond its authority,⁹⁰ and an action by those who art not the State’s representative organ cannot be recognized. In other words, the ultra vires action is on the premise of the State’s representative organ and becomes a problem in case the representative organ went beyond its authority.⁹¹

Therefore, the action taken by those who are not the State’s representative organs cannot confer the validity of the conduct to the State. In the case of the conclusion of a treaty, the ultra vires formal action of an organ possessing a letter of credence. Therefore, it is “non- existent” as an act in international law even based on the analogy of being a ultra vires act.

B. Legal Nature of the Shimane Prefecture Notice

In order to regard “the Shimane Prefecture Public Notice No. 40” as a unilateral transaction of the Japanese

⁹⁰ Art. 47 of the Vienna Convention on the Law of Treaties.

⁹¹ Fiarman, *op. cit.*, *supra* n. 88, p.440 ; William W. Bishop, *International Law, Cases and Documents* (Boston : Little Brown, 1953), pp.90~91 ; “Harvard Research Draft Convention on Treaties,” *A. J. I. L.*, Vol. 29 1935, Supplement, p.1008.

government in international Law, it is necessary to investigate the legal nature of the Notice in international Law.

Has “the Shimane Prefecture Public Notice No. 40” the nature of notification under international law? “Notification” in a State’s unilateral action is a communication to another State or States of a legally significant specific fact or facts,⁹² and the purpose of notification is to make clear the position of notifying country on that fact or facts.⁹³

According to general international law, unilateral actions such as notification, protest, acquiescence, and dereliction have the same legal validity as bilateral acts of a treaty because a unilateral action expresses the intention of a State or States as in a formal agreement.⁹⁴ That a State’s unilateral action binds the States under international law like a treaty was ruled on by the International Court of Justice in the Corfu Channel Case(1948).⁹⁵

Since a valid notification is an interstate activity⁹⁶ under international law, it is contradistinguished from a notice which is an administrative action under domestic law. A notice is designed for many and unspecified people (1) to inform them do a specific matter, (2) to announce the

⁹² Levi, *op. cit.*, *supra* n. 81, p.214 ; Lauterpacht, *op. cit.*, *supra* n. 28, p. 874.

⁹³ Schwarzenberger and Brown, *op. cit.*, *supra* n. 3, p. 140.

⁹⁴ Fairman, *op. cit.*, *supra* n. 88, p. 39.

⁹⁵ Green, *op. cit.*, *supra* n. 68, p. 631.

⁹⁶ McNair, *op. cit.*, *supra* n. 87, p. 32

enactment of a law or regulation ; (3) and to make public an administrative disposition or legislation.⁹⁷ “The Shimane Prefecture Public Notice No. 40” is not a declaration or notification of occupation because it was not conducted as an interstate activity but was merely an administrative action under municipal law. Thus, “the Shimane Prefecture Public Notice No. 40” is non-existent as a declaration of occupation or notification under international law.

As investigated above, therefore, the Japanese government claim in the note verbale February 10, 1954 does not have any meaning except under Japan’s domestic law.

IV. Conclusion

As investigated above, the Japanese government’s assertion that Dokdo is Japanese territory has no legal basis, the island is neither inherent nor occupied territory of Japan.

Dokdo is an integral part of the Korean territory when seen against the historical documents, the contradictory Japanese allegation under international law, and a series of international agreements or documents including “the Cairo Declaration” and “SCAPIN No. 677.” Japanese government’s assertions to the sovereign right over Dokdo after entering

⁹⁷ Sugimura Shosaburo, *Gyoseigaku gaiyo* (An Outline of Administrative Law) (Tokyo : Yuhikaku, 1951), p.261 ; Nobuta Kiro, *Gyoseiho* (Administrative Law) Vol. 1 (Tokyo : Kobundo, 1973), p.164.

the United Nations in 1954 is a violation of “the U. N. Charter,” Article 2, Paragraph 4, which defines the principle of territorial integrity. It is also a breach of Article 4 of “the Korean–Japan Treaty on Basic Relations” which defines the principle of mutual respect of sovereignty.

However, Japan continues to claim Dokdo’s territorial rights even today, which is straining the friendly relations between the two countries. Japan should make a sincere effort to promote friendship with Korea as a good neighbor by admitting Korea’s sovereignty over Dokdo. There can be no question about Dokdo’s sovereignty. Japanese government’s assertion that Dokdo is Japanese territory means nothing but an intention of aggression.