

Korea's Territorial Rights to Tokdo in History and International Law^{1)*}

*Ban Key Lee^{2)**}*

I. Origin and Development of the Question of Tokdo

A. Origin

Tokdo is a Korean territory, administratively registered at No.1, Todong, Namyong, Ullunggun, Kyongsang Pukto, Korea. Japan claims it as Takeshima in Gokamura, Okinogun, Shimaneken. The question of Tokdo, a typical dispute between Korea and Japan arose when Japan annexed the island on February 22, 1905, (38th year of the Meiji era) by means of public notice 40 of Shimaneken (Shimane prefecture) to the effect:

"...The island 85 miles northwest of Okinoshima shall be designated as Takeshima and be placed under the jurisdiction of the head of Okinoshima.³⁾"

At that time, the whole territory of Korea had become the focus of aggression by expansionist Japan and Korea was not able to pay attention to that far-off uninhabited island and was not in a position to lodge any protest against the Japanese action.⁴⁾ Accordingly, the question of Tokdo passed into oblivion as Korea was annexed by Japan five years thereafter in 1910.

On January 18, 1952, after Korea, as an independent country, proclaimed a "Presidential Declaration on Sovereignty over the Adjacent Seas"⁵⁾; the dispute came to the fore and the Japanese government protested against it ten days later. What prompted the Japanese action was that the "adjacent seas" included Tokdo. In the protest, the Japanese government stated:

"...The Republic of Korea appears to assume territorial rights over the islets in the Sea of Japan known as Takeshima or Liancourt Island, but the Japanese government does not recognize such assumption or demand by the Republic of Korea. ..." ⁶⁾ To this, the Korean mission in Tokyo countered in a memorandum dated February 12 of that year; again this was confuted by the Japanese side by its memorandum dated April 25. This continued more than ten times until Japan sent its last memorandum dated July 13, 1962, but the dispute remained unsettled.⁷⁾

On June 22, 1965, a basic treaty for the normalization of Korea-Japan relations and other agreements were signed, thus putting an end to the Korea-Japan negotiations that had dragged on for 14 years. But in the process of the normalization talks between the two countries the question of Tokdo never was taken up as an agenda item. In the "instruments exchanged for peaceful settlement of disputes," both parties agreed to settle a dispute first through diplomatic channels unless otherwise agreed upon and then resort to arbitration according to the procedures to be agreed on by the two parties if settlement of a dispute failed through diplomatic channels. The Japanese side asserts that, although no mention was made of Tokdo,⁸⁾ it is apparent that the provision was meant for Tokdo. Therefore, Japan insists the question of Tokdo should be settled by the method provided for in the instruments exchanged. Contrary to this, the Korean side regards the Japanese view as a stretch of the law in its favor because the question of Tokdo was never taken up at any stage of the Korea-Japan negotiations. Thus, another dispute arose over the application

of the instruments exchanged.

However, the Korean-Japan Treaty is written confirmation that "a cooperative system was established within a bloc"⁹⁾ between the two countries. The question of Tokdo has been removed from the dangerous agenda items that would incite a bitter confrontation and heighten nationalist emotions as in the past. Despite this, the question still remains a dispute with many problems attendant on it and nobody knows when it will burst into eruption like a volcano.

B. Geographical situation

In order to establish the territorial rights to Tokdo, it is necessary to inquire first into its historical background and geographical situation. But both questions are colored by two self-centered views and make the facts about Tokdo blurred and nebulous. As a temporary step, the writer will use the documents known to date and describe the geographical natural environment of Tokdo and identify the problems that this environment and its historical background combined to raise.

According to a survey conducted by the US warship New York in 1902, Tokdo is located at lat. 37;9' 30" N. and long. 131;55' E¹⁰⁾ in the middle of the East Sea, 49 miles southeast of Ullungdo and 86 miles, almost twice the distance, from Okinoshima, Japan. It is 120 miles straight from Ulchin in Kangwondo, this being the shortest distance from Korea proper.

Tokdo consists of two main islets, East and West, and numerous reefs around them; its total area is 186, 121 m² and the highest peak is 174m on the West Islet. Southeast of the East Islet stands a high rocky islet soaring into the sky like a steeple or a candlestick. This makes Tokdo look like an island with three high peaks when viewed from a distance. Therefore, it was called Sambongdo (an island of three peaks) during the reign of King Songjo (1469-94), the 9th monarch of the Choson dynasty. ¹¹⁾The distance between the East and the West Islets is about 200m; the former is about 1.5 miles around; and that of the West Islet is about 1 mile around. It is a small volcanic islet and the volcano on the East Islet remains intact like a bowl laid empty; the bottom of the eastern cliff is pierced through and the current flows through. Everywhere around the islets are keen-cut cliffs, and strange caves abound, but they provide no anchorage and shelter for ships in stormy weather. As volcanic rocks form the islets and they are exposed to the sea wind, no plants grow on the top of the islets but some grass grows on the southern side.

As a whole, barren rocks dominate the scenery. According to the *Chosen engan suiroshi* (The Sealanes along the Korean Coasts) by the Japanese navy, some fresh water was found at the southeastern part of the West Islet, but the first academic study team sponsored by the Korean Alpine Society in August 1947, reportedly failed to find the water. These natural features make Tokdo unfit for sustained human habitation. Every summer people come here from Ullungdo, build huts and hunt sea lions and catch fish. In the old Korean records sea lions are named kaji fish and according to the *Annals of King Chongjo* of the Choson dynasty, Vol. 40, entry for July 1779, (18th year of the 22nd monarch, King Chongjo), Tokdo was designated as Kajido.¹²⁾

Tokdo is famous not only for sea lions, but also for kelp, brown seaweed, sea urchins and a balone in the surrounding seas. Also, whales, sharks, cuttlefish, and other migratory fish are found in large numbers. Guano is estimated at 160,000 tons, but its phosphoric acid content is 9.8

8%, not considered to be of good quality.¹³⁾

The military value of Tokdo is uncertain. Early on May 28, 1905, a combined fleet under the command of Adm. Togo Heihachiro defeated the Russian fleet in the sea near Tokdo and soon afterward the Japanese navy built a watchtower here. Whether Tokdo could provide a strategic base or radar base is a matter to be examined by military experts.

The distance between Tokdo and Ullungdo is about 50 miles and on a clear day one can be seen from the other with the naked eye. *The Annals of King Sejong*, Vol. 153 (Gazeteer), in its entry for Ulchin county in the Kangwondo records the locations of and the relationship of Tokdo and Ullungdo: "The distance between the two islands is not far off from each other so one is visible from the other on a fine day ." Mullungdo is another name for Ullungdo; it has been used since the period of King Kojong. In the middle of the sea east of Ulchin there are no other islands except Ullungdo and Tokdo and they are visible from each other as recorded in the gazetteer of the *Annals of King Sejong* and Mullungdo being another designation for Ullungdo, Usando is undoubtedly Tokdo. Also *Tongguk yoji sungnam* (Augmented Survey of the Geography of Korea), a famous geography book edited during the period of King Songjong, records Usando and Ullungdo under the jurisdiction of Ulchin county.¹⁴⁾

However, there is a note in the *Augmented Survey of the Geography of Korea* that "One theory holds that Usan and Ullungdo were originally one and the same island" and Ullungdo was called Usan'guk during the Three Kingdoms period. Invoking these two facts, Japan maintains that Usan and Ullungdo both refer to the same island, that from these facts it cannot be said definitely that Usando is today's Tokdo, nor that Korea has had clearcut knowledge of Tokdo from ancient times.

In this way, Japan's claim seems to be aimed at the denial of an inchoate title by discovery. But it is not logical for Japan to just disregard the main text of the *Augmented Survey of the Geography of Korea* that describes Ullungdo and Tokdo separately and focus its attention on the note that Usan and Ullung were one and the same island. Usan'guk of the Three Kingdoms period in the *J* gazetteer of the *Annals of King Sejong* and Usando in the *Augmented Survey of the Geography of Korea* are different in nature as the former refers to a tribal country and the latter to an island.¹⁵⁾ Usan'guk and Usando are different as Usan'guk comprised Ullungdo and Tokdo, and Tokdo has since been administered or conceived of as a dependency of Ullungdo.

One Japanese scholar holds that Ullungdo is visible from Tokdo but Tokdo cannot be seen from Ullungdo even on a clear day unless one moves more or less 50 miles toward the island. He goes on to say that the description in the gazetteer in the *Annals of King Sejong* and the passage in the *Koryosa chiriji* (gazetteer of the *History of Koryo*), which is based on this description, i.e., "the distance is not far off from each other, so one is visible from the other on a fine day," do not refer to the distance between Ullungdo and Tokdo, but to that between the mainland of Korea and Tokdo. To arrive at this conclusion, he uses the following formula:

$$D=2.09 (\sqrt{H}+\sqrt{h}) \quad D: \text{visible distance (mile)}$$

H: height of the object above the sea level

h: height of the eye

Considering the highest point on Tokdo to be the 157m zenith on the West Islet and the height of the eye to be 4m. (a person 1.5m tall standing on the deck of a ship 2.5m above the sea level), the visible distance is about 30 miles on a fine day:

$$\begin{aligned} D &= 2.09 (\sqrt{157} + \sqrt{4}) \\ &\approx 39 (12.5 + 2) \\ &\approx 1,305 \end{aligned}$$

Even if we assume this formula to be correct, the calculating method is not considered sensible because the formula sets the height of the eye at 4m and Tokdo is seen aboard a ship in the sea, not on land, particularly from atop a high mountain. The highest peak on Ullungdo is Songinbong, 985m high. If viewed from this peak, the height of the eye will certainly differ. Even ignoring the height of the viewer, the height of the eye becomes as follows:

$$\begin{aligned} D &= 2.09 (\sqrt{174} + \sqrt{985}) \\ &\approx 39 (13.19 + 31.39) \\ &\approx 1,171.6 \end{aligned}$$

(According to the survey by the Korean Alpine Society, the highest point on Tokdo is 174m on the West Islet.)

This means that from the top of Songinbong on Ullungdo the range of visibility becomes 93 miles. No doubt Tokdo is well within this range. As the Japanese scholar maintains, Tokdo comes into sight if a boat is about 20 miles away from Ullungdo. Is it unreasonable to infer that the passage, "These islands are not far off from each other, so one is visible from the other on a fine day," describes the view aboard a ship off Ullungdo. Particularly, it is to commit an error in methodology to measure the description made several hundred years ago in an oriental society by the highly advanced scientific methods of today.

The Ullungdo of the day must have been luxuriantly forested. Taking note of this fact, the Japanese scholar argues: "As Ullungdo was covered by a dense forest at that time, it must have somewhat been difficult to climb up to a height.¹⁷⁾ Even if one reached the height, it was doubtful whether one's view were not disturbed."

The scholar tends to negate as far as possible the Korean people's historical and geographical perceptions of Ullungdo and Tokdo and their relationship. There is no knowing how thickly Ullungdo was forested and to what height people could climb at that time. The writer's calculation is that it would not be necessary to climb to the highest point, but an altitude of 120m is enough to view the peak of Tokdo:

$$\begin{aligned} 50 &= 2.09 (\sqrt{174} + \sqrt{x}) \\ 50 &= 2.09 (13.19 + \sqrt{x}) \\ \therefore \sqrt{x} &= 50/2.09 - 13.19 \\ &= 23.92 - 13.19 \\ &= 10.73 \\ \therefore x &= (10.73)^2 \\ &= 115,132.9 \\ &\approx 10 \end{aligned}$$

However thickly forested Ullungdo might have been, it must not have been difficult to go up to an altitude of 120m, and there one's visibility must not have been kept from viewing Tokdo. Nor was it considered impossible to look down on the surrounding seas.

Tokdo subidae pisa (A Hidden History of the Tokdo Garrison) published after the end of the Korean War describes in detail that people of Ullungdo called Tokdo "Tolsom" and from the peak of Ullungdo they could view "Tolsom."¹⁸⁾ On the sea spanning Ullungdo and Tokdo, both warm and cold currents mingle with each other and it is the place known for the highest frequency of the occurrence of fog along all the coastal areas of Korea, and the number of fine days when Tokdo was visible might have extremely been limited.¹⁹⁾ Therefore, the description that one is visible from the other "on a fine day" is a most accurate perception of the climate in the area where the range of visibility opens up when the fog has cleared up and Tokdo comes into sight.

C. Historical background

1. Tokdo in the pre-World War II period

The history of Tokdo is also a history of changes of its name, and the country which claimed ownership of Tokdo can be seen by studying this history. It is very important to see what Tokdo has been called.

First was Usan'guk. Already back in the period of the Silla Kingdom, Tokdo comprised, along with Ullungdo, an independent country by the name of Usan'guk. It was subjugated by Silla in 512 during the reign of the 22nd monarch, King Chijung. In the following Koryo dynasty, Usan'guk continued to pay tribute until it was destroyed by Jurchen in 1017 (in the 9th year of King Hyonjong).²⁰⁾

At the beginning of the Choson dynasty, this island was called Usando, and was placed under the control of Ulchin county in Kangwondo together with Ullungdo. In the gazetteer of the *Annals of Sejong*²¹⁾ (2nd year of King Tanjong in 1454), Vol. 153, entry on Ulchin county of Kangwondo lists Usando and Ullungdo among the islands under the control of Ulchin and the locations and relations of these two islands are described as follows: "The two islands of Usan and Mullung are located in the middle of the East Sea; the distance between them is not far, so one is visible from the other on a clear day."

Mullungdo was the name used for Ullungdo during the period of King Kojong (1864-1907). Except for Ullungdo and Tokdo no other islands exist in the middle of the sea east of Ulchin county. These islands were visible from each other on a clear day. This description corresponds to the record in the gazetteer of the *Annals of King Sejong*. Mullung being another name for Ullungdo, it is beyond doubt that Usando is Tokdo.²²⁾

According to the *gazetteer of the History of Koryo*,²³⁾ Vol. 58, entry for Ulchin county, item on Ullungdo, Ullungdo is located in the sea east of the county; it was called Usan'guk or Mullung or Ullung (羽陵 as distinguished from Ullung 鬱陵, different Chinese characters, but the same sound) during the Silla dynasty; one theory has it that Usan and Mullung were originally two different islands; and they are not so far off from each other that one can be seen from the other on a fine day. The passage that "One theory has it" seems to imply this isn't an established

theory, but this description too is considered to denote a two-island theory .

Again in the *Augmented Survey of the Geography of Korea*,²⁴⁾ a famous Korean geography book (Vol. 45), there is a record of Usando and Ullungdo as islands attached to Ulchin county: "Two islands of Usando and Ullungdo also known as Mullung or Ullung (羽陵 are in the middle of the sea east of the county ." This is the two-islands theory.

But a note in the book says, "One theory has it that Usan and Mullung were originally the same island," while the *History of Koryo* cited above says "One theory has it that Usan and Mullung were originally two different islands." Thus, it gives the impression that the two-islands theory has the upperhand and during the Three-Kingdoms period, Ullungdo was called Usan'guk. Therefore, Japan, citing these records, supports the one-island theory against the two-islands theory maintained by Korea.²⁵⁾

However, as mentioned already, it is unjust to stress the notes attached and disregard the main contents of the books. Moreover, the addendum to the main body of the *Annals of King Sejong* that "Usan'guk also known as Ullungdo in the entry for the Silla period" refers to Usan'guk, not to Usando. The *Augmented Survey of the Geography of Korea* clearly describes Usando and Ullungdo separately, taking the two-islands theory and making it possible to construe that these two islands composed Usan'guk. At the same time, the note attached to the book is simply a "theory ." As seen in the *gazetteer of the History of Koryo*, there is some confusion about this question, but this cannot definitely influence the theory of the existence of two different islands with two different names, established at the time of the compilation of the *Annals of King Sejong* and the *Augmented Survey of the Geography of Korea*. Furthermore, at a time when geographical information was not fully and accurately acquired, there were too many cases to enumerate, in which an area was given different names, becoming two different areas with two different appellations. Japanese scholar, Tabobashi Kiyoshi, proved in his research that in the early Meiji era when Japan's geographical knowledge about Ullungdo and Tokdo was inadequate, Japan used Matsushima and Takeshima for the island of Ullungdo; later they were used separately for Ullungdo and Tokdo; and finally Takeshima denoting Ullungdo began to be used exclusively for Tokdo.²⁶⁾ Likewise, it is assumed that Ullungdo and Usando (Tokdo) once formed Usan'guk, but as the county fell to Jurchen, Usando became disassociated from Usan'guk and used exclusively as the name of the island; once Ullungdo and Usando were used interchangeably but the latter designation used mainly for Tokdo. Accordingly, the passage that "one theory has it that Usan and Ullung were originally one island" was based on what people said when Ullungdo was called Usando.

The Japanese government quotes the entry for February in the 17th year of King T'aejong (1417) in Vol. 33 that Usando produced large bamboo trees, buffalo hides, hemp and cotton and 86 people were living there, and argues that "Usando does not refer to Tokdo where sustained human habitation is impossible." But the entry in the *Annals of King Sejong* definitely refers to Usando. Usan'guk of the Silla dynasty became Usando in the following Koryo dynasty; again Usando was called Ullungdo, Tokdo Usando. In this process, Usando of ancient times came to be identified with Ullungdo and Usan'guk."²⁷⁾

On the maps in the opening pages of the *Augmented Survey of the Geography of Korea*, " A

Map of Eight Provinces" and "Kangwondo," Usando that is as large as Ullungdo in size is shown halfway between Korea proper and Ullungdo.

The Japanese side cites these maps and maintains that, if Usando had been Tokdo, it should have been placed east of Ullungdo. Japan further argues: "Thus, the two-islands theory concerning Usan and Ullungdo is totally a conceptual one, not based on factual information."²⁸) On this point, Ch'oe Nam-son points out in *Ullungdo and Tokdo*: "At first, Usan was recorded as the name of a county and Ullungdo as the name of an island in the *Samguk sagi* [History of the Three Kingdoms], but during the Koryo dynasty, many different Chinese characters and popular names began to be used for the original names, i.e., Mullung(武陵 Ullung(羽陵 Mullung(武陵 or Ullung(蔚陵). He goes on to state: "As more factual information on Ullungdo proper and its associated islands was acquired, the appellations mentioned above began to be applied for Ullungdo proper or its associated islands interchangeably or indiscreetly causing much confusion among people."

Accordingly, "Usan, the original name for Ullungdo, was used for another island other than Ullungdo, perhaps for Tokdo northeast of Ullungdo." Usando and Ullungdo used in the mid-Choson dynasty period were found to have been mistaken in the late Choson dynasty period and were corrected as Ullungdo for Ullungdo and Usan for Tokdo. In this way, it is quite natural, in consideration of the geographical conditions of the East Sea, that Usando should be applied to Tokdo.

From the early days of the Choson period, Tokdo assumed yet another name, Sambongdo, in addition to Usando. In the *Annals of King Songjong*, many entries are found on Tokdo between the 2nd and 12th years of King Songjong (1471-81). Sambongdo was in the middle of the East Sea and was regarded as a mysterious island nobody had ever sailed to. As a rumor spread that many corvee and tax evaders from Kangwondo and Yongando (Hamgyongdo) had taken refuge in the island, the government strictly banned people from going over there and sent a search team to the island. The search team never found the island. Only in the 7th year of Songjo!lg (1476), Kim Cha-ju of Yonghung and another man sent by magistrate Yi Kuk-ch'an of Yongando saw Sambongdo from afar. In the entry dated December 27 in the 7th year of King Songjong in the *Annals of King Sifngjong*, Kim Cha-ju's account is

recorded: "On September 16, we sailed from Onggumip'o in Kyongsong and on the 25th saw Sambongdo 78 *ri* [190 miles] away in the west. On the north of the island were standing three rocks in a row. ., between the islands were seen about 30 doll-like objects standing side by side. Frightened at this sight, we did not go to the island, and drew pictures of the shape of the island."²⁹)

Therefore, Kim Cha-ju and company could not land at Sambongdo and viewed it from the west aboard the boat 78 *ri* east of the island, and the shape of Sambongdo he drew corresponds precisely to today's Tokdo. What looked like dolls between the island may have been sea lions.³⁰)

Again in the *Chungbo munhon pigo* (Augmented Reference Compilation of Documents on Kor

ea), we find the following entry: "The island is located due east in the sea.. .In the second year of King Songjong, someone reported the existence of Sambongdo and Pak Chong-won was dispatched there. Because of the high seas, he returned in vain. He and company spent overnight on Ullungdo, returned with large bamboo and large abalone and said there was no people living there."³¹⁾

Kim Cha-ju and Pak Chong-won both failed to reach Sambongdo. Although they spent overnight on Ullungdo and high seas kept them from going to Sambongdo, it is obvious that they had sure knowledge of the island. But there is no clear evidence that Sambongdo is Tokdo. However, in consideration of the fact that Korean people had a perception of Sambongdo apart from Ullungdo and that no other islands exist except Ullungdo and Tokdo in the East Sea, it is difficult to conclude that the Korean people of the day were completely ignorant of the existence of Tokdo (Sambongdo) even if their geographical knowledge was somewhat vague. In addition, Korea's *Munhon ch'wallok* (Reference to Old Books in Summary) is quoted by the Japanese side in backing up its argument that Sambongdo, Usando and Ullungdo were all the same. The book states in part:

"Ullungdo is situated in the sea due east of Ulchin. On a clear day, the peak and the steep mountain can be seen. The island is fertile and produces big bamboo. This island is called Chukdo and also Sambongdo as three peaks are standing on the island. Usan, Ullung (于陵 Ullung 羽陵 武陵 貴竹 are all its corrupted forms."³²⁾

This book is, however, an account of an individual writer of the late Choson dynasty and does not have any value as does the *Annals of King Sejong* does in shedding light on historical and geographical facts and changes.³³⁾ *Chibong yusifl* (Topical Discourses of Chibong, 1614) that advocates a theory of one island with two names is also an unofficial personal account. "In order to ascertain whether there was any firm knowledge of the situation, it is of course necessary to compare and examine all the available records of the day, and whether a record is compiled by the government or not does not have any decisive meaning for this purpose."³⁴⁾ However, whether it is a personal account or a government record certainly makes a difference. Also it is not possible to give a decisive meaning to a personal observation.

The Japanese side states that the *Augmented Survey of the Geography of Korea* and the *Augmented Reference Compilation of Documents on Korea* imply one island with two names while advocating a two-islands theory.³⁵⁾ But the latter book states: "Concerning Usando (于山島 and Ullungdo (鬱陵島, the Chinese character of Ul (鬱 is replaced by different characters such as 蔚 芋 羽 武 于山 芋山 In other words, the first Chinese character of Ullung, 鬱 于 are used in a confused way. Therefore, it is clear that the *Augmented Reference Compilation of Documents on Korea* confirms Usan and Ullung as two separate islands.³⁶⁾

Further, the gazetteer in the book records: "Ullungdo and Usando both comprise Usan'guk, and Usando is what Japan calls Matsushima." This makes a clean sweep of the lopsided Japanese interpretation. Usan'guk comprised the two islands of Ullung and Usan, and the latter was called Matsushima (Takeshima today) meaning Tokdo. That this description is found not in a personal account, but in a government-compiled gazetteer evidences the government's perception of Tokdo a

s its territory.³⁷⁾

Ch'oe Nam-son, in "Ullungdo and Tokdo," an article serialized in the *Seoul sinmun* in August 1953, presents the view that Tokdo was called Kajido in ancient times: "The existence of Kajido east of Ullungdo is recorded in some of our government documents. To pinpoint the location of this island requires further study, but we think this is today's Tokdo because people live on other islands, but the only known place where kaji (sea lions) live and breed is Tokdo." Here, Ch'oe Nam-son quotes the report of Commissioner Han Ch'ang-guk in the *Annals of King Chifngjo* (Vol. 40) wherein kajido appears for the first time in the entry for June 1794, (18th year of the king): "On 26th we headed for Kajido. Four to five sea lions resembling buffalos were frightened and came out. The gunners fired and caught two head." He regards Kajido as Tokdo today.

Here again, the Japanese side takes issue with this: At the time Han Ch'ang-guk explored the area, today's Tokdo was not only the place where sea lions lived. From the early Meiji period, Ullungdo began to be developed and settled, and as the number of people increased, sea lions were driven away from the periphery of the island to Tokdo. Prior to this time, when Korea's vacant island policy was in force, sea lions lived mostly around Ullungdo. Therefore, because of four or five sea lions found at Kajido, it cannot be said that today's Tokdo was the habitat of sea lions and that Kajido was Tokdo on those grounds. There is not any positive evidence that Kajido refers to today's Tokdo as Kajido is assumed to be a nameless island that might exist near the northeastern coast of Ullungdo.³⁸⁾ A certain Japanese scholar infers that as Kajido derives its name from the habitat of kaji (sea lion) as Ch'oe Nam-son suggests, it might be a reef or an islet near Ullungdo such as Kwanundo, Chukto or Samhyonjaedo.³⁹⁾

By refuting the assumption that Kajido was Tokdo, Japan is taking lightly of the *Annals of King Chongjo*. How could the name of an island duly recorded in the official annals of a state be fictionalized as a nameless island? Because an island by the name of Kajido did exist and people of the time called the island by that name, the name of Kajido was used. From the context, it is certain that Commissioner Han Ch'ang-guk did not invent Kajido.

As the *Annals of King Chongjo* describes, Han Ch'ang-guk and company departed the eastern coast of Ullungdo on April 26, made around trip to Kajido, arrived at Tonggumi on the western coast, and sailed back home on April 30. This three-day voyage is considered impractical by the Japanese side.⁴⁰⁾ This assertion does not reflect a scholarly attitude toward interpreting a problem squarely. Rather, Japan draws a foregone conclusion first and tries to lead forcibly toward it. The distance between Ullungdo and Tokdo being about 50 miles, was it impractical to make a return trip to Tokdo from Ullungdo in the five days from 26th to 30th?

Granted that Korea's art of navigation was quite undeveloped then, is it reasonable to identify Kajido with Chukdo (Chuks) immediately in the vicinity of Ullungdo and to say it took five days to cover such a short distance? It is thus proper to regard Kajido as presented in the *Annals of King Chongjo* as Tokdo.

Thus, not only the Korean documents but a Japanese record recognizes Kajido as Tokdo in the *Matsushima no gi* (Question of Matsushima). This record is very significant as it reveals the perception of high-ranking Japanese officials. Between 1876 and 1878 (9th to 11th years of the Meiji era), when Japanese individuals filed applications for the development of Takeshima, such

as Muto Heiguk's request for the development of Matsushima (Matsushima Kaitaku no gi) and T oda Keigi's application for voyage to Takeshima (Takeshima tokai no negai), the Japanese govern ment asked Japanese scholars for their advice.

Then Director Tanabe Taiich of the Official Communication Bureau of the Foreign Ministry s aid that Matsushima was named by the Japanese, but actually it was Usando that belonged to K orea's Ullungdo... "To dispatch our people there and inspect the island without any justifiable rea sons is like coveting other's treasures. Particularly, it is a delicate case of encroaching on the bor derline...."⁴¹⁾ In this way the applications were turned down. He went on to say "Intellectuals ma intain, even if Tokdo does not belong to Korea, it is unjust to develop uninhabited islands in the south and subjugate the Ryukyu Islands." Director Watanabe Koki of the Foreign Ministry's Docu mentary Record Bureau admitted that he was not sure about the ownership of the two islands ca lled Takeshima and Matsushima.⁴²⁾ Despite this prevailing opinion among the responsible officials in the Foreign Ministry, it is self-contradictory for Japan today to claim Tokdo as Japan's inhere nt territory. It was only since the annexation of Tokdo that Japan has claimed Tokdo as its inhe rent territory .

Another Japanese document is *Onshu shicho goki* (Records on Observations on Oki) which is alleged by the Japanese side to contain the passage that Takeshima (Ullungdo) and Matsushima (Tokdo) mark the northwesternmost boundary of Japan, the passage that Japan so fondly invoke s.⁴³⁾ The book is an account of Okinoshima in Onshu county and if one peruses the contents, o ne easily comes to notice that Onshu marks the northwestern boundary of Japan. But it is errone ously interpreted by the Japanese side to mean that Ullungdo and Tokdo mark its northwestern li mit. The original text in Chinese writing (used in that day both by Koreans and Japanese) follo ws.

隱州在北海中 故元隱岐島 戌亥間行二日一夜有松島 又一日程有竹島 此二島無人之地 見 高麗 如自雲州望隱州 然則 日本之乾地以此州爲限矣

The translation follows (underling by the writer):

Oki is in the middle of the North Sea, so it is called Okinoshima. Going further from there for two da ys and one night in the direction of northwest one reaches Matsushima. Also there is Takeshima at ano ther day's travel distance. These two island are uninhabited and getting a sight of Koryo from there is l ike viewing Oki from Onshu. And thus the island (s) marks the northwestern boundary of Japan.

Here 此州 (*thus* or *the* island or *these* islands as sinitic characters can be used either as sing ular or plural) is erroneously interpreted as the "two islands." This can be rightly interpreted as denoting Oki making the northwestern boundary of Japan.⁴⁴⁾

This Korean view is decisively supported by the *Annals of King Sukchong* and the *Augmente d Reference Compilation of Documents on Korea* which both record the activities of An Yong-bo k. The former (Vol. 30) in the entry for September in the 22nd year of the king states:

At Pibyonsa (Border Defense Council) An Yong-bok testifies... Arriving at the island [Ullung do] we found many Japanese boats at anchor. The people aboard our ship were surprised and standing on the bow of the boat shouted at them: "Ullungdo is originally our territory .How have you Japanese dared encroach on our island?" They replied they were originally living o

n Matsushima and chanced on this area while fishing and said they would go back. At this, I retorted Matsushima is Usando and it is also our territory and reproved them for going back there. Next morning, we sailed to Usando to find the Japanese cooking fish over the cauldron. We destroyed the cauldron and decried them. The Japanese collected what they could, carried them on the boat and sailed home.

Another account is found in the entry for Usando and Ullungdo of Ulchin in the *Augmented Reference Compilation of Documents on Korea*:

An Yong-bok of Tongnae speaks Japanese well... Arriving at Ullungdo after three days and nights, An and company saw a Japanese boat coming from the east. An eye-signalled his company and they apprehended the Japanese and bound them.

The Japanese were too frightened to resist. An inched toward them alone and demanded to know why they had trespassed on our territory. The Japanese replied they were en route to Matsushima and would go back there. An followed them to Matsushima and reproved them for not knowing that Matsushima is Usando and is Korean territory. As An and company destroyed the cauldron the Japanese had set, they were frightened and took flight.

An Yong-bok and company found Japanese on Ullungdo, scolded them for their encroachment, pursued them to Tokdo (Matsushima) alias Usando, convinced them that Matsushima was Korea's Usando, and evicted them from the island.

Three years prior to this, in the 16th year of King Sukchong (1693), An went to Ullungdo to fish, but was abducted by Japanese to Okinoshima. There he advocated Korea's ownership of Ullungdo to the lord of the island, who sent him to his superior, the magistrate of Hoki, Matsudaira Shintaro (Ikeda Mitsumasa).

In Hoki province, An repeated his claim and requested the magistrate ban Japanese fishermen's passage to Ullungdo. The magistrate seemed to know that Ullungdo was originally Korea's territory; he treated An hospitably and had the kanpaku (Imperial Regent) in the shogunate write a letter attesting to the Korean ownership of Ullungdo. An, with this letter, was repatriated in that year to Korea via Edo [Tokyo], Nagasaki and Tsushima. But in Tsushima, Lord So Yushitsugu took the kanpaku's letter from An and concocted a scheme to seize Ullungdo. In November of that year, accompanied by his envoy Tachibana Saneshige, So repatriated An to Pusan as a criminal who had trespassed on the Japanese territory of Takeshima.

Tachibana carried So's note addressed to the Korean Minister of Rites, requesting him to place an injunction on voyages to Ullungdo by Korean fishermen. Ullungdo was called Takeshima by the Japanese and the Korean government was aware of this fact. However, Second State Councilor Mok Nae-son (second highest minister) and Third State Councilor Min An, both of the Nammin faction in power then, thought that it would be unadvisable to cause a dispute with a neighboring country over all island that had been vacated for about 300 years and sent Hong Chung-ha, a protocol officer, to Tongnae to receive Tachibana and deliver to him a letter that Korea would keep strictly its fishermen from going to Takeshima. This letter admitted Takeshima was Japan's territory, but included this passage at the beginning of the letter: "Whereas our fishermen ar

e not allowed to go out to an ocean, and are even prohibited to travel at will to our territory of Ullungdo, that is thought to be rather far off, how could they be authorized to go over to other places?" Thus, Takeshima was separated from Ullungdo as another island, but it was expressly stated that Ullungdo was Korea's territory. As long as the letter contained this expression, Tsushima could not implement its scheme of occupying Ullungdo. Therefore, Tachibana was hesitant to accept it and demanded that the expression be expunged from the letter. The next year, in February, (20th year of King Sukchong), the lord of Tsushima sent Tachibana again to request for deletion of the words in question: "to our territory of Ullungdo." This is considered a most shrewd strategem.

Then a coup came to dislodge the Namin faction in power that had applied an appeasement policy toward Tsushima, and the Soron faction headed by Nam Ku-man and Yun chi-wan seized power. Nam took a hardline policy. For several years thereafter, the lord of Tsushima repeatedly laid claim to Takeshima which was Ullungdo. As the claim was untenable historically, in the 22nd year of King Sukchong (1696: 9th year of the Genroku in Japan), the shogunate cautioned Tsushima not to stir up trouble with a neighboring country over a small island of little value. Tsushima was ordered to admit Korean ownership of Takeshima, i.e., Ullungdo, and to keep Japanese fishermen from voyaging to Takeshima. In this way, the question of territorial rights to Ullungdo was completely settled. Not only Korea's title to Ullungdo but also that to Tokdo was recognized by Japan and this was made clear by An Yong-bok's second negotiation with the magistrate of Hoki province.⁴⁵⁾

In the 19th year of Sukchong, An Yong-bok returned from his first trip to Japan and reported to Protocol Officer Hong Chung-ha on what he had done in Hoki province, but the government did not take his statement seriously, and continued contending with Tsushima over the question. Angered at this, An enlisted the support of Buddhist monk Noehon of Sunch'on and 15 other boatsmen and fishermen, went to Ullungdo and drove away the Japanese fishermen from Ullungdo and Matsushima (Tokdo) as has already been discussed.

While pursuing the Japanese, An and his fishermen were struck by a typhoon and arrived at Okinoshima again. He met the lord of the island again and protested: "Several years ago when I came to Japan, Ullungdo and Usando were confirmed as Korean territory in a shogun's letter, but Japanese have indiscreetly trespassed on our territory. Does that stand to reason?"

The lord of the island replied he would settle the matter after consulting the magistrate of Hoki province. An was vexed as no reply was forthcoming and sailed directly to Hoki, and informed the magistrate of his arrival through a messenger. Impersonating a Revenue Supervisor for Ullungdo and Usando, An put on the official uniform, the black horsehair hat and leather shoes and was carried in the sedan chair while his followers mounted horses, all provided by the magistrate.

In the castle, he sat face to face with the magistrate and told him: "Last time, I received a shogun's letter on the question of the two islands, but the lord of Tsushima robbed me of the note, forged many facts in it, sent his envoys to Korea several times and Japanese trespassed on [Korean islands]. Therefore, I should like to send a memorial to the kanpaku and expose everything to him." An had had Yi In-song write a memorial and handed it to the magistrate. At this t

ime, the lord of Tsushima and his father, So Yoshizane, were in Edo and came to know of this. They appealed to the magistrate and successfully kept him from forwarding the memorial to the kanpaku. However, the magistrate punished 15 Japanese who trespassed on Ullungdo and told An: "These two islands belong to your country, so should there be found any trespasser or should the lord of Tsushima attempt to take the islands, please send an official note and a translator-interpret. Then they will be punished severely." An and his followers were provided with food and were sent home together with a Japanese escort.

The above is quoted almost in full from *Tokdo iii naeryok* (The Origin of Tokdo) by Sin Sok-ho, whose account is based on the statement by An Yong-bok in the entries for August and September in the 22nd year in the *Annals of King Sukchong*. However, the Japanese side refutes the record as fictitious or groundless and tries to discredit it. The Japanese side states: "An Yong-bok came to Japan via Ullungdo and Oki for the second time in June 1696, but the shogunate already issued a ban on voyage to Ullungdo in January of that year and Japanese no longer went to the island. An came to Japan several months after the issuance of this injunction and the shogunate's decision had not resulted from An's negotiation." "An's statement gives rise to a doubt that he may have exaggerated and doctored his statement on his first visit to Japan in order to escape punishment for his illegal exit to a foreign country." It further goes on to say: "An is said to have impersonated a Revenue Supervisor for Ullungdo and Chasando, but no such official position is found in the Choson government organization. As he was not appointed by the government, An was subject to punishment for his illegal trip abroad and was exiled. This act of an individual citizen can not be accepted as exercise of sovereignty by the Korean government."⁴⁶⁾

The shogunate in Japan is said to have decided on the prohibition of Japanese fishermen's operation at Ullungdo in January 1696, after the "Takeshima Incident of the Genroku." As An Yong-bok went to Japan in June 1696, five months thereafter, he is alleged by the Japanese side to have exerted no influence at all on the shogunate's decision. However, the Takeshima Incident was (although there is no way to confirm the internal decision process within the shogunate government) settled after An's parley with the Japanese and Japan notified Korea of its decision in the following year. In the decision-making process and notification, the activities of An Yong-bok must have influenced Hoki province and the shogunate. An was exiled by the Korean government for fishing in the ocean in breach of the law banning voyaging abroad and this had nothing to do with the sovereignty over any part of Korea's territory. In extenuation of his meritorious service in making the Japanese government reconfirm Korea's sovereign rights to Ullungdo and Usando, An's sentence was commuted from death to exile. An's activity was undoubtedly a personal act, but the fact that the official annals of the Korean government duly recorded it should be taken as evidence of its relevancy to government policy.

As the Choson dynasty came into being, Ullungdo became a shelter for the displaced people of the preceding Koryo dynasty, who sought to evade taxes and military service. This led the government to enforce a vacant island policy for the island for about 400 years, but the government never abandoned its sovereignty over the island. As the result of the Korea-Japan negotiation (Takeshima Incident) in 1696, Japanese fishermen were banned from crossing to Ullungdo, and Ullungdo and Usando were reconfirmed as Korea's territories from ancient times. The Korean gove

government sent a search party to this area every three years and checked whether there were any Japanese trespassers. 140 years thereafter in the 3rd year of Honjong (the 8th year of Tenpo in Japan) in 1837, the shogunate executed Banhachiuemon of Hamada domain in Ishimi for his smuggling activities at "Korea's Takeshima (Ullungdo)" and honored the agreement with Choson.⁴⁷⁾

Japanese began encroaching on Ullungdo, taking advantage of the vacant island policy. In Volume 34 of the *Annals of T'aejong* is an entry on the invasion of Usan and Mullung by Japanese in 1417. Before and after the establishment of the shogunate government in Edo, Otani Jinkichi and Murakami Ichihei, fishermen of Hoki province, applied for a permit to cross over to Ullungdo; the shogunate delegated the authority to issue a permit to Japanese fishermen to Matsudahira Shintaro (Ikeda Mitsumasa), magistrate of Hoki province, providing him with the Red Seal (Shuin) in the 4th year of Genwa (1618). Those authorized fishermen went to the Ullungdo area to fish annually. Japanese historical documents make it clear that a permit bearing the red seal was issued for voyage to a foreign country, but the Japanese side today is trying to regard this as a license for crossing the seas. This Japanese argument notwithstanding, it is obviously a license for foreign trade. This fact alone is evidence enough that the shogunate admitted Korea's sovereignty over the Ullungdo area.

A certain Japanese scholar questions indiscriminate application of the red seal and presents the view that a license for voyaging to such foreign countries as Luzon in the Philippines and Sung-China and to such uninhabited islands as Ullungdo and Tokdo should be differentiated. He maintains: "If the shogunate had regarded Takeshima (Ullungdo) and Matsushima (Tokdo) as foreign territories, it would have revoked the license to these Korean islands in 1639 when Shogun Iemitsu proclaimed an isolation policy and banned foreign trade. However, voyage to Ullungdo had not been banned until 1676 and passage to Tokdo was not prohibited thereafter.⁴⁸⁾ Such a view is illogical. He seems to argue that Tokdo is Japan's since voyage to the island was not prohibited in 1696 and thereafter. This is contrary to the facts. In 1696, when the so-called Takeshima Incident was settled, the shogunate reconfirmed Korea's sovereignty over the Ullungdo area, and this unilateral decision does not affect the status of "Takeshima." While admitting that, prior to January 1696, the Japanese government banned voyage to Ullungdo, reported this to the Otanis and Murakamis in January 1696, notified the Korean government of the decision, and put an end to the Takeshima Incident, the Japanese government maintains that the shogunate "did not ban voyaging to Ullungdo even after 1696." This is indeed an incoherent line of argument. If the shogunate decided not to ban Japanese fishermen's passage to the Ullungdo area, why did it notify Korea of its decision?

As mentioned already, the shogunate executed a rich merchant of Hamada, Machiuemon the Difter, who illegally entered Ullungdo, felled trees there and smuggled out timber in the 3rd year of King Sukchong (8th year of the Tenpo in Japan, 1837), and faithfully abided by the decision that reconfirmed Takeshima (Ullungdo) as Korea's territory and placed a ban on Japanese passage to the island. On the other hand, the Choson government continued its vacant island policy while the Meiji government abandoned the isolationist policy of the shogunate and encouraged its people to go abroad. Thus, some Japanese invaded Ullungdo and felled trees while others (such as Muto Gakuhei and Kodama Masakane) applied to the Japanese Foreign Ministry for the developme

nt of Ullungdo, naming it Matsushima. In May of the 18th year of King Kojong (14th year of the Meiji, 1881), a Korean inspector found five Japanese felling trees on Ullungdo and reported this to the government which came to know of the Japanese trespassers on the island for the first time. The Ministry of Rites was instructed to file a strong protest to Ueno Kagenori, acting Foreign Minister of Japan, drawing Japan's attention to the agreement reached with the shogunate during the reign of King Suk-chong. Simultaneously, Puhogun (a field officer) Yi Kyu-won was appointed inspector for Ullungdo and the government decided to redevelop the island, thus ending the vacant island policy.⁴⁹⁾

As the decree for redevelopment was promulgated, the island began to be settled in that year; in 1895, the superintendency of the island was created and on May 26, 1898, the superintendent of pannim grade was named from among the residents of the main-land; on October 25, 1900, Imperial Ordinance 41 was proclaimed "on the redesignation of Ullungdo as Uldo county and the change of the title of island superintendent to county magistrate." Under the ordinance, Ullungdo was named Uldo, and it was placed under the control of Kangwon province; the position of island superintendent was upgraded to county magistrate and the county was incorporated in the administrative system of the government; Taehadong was named the venue of the county office (Article 1); and the county had under its jurisdiction the whole area of Ullungdo, Chukdo and Sokdo (Articles 2).⁵⁰⁾ Here, it seems that Chukdo refers to an islet near Ullungdo, also called Chukso, and Sokdo to Tokdo. "Tok" in Tokdo means "stone or rock" and becomes "sok" in the Chinese writing system. Thus, the ordinance expressly placed Tokdo under the administrative control of Ullungdo and undoubtedly exercised Korea's sovereignty over these islands.

Since the development of Ullungdo began, Tokdo has been called by that name. Toksom (Rocky Island) seems to have been sinicized as Tokdo. Since 1881 when the redevelopment of Ullungdo began, people have called the island by this name.⁵¹⁾ The appellation of Tokdo first appeared in 1906, one year after it was "incorporated" by Japan.

A report dated March 5 of that year by Sim Hung-t'aek, magistrate of Ullungdo, begins with the words "Tokdo belonging to this county ." The *Maech'on yarok* (Personal Accounts of Maech'on), in the entry for April 5, 1905, states: "100 *ri* [244 miles] east of Ullungdo, there is an island called Tokdo. It belonged to Ullungdo in ancient times, but the Japanese unilaterally claimed it as theirs and conducted an inspection there."⁵²⁾ These two records account for the perception prevalent in the government and the public that Tokdo was Korea's territory. As Tokdo is an island which can be viewed with the naked eye on a clear day from Ullungdo, it is natural that Korean people rediscovered it at the time the redevelopment of Ullungdo started and used the island for their fishing activities. In 1904, one year before Japan seized the island, when the Japanese warship *Tsushima* surveyed Tokdo, dozens of fishermen came to Tokdo during the summers, built huts and stayed for about ten days hunting sea lions. This scene was vividly documented in the *Chosen engan suiroshi* (Records on the Coastal Sealanes of Korea) published by the Japanese navy in 1933. An account in the book is quoted here: "There are extremely limited places on the island where huts can be built. When the warship *Tsushima* surveyed the island in 1904, there was a thatched hut for fishermen on the East Islet but was reportedly in disrepair at the mercy of the wind and waves. In every summer, many people came from Ullungdo to hunt sea lions, s

ometimes scores of them. They built huts and stayed there for about ten days each time." From the context, it is beyond doubt that the hut found by the *Tsushima* was erected by people from Ullungdo for fishing or gathering marine products in the summer. This is an important document attesting to the effective utilization of Tokdo by the residents of Ullungdo.

Despite this, the Japanese government insists that the fishermen from Ullungdo in the book were Japanese or the Koreans hired by Japanese. Japanese began to live on Ullungdo after the conclusion of the Korea-Japan Treaty of Protectorate of 1905 or after the annexation of Korea by Japan in 1910. No Japanese were living on Ullungdo in 1904 when the *Tsushima* conducted the survey of Tokdo.⁵³ Even if they were, the Japanese on Ullungdo must have been those who smuggled themselves into the island and it is absurd to maintain that Korean fishermen were in the service of these illegal Japanese residents.

It is evident that, despite the denial by the Japanese side, that the *Records on the Coastal Sealanes of Korea* regards Tokdo as a dependency of Ullungdo. In the entry entitled "Ullungdo and Takeshima [Tokdo]" in Chapter 3 is listed the location, geographical features, products and other information on Tokdo. This makes a contrast with the entry under the heading of "Okinoshima and Takeshima" in Vol. II (Japanese Coasts) of *Nihon honshu engan suiroshi* (Records on the Coastal Sealanes of Honshu, Japan).

In this entry, only the name of Tokdo is given. Had Tokdo been an inherent part of Japan, the entry should have covered its location, geographical features, resources, etc. in full. From this, it is most reasonable to consider Tokdo a dependency of Ullungdo which originally and geographically belonged to Ullungdo, and that the Japanese hydrographic authorities took these facts into account.

The Japanese side states on this point: "A record of sealines is so compiled as to fit the convenience of the user, not as to determine the territoriality of the island." It also argues: "As Takeshima bears on the navigation in the vicinity of Ullungdo, the island is mentioned together with Ullungdo while Takeshima is also described in the northwestern coasts and the southeastern sea of Honshu as it is related to the navigation in the neighborhood of Okinoshima." This is meant to deny that the Japanese hydrographic authorities regarded Tokdo as a dependency of Ullungdo.⁵⁴ The relative mode of description of the entry on Tokdo in its relation to Ullungdo leads to the conclusion that the Japanese hydrographic authorities regarded the two islands inseparable geographically and hydrographically. A record on sealanes being an official publication by the Japanese navy, it should be taken as reflecting a view of the state based upon reliable materials, not as expressing facts fabricated by any compilers. The Japanese government states that, "the entry invoked by the Korean government is not a part of the report of the warship *Tsushima*, but the description of the later situation of Takeshima (Tokdo) that the compilers of the book added on the basis of hearsay. Furthermore, as the original text says "people from Ullungdo," not "residents of Ullungdo" as the Korean government pointed out, the Japanese side states that they were the Japanese who came to Takeshima from their base in Ullungdo and Koreans were employed by them.⁵⁵ This argument maintained by the Japanese side is irresponsible and tenuous. In 1881, the Japanese government reconfirmed Korean ownership of Ullungdo and put a ban on Japanese voyage to Ullungdo, so it is quite contradictory to maintain that a Japanese fishing base existed o

n Ullungdo. To argue the point is to admit Japan's aggression in building a base within a sovereign foreign state. Even in view of international law prevailing then, it cannot be recognized as the acquisition of legal title by effective control of a territory.

An Yong-bok's visit to Japan for negotiations with the shogunate is recorded not only in many governmental and personal accounts, but also notably in the *Sankoku tsuko ichiran* (A Survey of Navigation of the Three Countries) published in Japan. This had such a great impact on the Japanese government of the time that it banned Japanese from going to the areas covered in the book. In this connection, the Japanese argument that Japanese fishermen were allowed to cross over not only to Matsushima (Tokdo) but also to build a fishing base on Ullungdo is like admitting piracy. It is illogical for the Japanese government to maintain that Japan managed or exercised its sovereignty over Tokdo on the grounds that the Japanese used this barren group of islets unfit for sustained human habitation as a port of call or an anchorage.

At the same time, it is difficult to know which island, today's Ullungdo or Tokdo, the Japan of that time referred to as Takeshima or Tokdo. In other words, "Takeshima" and "Matsushima" were used in a very confusing way; these two names were applied to both Ullungdo and Tokdo.

In the Japanese documentary records, it is difficult to confirm which of the two names applied to today's Tokdo and which of them referred to today's Ullungdo. This state of disorder relative of the designations of these two islands bespeaks Japan's inaccurate knowledge of the Ullungdo area and the fact that these two islands existed beyond the territorial boundary of Japan.

Japan holds that until the early Meiji period, i.e., in the 1860's, Japan had consistently called Ullungdo "Takeshima," and Tokdo "Matsushima," but the inconsistency was caused by the mistakes committed by Europeans in surveying Ullungdo; in 1787, French navigator Jean Francois Galup de la perouse reached Ullungdo and named it "Dagelet"; later in 1797, a Briton named William Robert Broughton designated the very same island "Argonaute." Broughton miscalculated the latitude and longitude of the island, and this resulted in two separate islands of "Dagelet" and "Argonaute" on the European maps. Further, in 1840, Philipp Franz von Siebold, in making the maps of Japan, committed an error, describing Takeshima (Ullungdo) as Argonaute and Matsushima (Tokdo) as Dagelet. Later, the inaccuracies in Broughton's survey were found and Argonaute disappeared from European maps and Ullungdo remained as Dagelet. Thus, Ullungdo which had been listed as Takeshima on European maps became "Matsushima."⁵⁶⁾

In this way, Japanese explain the confusion of names for Takeshima and Matsushima. In order to be free from the confused use of the names of Takeshima and Matsushima caused by Europeans, Japan renamed Matsushima [Tokdo] Takeshima when it annexed the island into its territory in February 1905. This explanation makes Koreans even more perplexed. If Ullungdo had been called Takeshima from ancient times, Japan should have kept the name, regardless of the mistakes committed by Europeans. Had Tokdo been called Matsushima as its inherent territory as Japan claims, it should have used the name to the last. Even if Siebold's map was mistaken, why should Japan change the name of Tokdo from its "inherent" appellation of Matsushima to Takeshima, once used for today Ullungdo? This is quite enigmatic. Had Japan blindly accepted the map of Siebold until the error was found, this could be interpreted as contradicting Japan's assertion that it has been well acquainted with the existence of the two islands from remote ages.

From the Three Kingdoms period, particularly around the end of the Koryo dynasty, Japanese plundered most coastal areas as well as the inland of Korea, killing, wounding or kidnapping Koreans and looting their property. Japanese voyaging for this flagrant pillage was not limited only to the Ullungdo area. Japan should frankly admit that its assertion on this question is based on a totally erroneous position from the start. If Japan came to acquire "good knowledge of the geography" of those areas they marauded, does this entitle Japan to claim the coastal areas of Korea as its territories?⁵⁷⁾

According to a Japanese document, an islander from Okinoshima discovered sea lions inhabiting Tokdo in 1897 and a keen competition began among the islanders to hunt sea lions from 1903 on. One of them, Nakai Yozaburo, filed an application for annexation of "riancoto"⁵⁸⁾ [Liancourt Rocks] and its lease to the Japanese government (Home Ministry, Foreign Ministry and Agriculture-Commerce Ministry) on September 29, 1904. He requested the government "incorporate" Tokdo into Japan's territory and lease the island to him for ten years. This application is alleged to be the "historic document" which induced the Japanese government to annex the island.⁵⁹⁾

In this "historic document" is contained the following passage:

There is an uninhabited island, popularly called riancoto, in the distant sea, 85 miles northwest of the Oki Island and 55 miles southeast of Choson's Ullungdo ...but the ownership of the island is undetermined, so if an unpredictable situation develops such as a dispute with a foreign country there is no guaranteeing security. Therefore, it is most perilous to invest funds into the management of this island. .. In short, if it is feared that a keen competition will develop among sea lion hunters unless the ownership of this island has been determined. Therefore, the management of this island, even if promising and desirable, will not attain the objectives envisioned.⁶⁰⁾

What is stressed in the above passage is the admission that the ownership of Tokdo was not determined. Therefore, Nakai Yozaburo used the Japanized western name of "riancoto" instead of Matsushima or Takeshima the Japanese used. Also, the application was submitted not only to the Ministers of Home Affairs and Agriculture-Commerce but the Foreign Minister as Tokdo was seen as a foreign territory. According to the *Shimane kenshi* (Chronicles of Shimane Prefecture), compiled and published by the Shimane Prefecture Educational Board in June 1923, it is stated: "As Nakai believed Tokdo to be Korean territory, he planned to go to Tokyo and request the Agriculture-Commerce Ministry to help him take a lease of the island from the Korean government."⁶¹⁾ This passage proves that Japanese of the day commonly regarded Tokdo as Korea's possession, not as an island whose ownership was undetermined. Furthermore, the Japanese government knew "riancoto" was Korean territory and did not process Nakai's application. So it is assumed that he went up to Tokyo and sought the good offices of the Agriculture-Commerce Ministry in filing an application to the Korean government.

In summation, this episode reveals that Nakai tried to lease Tokdo from the Korean government in 1904, one year before Japan's annexation of Tokdo and that Japanese believed that "riancoto" island was Korea's territory. On this point, the Japanese government states: "According to the application Nakai filed to the Okinoshima office, he believed that today's Tokdo had been known

to and managed by Japanese for a long time. Therefore, the passage cited above 'Nakai believed that "rianco" island was Korea's territory. ...' was caused by some misunderstanding of the editor (s) of the document."⁶²) It is hard to believe the passage in question derives from the misunderstanding of the author or the editor(s).

The application of Nakai Yozaburo "for incorporation of rian- co island into Japan's territory and its lease" dated September 29, 1903, had been pending for a long time before Nakai was authorized to hunt sea lions at Tokdo after it was annexed into Japan's territory on February 22, 1905. During the intervening years, the Russo-Japanese War broke out in 1904; Japanese troops landed in Korea; the Korea-Japan protocol was signed on February 23; all the ministries of the Korean government were manned by Japanese or Japanese-recommended foreign advisors; and the internal and external policies and administration of the Korean government were placed under the control of Japan.

This situation should be examined in more detail. Just one year before Tokdo was annexed, the Russo-Japanese War broke out in February 1904. On February 6, Russian-Japanese diplomatic relations were ruptured and war declared four days thereafter. On February 9, prior to the declaration of war, two Russian warships were sunk off Inch'on by the Uryu fleet. On the same day, the Kinori Mixed Brigade landed at Inch'on and two battalions of the brigade invaded Seoul, followed by the 12th division. Thus, the capital city of Seoul was completely occupied by Japanese troops. Under this situation, Korea was forced to sign a treaty of protocol which provided, among other things: "Japan shall temporarily expropriate places considered necessary for military purposes." After all, this clause applied to the lease of fishing grounds to Nakai, a fisherman from Shimane prefecture. Tokdo, thus leased, was finally incorporated into Okinoshima in Shimane prefecture on February 22, 1905, when Japan's victory became decisive after the sea battle of Port Arthur on February 8.

Obviously, Tokdo was "expropriated" and then "incorporated" as the first victim of Japan's aggressive design, five years before all Korea was absorbed by Japan. It cannot be denied from this fact that Tokdo was not an inherent territory of Japan. Before Nakai Yozaburo filed the application, the Meiji government regarded Tokdo as a Korean possession and sent a study mission comprising Sada Hakubo, Moriyama Shigeru and Saito Ei to Korea in December 1869, to find out, among other things, under what circumstances Tokdo and Ullungdo had become Korean territory. The report of the mission entitled *Chosen koku kosai shimatsu naitansho* (A Confidential Inquiry into the Particulars of Korean Diplomacy) describes the circumstances.⁶³) These Japanese officials dispatched by the Foreign Ministry at the beginning of the Meiji government seemed to be mindful of the strict isolationist policy enforced by the Taewongun (Prince Regent) of Korea and recommended that the Japanese government send an envoy backed up by military forces, but the mission did not make the false statement, as the Foreign Ministry of Japan does today, that Tokdo was an inherent part of Korea's territory.

The Korea-Japan Protocol signed on February 23, 1904, and the later developments in Korea need to be examined. Originally, the protocol was to be a secret agreement, but as its contents were divulged by the Korean government, the Japanese government hastily published the agreement in the official gazette on February 27. The negotiation for this secret agreement seems to hav

e begun around the end of 1903. To conclude the agreement, Japanese Minister Hayashi Gonsuke maneuvered either to bribe pro-Japanese Korean officials or threaten anti-Japanese leaders and seemingly played an important role behind the scene. This was brought to the light in a coded message entitled "on the maneuvering for Korean leaders for a Korea-Japan secret agreement" dated January 16.⁶⁴⁾ After removing those Koreans standing in the way of signing the agreement, Japanese succeeded in concluding the agreement. Article 1 of the protocol reads: "The Empire of Korea shall place its faith in Japan and accept the latter's advice on the improvement of facilities." What the "advice" between the strong and the weak requires no explanation here. Article 4 stipulates: "In case the security of the Imperial Household of the Empire of Korea and the territorial integrity are imperiled by the invasion of a third country or by a civil war, the Empire of Japan shall immediately take actions deemed necessary and the Empire of Korea shall provide adequate facility to make the action of the Empire of Japan facile." It further provides: "The Empire of Japan shall, in order to achieve the objectives set forth in the preceding item, temporarily appropriate the places required for military purposes." This implies that Korea was placed under the sovereignty of Japan.⁶⁵⁾

The further step taken toward realizing the Japanese ambition was "the policy directives of the Empire (or principles of policy toward Korea)" that were adopted at the elder statesmen's conference on May 30, 1904, approved by the cabinet the next day, and sanctioned by the emperor on June 11. This includes the passage that draws Korea's attention: "The Empire has acquired protectorate rights to some degree." In other words, Korea had become the protectorate of Japan well before the Treaty of Protectorate was signed on November 17, 1905.⁶⁶⁾ After the Korea-Japan Protocol was signed, Korea scrapped all the agreements and treaties concluded with Russia, signed the first Korea-Japan Treaty on August 23, employed one Japanese as advisor to the Ministry of Finance and a foreigner recommended by the Japanese government as advisor to the Foreign Ministry and consulted the Japanese government on all important diplomatic issues.

As a result, the Korean government was deprived of its sovereign right to conduct diplomacy and Durham W. Stevens, an American who had been in the service of the Japanese Foreign Ministry, was appointed foreign affairs advisor; Director of Tax Megata Tanetaro of the Japanese Ministry of Finance was named financial advisor.⁶⁷⁾ This enabled Japan to control Korea's every internal and external policy.

In this situation, Tokdo was placed under the jurisdiction of Shimane prefecture on February 22, 1905, and Nakai Yozaburo was awarded a permit to hunt sea lions at Tokdo; on April 4, 1906, the head of Okinoshima, Azuma Fumisuke and nine other officials came to Ullungdo and notified Magistrate Sim Hung-t'aek of Ullung county that Tokdo had become Japan's territory. Magistrate Sim reported this to the governor of Kangwon province the next day:

Tokdo, which belongs to this county, is located on the ocean about 100 ri [about 40 km] off this county. On March 4 of this month by lunar calendar at about eight in the morning, a steamer came to Todongp'o and anchored there on the island. A party of Japanese officials called at my office and unilaterally asserted that as Tokdo had been incorporated into Japan's territory, they had inspected the island and stopped here on their way back home. The party consisted of Azuma Fumisuke, head of the island, Administrative Official Zinzai Yutaro, Directo

r of Tax Supervision Yoshida Meigo, Police Substation chief, Inspector Kageyama Iwahachiro, one policeman, one councilman, one physician and one technician, and over 10 other members of the suite. They asked me about the total population, the land and its productivity, the number of personnel and administrative expenditures. They took note of these items as if investigating us and went away. Therefore, this report is made for your deliberation.⁶⁸⁾

This report is copied from the original kept at the Ullungdo county office and the last passage in the report eloquently explains that the head of Okinoshima and other Japanese officials made an illegal entry into a foreign country and acted toward Korean officials as if they were conquerors. There is no way of knowing how the Korean government coped with the problem. However, this was the time when the victory of Japan was assured over Russia and Japan's pressure on Korea was mounting. In September 1905, the year when Tokdo was annexed, the Portsmouth Treaty was signed and Japan's political, economic and military supremacy in Korea was internationally recognized. Against this background, Japan concluded the second Korea-Japan Treaty in November. Under the treaty, the whole conduct of Korea's foreign affairs was subject to the Japanese Foreign Ministry's direction and supervision; Korea could not conclude any agreement or treaty without Japan as an intermediary; Japan's Resident-General was to be posted in Seoul to control Korea's diplomacy; and the Japanese Resident-General wielded absolute power as did his successor, the Governor-General in Korea.

On February 1, 1906, the Residency-General was established and Ito Hirobumi, empowered to control the Japanese troops in Korea, assumed the position in March that year. In June 1907, Emperor Kojong made one last effort to regain Korea's independence and sent a secret mission to the Second World Peace Conference in the Hague, but to no avail. This led to the forced abdication of the throne and the disbanding of Korean troops. In July still another Korea-Japan Treaty was signed, subjecting the enactment of all the laws and decrees, personnel and administrative actions to authorization by the Resident-General; in 1909, judiciary and prison administration was entrusted to Japan; in June 1910, even police administration was taken over by Japan and Japanese gendarmes began operating openly in Korea; and finally on August 29, 1910, all of Korea was annexed into the territory of the Empire of Japan. The "incorporation" of Tokdo was partial and that of Korea itself total but there is no difference in that both were "incorporated," and by this time the question of that far off and uninhabited Tokdo had become engulfed in the whirlpool that swept all of Korea.

As seen above, Tokdo was annexed and wrested from Korea by force. However, geographically, Tokdo is 86 nautical miles from Okinoshima and 130 nautical miles from Sakai city in Shimane prefecture, whereas it is only 49 nautical miles away from Ullungdo, and even after it was "incorporated," people of Ullungdo used Tokdo more effectively than the Japanese did. So, the Japanese continued considering Tokdo Korea's possession regardless of the public notice by Shimane prefecture. Some examples are shown here.

A noted Japanese scholar Toibata Setsuko states in a short article entitled "Nihonkai ni amata keshima ni kansuru nikkans kankei (Japanese-Korean Relations over Takeshima in the Sea of Japan [East Sea])" in *Rekishichiri* (History and Geography), No.6 (June 1930), that "Takeshima [Tok

do] that belongs to Kangwon province today marks the easternmost territory of Korea and is located in the Sea of Japan." Here again, the Japanese government brushes aside this as the "writer's misunderstanding" or "his ignorance of facts." The writer bases his writing on his own knowledge and clearly! states Tokdo to be Korea's territory, and he believed this 25 years after it was "incorporated." From this, it is obvious that the Japanese position is to ascribe all disadvantageous facts to misunderstanding of the Writers or editors.

Next comes Tokio Shunjo's *Chosen to manshu annai* (A Guide to Korea and Manchuria) published in 1935. In "Chapter I: "Geography" in "Part on Korea," it is stated that the eastern end of Korea is "Ullungdo and Takeshima." The Japanese side may claim this is the writer's misunderstanding, but the writer authored *Chosen heigoshi* (A History of Korean Annexation) and in the preface of the book, he states that "Chosen is Japanese territory and the Japanese blood has flowed into the Korean peninsula," indicating his colonialist streak, so, there should be no mistakes on his part.

Also, various books on Korean marine products and coastal sealanes compiled by Japanese government agencies record Tokdo as Korea's island. *Chosen suisanshi* (Records on Korean Marine Products) was published in 1908, three years after Tokdo was "incorporated." For the compilation of the book, Fishery Section Chief Iohara Fumiichi, employed by the Ministry of Commerce and Industry of the Korean government, and all the other Japanese officials in Korea were mobilized by the Japanese Resident-General and conducted an extensive on-the-spot survey of every island in Korea, checking its location, geographical features, products and other information. This book lists Tokdo as Korean territory.

As already mentioned, *Chosen engan suirosshi* (Records on the Coastal Sealanes of Korea) published in 1923 by the Japanese navy also covers every island in Korea and records its location, geographical conditions and products. In part III, Ullungdo and Tokdo are shown off the eastern coast of Korea, with Tokdo belonging to Korea. Book II (Coastal Areas of the Sea of Japan) of the *Honshu engan suirosshi* (Records on the Coastal Sealanes of Honshu) simultaneously published by the Japanese navy, along with the *Chosen engan suirosshi* above, lists Tokdo only by name. This is because the Japanese considered it reasonable to place, in terms of historical territoriality and of geography, Takeshima (Tokdo) where it should belong, in Korea.

2. Tokdo after World War II

On November 27, 1943, during World War II, the U.S., the United Kingdom and China declared in Cairo:⁶⁹⁾ ". ..The aforesaid three Great Powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent. ..." The declaration also states: ". ..It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China." The declaration also provides: ". ..Japan will also be expelled from all other territories which she has taken by violence and greed. ..." By the declaration, Korea's independence was pledged and the areas, Japan acquired by imperialist method after the Sino-Japanese War in 1895 were to rev

ert to their pre-war status.

The Cairo Declaration was a joint communique issued by the U.S., the U.K. and China and was not binding upon Japan. But as Japan accepted the Potsdam Declaration on July 26, 1945 (Soviet Russia acceded to it on August 8) which incorporated the above stipulations of the Cairo Declaration in Article 8, it became an international instrument binding on Japan.

Article 8 of the declaration stipulates: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the Islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we shall determine."⁷⁰) The declaration itself was also a joint communique of the four Great Powers and was not binding upon Japan before it accepted unconditional surrender on August 14, 1945, and signed the instruments of surrender on September 2 that year. Thus, Japan shouldered the responsibility of abiding by the Cairo and Postam Declarations.

It is clear that the basic Allied policy was to return the Japanese territory to the status prevailing before the Sino-Japanese War and Japan's acquisition of Tokdo was by "violence and greed" as defined in the Cairo Declaration. The logical sequence naturally calls for the expulsion of Japan from this area.

One problem arises here whether Tokdo should be construed as one of ". . .such minor islands as we shall determine" in Article 8 of the Potsdam Declaration, which does not clarify this point. Therefore, one has to examine the post-surrender policies SCAP (the Supreme Commander for the Allied Powers) took in order to judge whether the Allied Powers included Tokdo in Japanese territory or separated it from it.⁷¹) Important among the measures SCAP took on the definition of Japanese territory is SCAPIN No.677 issued on January 29, 1946, and entitled "Governmental and Administrative Separation of Certain Outlying Areas from Japan."⁷²)

This was a memorandum SCAP sent to the Japanese government to implement the surrender instruments, and it directed the Japanese government to cease exercising, or attempting to exercise, governmental or administrative authority" over Tokdo. By this directive, Tokdo was separated from Japanese territory, unless the Allied Powers made another positive decision to return Tokdo to Japan. As SCAPIN No.677 stipulates in Article 6 that "nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands. . ., the Japanese government counters that SCAPIN No.677 is not the final decision on the Japanese territory and quotes its revised form in a memorandum dated December 5, 1951, that returned to Japan the Nansei Islands lying between 30°latitude and 29°latitude, on which Japan had been directed to "cease exercising or attempting to exercise its governmental or administrative authority." The Japanese side also cites the Amami Islands returned to Japan afterwards and alleges that Japanese residual sovereignty⁷³) over the Ryukyu and Ogasahara Islands is recognized.

However, Article 6 of SCAPIN No.677 does not mean that the Allied Powers had not defined Japan's territory but that they had made no ultimate determination. While clearly defining the ownership of the minor islands, including Tokdo, the Allied Powers reserved the right to revise this definition should the need arise. Therefore, some islands were returned to Japan and Japan's residual sovereignty was recognized for some other islands, but no specific directive or memorandum was issued to retrocede Tokdo to Japan, nor a declaration made to recognize Japan's residual sovereignty over Tokdo. Tokdo was separated from Japan by SCAPIN No.677 and in this situati

on, the San Francisco Peace Treaty was concluded. Since there was no positive provision in the treaty to retain Tokdo within Japanese territory, the peace treaty should be construed to have admitted Tokdo's separation from Japan permanently.⁷⁴⁾

The San Francisco Peace Treaty (signed on September 8, 1951, became effective on April 28, 1952), provides in Article 2(a): "Japan will recognize the independence of Korea and renounce all right, title and claim to Korea including Chejudo, Komundo and Ullungdo." By virtue of this provision, Korea's independence was recognized ultimately and officially, and Tokdo's reversion to Korea confirmed. In other words, including Tokdo, Korea, was separated from Japan and became independent when Japan accepted the Potsdam Declaration and achieved its independence officially on August 15, 1948, having been under Allied occupation until then. Nowhere in the San Francisco Treaty is there any positive provision to make Tokdo Japan's territory. This writer feels that there is no evidence at all that, after Tokdo was separated from Japanese sovereignty by SCAPIN No.677, it was again returned to Japan by the Peace Treaty. The treaty provides that Japan will renounce all right, title and claim to Korea including Chejudo, Komundo and Ullungdo, but does not mention anything about Tokdo.

The Japanese side argues on this point that Tokdo was separated from Korean sovereignty as the island was listed in SCAPIN No.677, along with Ullungdo and Chejudo, but was not mentioned by name in the San Francisco Peace Treaty.⁷⁵⁾ This was confuted by the Korean side: there are numerous islands in the seas near the Korean peninsula, which were not listed in the Peace Treaty by name, they can never be considered Japanese territories⁷⁶⁾ Again, this is countered by the Japanese government:

Three islands of Cheju, Koje and Ullung are not only typical islands in the seas near the Korean peninsula, but they are located at the outermost sides of the Korean peninsula and are close to Japan. If Tokdo is located in the inner side of these three islands and is nearer to Korea proper, the island will undoubtedly be included in the Korean territory even if its name is unlisted in the treaty. Contrary to this, Tokdo is outside these three islands and nearer to Japan. Therefore, if Tokdo were to be included in Korean territory, the island's name should have been mentioned, together with the three islands. But as examined already, the name of Tokdo does not appear in the treaty. This means Tokdo remains as part of Japanese territory.⁷⁷⁾

At the same time, the Japanese government states: "There is an assertion that Tokdo is an associated island of Ullungdo and shares the same fate with the latter, and the assertion is not convincing in consideration of their geographic and historical backgrounds."⁷⁸⁾

The Korean government has not expressed its view directly on this point. But Japanese scholars are committing an obvious error when they maintain that because Tokdo is located outside Ullungdo, the island should be considered Japanese territory as its ownership was not renounced in the San Francisco Peace Treaty. Chejudo, Komundo and Kojedo are "typical islands in the seas near Korea" as Japanese scholars contend, but these three islands do not mark the outermost sides of Korea, but are nearer to Korea proper than to Japan. If this argument is applied, by analogy, Marado which lies outside Chejudo should be considered Japan's possession since it is not listed

d in the San Francisco Peace Treaty. This is absurd. Therefore, the island enumerated in the peace treaty are limited to "typical islands," and such minor islands as Tokdo were omitted. This line of inference stands to reason.

At the same time, the following assertion by Japan is unjust: "Of the three islands of Ullungdo, Chejudo and Tokdo separated from Japan's administrative authority by SCAPIN No.677, the Peace Treaty provides for abandonment of Ullungdo and Chejudo and does not provide anything for Tokdo. This fact indicates that Tokdo was not included in the territory of Korea whose independence Japan recognized and to which Japan renounced its right, title and claim."⁷⁹⁾

As the writer has pointed out several times, Tokdo as a non-outlying island is distinguished from other "outlying islets" in SCAPIN No.677, and as Japanese territory was limited to "outlying islands" under the basic post-surrender policies of SCAP, Tokdo was clearly separated from Japan. As a result, the status of Tokdo remains unaffected as there is no specific provision in the San Francisco Peace Treaty to return it to Japan.⁸⁰⁾

Tokdo was not an "outlying minor island" under the control of SCAP, not an area for which the United States reserved the right to exercise its legislative, judicial or administrative powers. Nor was it an area for which Japan's "residual sovereignty" has ever been established. Before the conclusion of the San Francisco Peace Treaty, Korea had exercised its sovereign authority over Tokdo since the Republic of Korea was founded in August 1948. The island was returned to Korea when most of the Allied powers officially recognized the republic. Under these circumstances, it is clear that Tokdo is Korean territory.⁸¹⁾

II. Points at issue on the question of Tokdo

A. Is Tokdo an inherent part of Japan's territory?

The Japanese government and most Japanese scholars maintain that Tokdo is an inherent Japanese territory.⁸²⁾ The same claim is made by the Korean government.⁸³⁾ This is similar to the *Minquiers and Ecrehos* case in which both parties claimed that they had historic title or original title to Ecrehos and Minquiers and had always maintained and never forfeited it."⁸⁴⁾ Likewise, both Korea and Japan are claiming historic or original title to Tokdo. So, the question of Tokdo, as in the *Minquiers and Ecrehos* case, is not distinctly a dispute on the acquisition of sovereignty over a *terra nullius*. Only a few Japanese scholars do not support the majority opinion that Tokdo is an inherent part of Japanese territory and justifies the "incorporation" of Tokdo as prior occupation of a *terra nullius* under international law.⁸⁵⁾ Is Tokdo a Japanese territory historically and originally? Was it an inherent part of Japanese territory as Japan proper before it was "incorporated" into its territory in 1905? This question merits examination first.

The Japanese government states: "In determining whether an area has been an inherent territory of a state or not under international law, the most decisive factor is how effectively the occupying state has managed the area."⁸⁶⁾ Then it goes on to state that when the Choson dynasty in its early days enforced a vacant island policy toward Ullungdo, Japanese fishermen called on Tokdo on their way to and from Ullungdo; merchants of Yonago, Otani Jinkichi and Murakawa Ich

ihai, obtained official licenses from the shogunate to voyage to Ullungdo; prior to this, Tokdo was bestowed by the shogunate on the Otani family who were authorized to monopolize and manage the island." The Japanese government stresses this as if this individual activity had been carried out under the official authorization of the shogunate (Japanese government). It also maintains that in January 1696, the shogunate decided to abandon Ullungdo but voyages were not banned to Tokdo, which it continued to perceive as its possession.⁸⁷⁾

Thus, Japan's effective management of Tokdo is limited to the individual activities described above, but bases its assertion for "inherent territory" on this. True, the Korean government applied a vacant island policy to Tokdo for a limited period of time, but it never expressed its intention to abandon the island.⁸⁸⁾ So far as a vacant island policy is a form of government policy, it is an expression of sovereignty. In view of this, it seems natural that the shogunate decided to abandon Ullungdo. Taking advantage of the vacated state of Ullungdo, some Japanese trespassed on this island and called at Tokdo en route to and from Ullungdo. This simple fact is stretched by the Japanese government to assert it had "effective management of Tokdo" and claim it as its "inherent territory ."

Among the terms often used by the Japanese government is "hairyo: "拜領 or "bestowal" in English, bestowal of Ullungdo or Tokdo on a Japanese fisherman. Who had the right to bestow whose land to whom? An act of calling at an island or fishing by an individual fisherman cannot be considered a government act. This is considered too flimsy a piece of evidence on which to base a legal claim.⁸⁹⁾

Since the shogunate decision of 1696, the Japanese side stresses, Japan had had a clear perception of Tokdo as its territory until the early Meiji years (1877- 78).⁹⁰⁾ But how can Japan account for the dispatch of a 3-man study mission to Korea by the early Meiji government that recognized Tokdo as Korean territory? In 1869, the Japanese government sent Sada Hakubo, Moriyama Shigeru and Saito Ei to Korea as mentioned already. The list of items the Foreign Ministry directed them to study includes an "item on Korean territory of Ullungdo and Tokdo"; the report by the mission entitled *A Confidential Report on the Korean Diplomacy* contains a section "the circumstances under which Matsushima and Tokdo have become Korean territories." This section states that "there has been found no record on file on Matsushima [Tokdo], an outlying island of Takeshima [Ullungdo],"⁹¹⁾ a point worth noting. Regardless of this fact, the Japanese government argues that Tokdo had been Japan's "inherent" territory from 1696 to 1877 and until 1905 thereafter .

Furthermore, it would be amiss not to cite a passage from the work of Yamabe Kentaro who points out the fallacy of the "inherent territory" view:

When Ullungdo was decided as Korean territory , no agreement was made on today's Tokdo. Therefore, it may be assumed Japan abandoned Tokdo at that time. Undoubtedly, Japan's interest in Tokdo was far less than in Ullungdo. In considering the history of the ownership of Tokdo, an assertion that Tokdo was known to Japanese during the shogunate period does not hold. Had the possession of Tokdo been determined by then, there should have been no necessity to announce the incorporation of Tokdo anew in February 1905. On the question of Tok

do, the Japanese Foreign Ministry and others maintain this island is an "inherent territory of Japan," but they do not define the word "inherent." While studying this "inherent territory," I discovered "The Dominion of the Empire" among the works of Ita Kiyoji. This book covers the findings of the study conducted for the *areas subject to the application of the constitutional law when the Constitution of the Empire was being enacted*. In it is found the definition of "inherent territory," which clearly states the "inherent territory" of the empire comprises what is described in the foundation myth of Japan, Honshu, Shikoku, Awajinoshima. I told a Japanese historian about this and he concurred, "it is indeed a beautiful definition." From this, it is clear that the "inherent territory" theory cannot be applied to Tokdo.⁹²⁾

In addition, in the afore-mentioned "Application for Incorporation of Rianco Island and Its Lease," a passage is found that states that the ownership of Tokdo was undetermined. The Home Minister who referred this application to the cabinet meeting admitted this fact, and it is clear that the cabinet decision regarded "Nakai Yozaburo's migration to Tokdo for fishing operations" as "prior occupation under international law,"⁹³⁾

A series of Japanese documentary records shows that Tokdo is not Japan's "inherent" territory and base Japan's annexation of the island on prior occupation of a "*terra nullius*" in international law, thus denying Japan's historic or original title to Tokdo. It is self-contradictory to annex into its territory an inherent area.

B. Effect of Tokdo's "incorporation"

Is the "incorporation" of Tokdo into Japanese territory in 1905 valid? The Korean government declares it null and void because the action was taken after the Korean-Japanese Protocol (February 23, 1904) and the first Korean-Japanese Treaty (August 22, 1904) were forced on Korea, Japan seizing virtually all diplomatic rights from Korea and placing it in a strategic position where in it could "occupy any part of Korean territory," and reducing the Korean government to a status from which it could hardly lodge any protest against "the Shimane Prefecture Public Notice."⁹⁴⁾

What is Japan's attitude toward this? Its Foreign Ministry states: "Article 4 of the Korean-Japanese Protocol originally provided for temporary expropriation of places strategically deemed necessary for the preservation of Korea's territorial integrity during the Russo-Japanese War and had nothing to do with the incorporation of Tokdo."⁹⁵⁾ At the same time, it is argued: "The foreigner recommended by the Japanese government was an American and Japan never did interfere in Korea's diplomatic affairs; only through the new Korean-Japanese Treaty of November 17, 1905, Japan began directing and managing Korean diplomacy; and had Korea had justifiable historic and administrative rights to Tokdo at the time of its incorporation, nothing would have prevented Korea from protesting to the Japanese government."⁹⁶⁾

This is an argument to justify Japan's invasion of Korea and contradicts historical facts.⁹⁷⁾ The decision of the elder statesmen's council on May 30, 1904, the cabinet decision of May 31, and "Administrative Guidelines for Korea" sanctioned by the emperor on June 11 state as follows:

If the Korean authorities were allowed to do as they like, we do not know what would happen covertly. Therefore, at the first opportunity available in the days ahead, Korea should be made to pledge to seek Japanese government agreement before the conclusion of a treaty with a foreign country and on important diplomatic affairs. Before the above plan is executed, the following method is to be applied to supervise [Korea's] diplomacy. A (omitted). B. Place one advisor at the [Korean] Foreign Ministry and let him direct and supervise affairs of state in the background. The advisor could better be a foreigner in order to execute smoothly the duties internally and externally so that our aims could be achieved.⁹⁸⁾

As seen above, the foreign advisor mentioned in the first Korea-Japan treaty was to carry out the task given in the "Administrative Guidelines toward Korea," and in all other respects, the treaty is considered the embodiment of the guidelines. It is against reason to argue Durham w. Stevens, an American posted as Foreign Ministry advisor, not the Japanese imperialists, should be held accountable for Japanese aggression in Korea.

Japan's aggression was directed at all of Korea, to grab all of its territory, and Japan's assertion that Article 4 of the Korean-Japanese Treaty was for the preservation of Korea's territorial integrity and was irrelevant to the "incorporation" of Tokdo is not tenable. In the article, the phrase "temporary expropriation" of strategically necessary places is used, but Japan was carrying out a permanent and basic scheme of aggression.⁹⁹⁾

Japan contends Korea could have protested against the "incorporation" of Tokdo. The Korean Foreign Ministry existed in name only at that time and Korean diplomats were posted abroad. But essentially, Japan controlled Korea's foreign policy formation. When Japan forced the Korean-Japanese Protocol, much resembling Japan's twenty-one demands to China in 1915, Korea became a Japanese protectorate as Prof. T. L. Lawrence of Cambridge University pointed out in his article, "War and Neutrality of the Far East."¹⁰⁰⁾ Prof. Lawrence interprets "advice" in Article 1 of the protocol ("The empire of Korea shall have firm belief in [the good faith] of the Great Empire of Japan and accept the latter's advice on improvement of facilities") as an order in international law, and states that Korea came under the domination of Japan, becoming its "protectorate." Also, Article 4 which states that Japan could expropriate places considered necessary for military purposes can be interpreted as placing Korea under Japan's sovereignty.

In short, Korea was deprived of its rights to conduct diplomacy and its sovereignty and independence by this protocol signed on February 23, 1904, not by the Protectorate Treaty concluded on November 17, 1905. In this situation, it was impossible for Korea to file any protest against the "incorporation" of Tokdo. As Schwarzenberger points out, "whether silence should be interpreted as tacit consent depends entirely on the circumstances of the individual case."¹⁰¹⁾ Japan alleges that Korea's silence on the "incorporation" of Tokdo is "acquiescence" in the action because the Korean government made no express protest against the action. However, the process of colonization of all of Korea, to say nothing of the "incorporation" of Tokdo, can never be justified simply by the absence of protest or opposition by the Korean government. To expect or infer a possibility of protest or opposition of a government, completely powerless in the face of Japanese aggression in the age of imperialism, is not a convincing argument. There is no time limit set in

international law for the expression of protest. This can only be decided by each specific case. A series of sovereign acts and other measures the Korean government has taken since it regained its sovereignty, particularly in 1952, can be understood as the expressions of specific protests against the actions Japan took in the past.

This fact is too clear to elaborate on. Further examination would be necessary to determine whether the "incorporation" of Tokdo means seizure of a Korean territory. The "incorporation," contrary to the contention of the Japanese Foreign Ministry, took place when Japan's aggressive design was progressing as scheduled, with Korea deprived of its sovereignty and diplomatic rights. In terms of time, Tokdo was "incorporated" in the process of Japan's colonization of Korea before, during and after the Sino-Japan War and the Russo-Japan War. This places Tokdo into the category of "all other territories Japan had taken by violence and greed" in the Cairo Declaration. Accordingly, Japan should be "expelled" from this island. If Japan refuses to accept this, it should bear the "burden of proof."

C. *Could Tokdo be acquired by prior occupation?*

Japan's claim that Tokdo was its inherent territory is groundless, while the grounds¹⁰²⁾ of its "incorporation" of Tokdo are farfetched in saying that the public notice by Shimane prefecture was to reconfirm the intention of Japan as a modern state to own the island and to incorporate¹⁰³⁾ it into the modern administrative system of Japan. It is self-contradictory to reconfirm a state's will to own an inherent part of its territory. There is no need for a modern state to commit such self-contradiction.

Therefore, some Japanese scholars have abandoned this view in favor of the prior occupation theory under international law.¹⁰⁴⁾ This argument goes nowhere toward the settlement of this question. It is like committing "an act of robbery within the purview of international law."

"Prior occupation" is a mode of acquiring a territory and is generally allowed in traditional western international law. But it is becoming the target of attack by newly emerging countries in Asia and Africa because it justifies "conquest" and colonization of their lands by the western powers.¹⁰⁵⁾ Japan is now applying this legal theory to justify its "incorporation" of Tokdo.

This mode of territorial acquisition is prior occupation of *res nullius* in Roman law applied to international law. At the beginning of the modern period, in the early period of colonialism, the "principle of discovery first" advocated by Spain and Portugal was excluded and this theory developed by analogy with prior occupation of *res nullius* in Roman private law, to make the competition among western powers for acquisition of colonies compatible with the rules of power politics. This new legal system was designed solely for the western powers in the acquisition of colonies in the non-European world.¹⁰⁶⁾ There is a great difference between prior occupation of *res nullius* as the primordial method of acquisition in modern civil code and international prior occupation as a mode of acquiring a territory as the latter applies not only to an uninhabited island or land, but to a currently inhabited and occupied area. Thus, many non-European areas were subject to prior occupation as *terra nullius*¹⁰⁷⁾ under effective control of European states even if the areas were inhabited and maintained a certain level of community life. Most Asian and African col

onies were formed through this process. Modern international law was thus closely associated with modern colonialism from the very moment of its birth.¹⁰⁸⁾ The decolonialization movement that emerged in the wake of the Second World War was a counterattack by indigenous peoples in these colonies against western imperialism and was a natural challenge to the validity of traditional prior occupation theory.¹⁰⁹⁾

In the 20th century, the division of colonies was completed and the legal theory of prior occupation had served its original goals. Japan is still applying this prior occupation theory to justify its acquisition of Tokdo, and, therefore, Japan seems to be applying the wrong method for the wrong object so far as Tokdo is concerned.

Assuming Japan could make application of prior occupation to Tokdo, then Japan should first of all prove Tokdo was a *terra nullius*. As seen already, Korea and the Korean people believe that Tokdo has been their island from ancient times just as Ullungdo has been.

From the brief historical survey at the beginning of this article, it can be seen that Japan regarded this island as an area "whose ownership was undetermined" and acquired it through prior occupation, but it did not regard this island as *terra nullius*. To see an area as a *terra nullius* is different from considering it an area whose owner is undetermined. This looks similar to the Korea's vast lands that the Japanese Government-General expropriated as estates whose ownership was "undetermined" in the land survey it conducted from 1905 through 1918. They were not ownerless lands. So far as Korea has a title to Tokdo to a certain extent, this can not be considered an ownerless island.

The complete title required of such small uninhabited islands as Tokdo is considered adequate by the pre-1905 historical facts presented by the Korean side. By the "incorporation" of Tokdo in 1905, Japan's original title was allegedly replaced by the title in positive international law through effective possession.¹¹⁰⁾

It is not clear what the Japanese side means by effective possession, but the Korean government promulgated, prior to this in April 1900, Imperial Ordinance No. 41; Under the ordinance, Ullungdo was renamed Uldo; the superintendent of the island under the control of Kangwon province was upgraded to kunsu (county magistrate) (Article 1); and the jurisdiction of the magistrate covered Chukdo and Sokdo (Tokdo) (Article 2).

This indeed is the clear evidence of the exercise of sovereign authority by the Korean government. It was five years before Japan "incorporated" Tokdo in 1905 that Korea replaced its original title to Tokdo with the modern title calling for effective possession under positive international law.¹¹¹⁾ Tokdo was clearly Korea's possession and was not a *terra nullius* subject to Japan's prior occupation. Japan's "incorporation" is, therefore, imperialist Japan's aggressive act.

The Korean government denies Japan's claim that it satisfied the requirement of prior occupation, i.e., the "official manifestation of the state will." The Japanese contention on this point follows:

In respect to the requirements for the acquisition of a territory under modern international law, the state's will to acquire Tokdo as its territory was confirmed in the cabinet decision on Jan. 8, 1905; the official announcement of the state's will to acquire the territory was made b

y the public notice by Shimane prefecture on Feb. 22, 1905. This was the mode of notification in practice for prior occupation of a territory by Japan, and satisfied the requirement for notification under international law.¹¹²⁾

The Korean government's counter-argument follows:

"The public notice by Shimane prefecture was made *sub rosa* and was not known not only to foreign countries, but also the general public in Japan. Therefore, this cannot be recognized as the manifestation of a state's will.¹¹³⁾

Certainly, a cabinet decision becomes a state's will, but is limited to internal affairs, and is inadequate as a requirement for acquisition of a territory unless supported by an external announcement by a government organ. Also, Shimane prefecture is a local government, and its notification is designed to announce a decision made by the government to its residents, not the expression of a state's will *vis-a-vis* foreign countries. If an act of notifying its residents of a local government decision is taken as an external announcement of a state's will, there should be no need to invoke international law or jurists' views because an international question can be settled by the application of a local autonomy law (municipal law).¹¹⁴⁾

The question of whether external notification is required for prior occupation of a land has raised a serious debate and opinions are split over precedents and legal theories. The Japanese government does not view notification as an absolute requirement under international law and states: "In the arbitration trials of the *Island of Palmas* case of 1928 and the *Clipperton Island* case of 1931, there was a ruling that notification was not required, and for prior occupation of Guana, the U.S. followed the practice of making no external notification.¹¹⁵⁾ However, in the *Clipperton Island* case, notification was served to the Hawaiian government and the establishment of French sovereignty over Clipperton Island was announced in English in the *Polynesia* published in Hawaii.¹¹⁶⁾ Furthermore, in 1928, in the arbitration trial of the *Island of Palmas* case, notification to foreign countries was confirmed as important a requirement as other official acts in justifying the act of Holland. All considered, it is erroneous to assert that notification is not required under any circumstances. Only in the case of the inhabited Island of Palmas, no need of notification was seen as in the case of the African continent on the assumption that secret exercise of sovereignty was impossible in such areas.¹¹⁷⁾ In the ruling in 1890 of the U.S. Supreme Court on the prior occupation of Guana, which the Japanese government invokes, the island was incorporated in the U.S. territory after it had been ascertained that it was a *terra nullius*. Therefore, no external notification was made and the case was only an internal case, involving no foreign countries.¹¹⁸⁾

Theoretically, L. Oppenheim states:

No rule of the 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 coasts the parties to the General Act of the Berlin Congo Conference of 1885 stipulated that occupation should be made known to one another. But this Act has been abrogated so far as the signatures of the Convention of St. German of September 10, 1919, are concerned.¹¹⁹⁾

Guggenheim, too, sees no obligation to notify other countries of the acquisition of a land unl

ess provided for specifically in a treaty.¹²⁰⁾

Jennings takes it a step further and concludes that not only recognition and acquiescence, but publicity have no absolute relation to a title by prior possession.¹²¹⁾ However, Westlake, citing Lord Stowell, holds that notification of prior occupation is required in international law.¹²²⁾ Therefore, even in case the obligation of notification does not exist in a treaty, the legal security of the international community demands that notification be made general as a rule in international customary law.¹²³⁾ It is not only the obligation imposed on the parties to a specific treaty to enable the other party to raise opposition if necessary.¹²⁴⁾ This agrees with the general need of the international community to prevent secret or illegal prior occupation (aggression on the pretext of prior occupation). Schwarzenberger sees that the exclusion of this obligation of notification from the convention of St. German has restored its place as a rule in international customary law.¹²⁵⁾

The Declaration of the Institute of International Law in 1888 regards official notification as a requirement for prior occupation: ① or the notification of an official act, each state may use the mode of publicity ② customarily uses or it may be done through diplomatic channels.¹²⁶⁾ From this, it is doubtful if the public notice of Shimane prefecture has the effect of notification or publicity described in the above declaration. Lastly, Japan refers to the "establishment of proper authority for control of territory" as the third requirement for prior occupation and invokes a survey of Tokdo conducted on the spot by the Japanese government and a license system applied to sea lion hunting at Tokdo.¹²⁷⁾ As stated already, however, the Empire of Japan, particularly after 1904, openly carried out its aggressive design for Korea under the pretext of land survey and other projects. Japan's act conducted against Tokdo during this period can be considered an act of aggression and is judged not to have any relation to the "continuous exercise of territorial management." After all, the Japanese assertion does not meet the requirements for prior occupation of Tokdo.

D. Does the principle of "effective possession" apply to Tokdo ?

Generally, the principle of "effective possession" provides the basis of positive international law in legal settlement of international law. This principle is supported both by jurists and precedents, and is recognized as an almost all-powerful (*erga omnes*) title in the acquisition of territory.

In the *Island of Palmas Arbitration Case* (1928) between the U.S. and Holland, Judge Max Huber attached great importance to the exercise of sovereign power over the Island of Palmas and ruled in favor of Holland. The U.S. claim to the Island of Palmas originated from the U.S.-Spain Treaty signed on December 10, 1898, ending the war between the two countries and ceding the island to the U.S. Then Judge Huber had to decide whether Spain had its sovereignty over the island at the time of its cession to the U.S. Holland maintained it had exercised its sovereign rights to the island peacefully in 1898 and for a long time before that time, and Judge Huber accepted "evidence of Holland's exercise of sovereignty since 1700."¹²⁸⁾

He stated, referring to the first half of the 16th century when Spain claimed to have discovered Palmas:

If we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolic, of taking possession, involved *ipso jure* territorial sovereignty and not merely an "inchoate title," *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed as the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

Thus, this leaves the question of whether Spain was sovereign *vis-a-vis* this island in 1898. In this connection, Judge Hubert opined that even if title was contingent on a simple act of discovery of a land in the past, the principle of effective possession had been established in international law by the 19th century, and therefore sovereignty once acquired in the past could only be guaranteed by its effective exercise in the 19th century. A majority of jurists and precedents recognize the possession of sovereignty of a state, without external notification, in an area where other countries have not exercised sovereignty.¹²⁹⁾ Thus, Judge Hubert treated this case as a case of inchoate title and ruled that Holland acquired this *terra nullius* by prior occupation.

In short, even if Spain discovered the island or made prior occupation of Palmas before Holland and began exercising sovereignty over it, Spain could not defend the title in the absence of effective occupation. The lesson from this case is that abstract title without effective occupation cannot emulate the one supported by effective exercise of sovereignty. This is a declaration of the principle of effective occupation.

This principle is supported by the General Act of the Berlin Congo Conference of 1885 already mentioned above. Article 35 of the Act provides:

"The signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to perfect existing rights, and as the case may be, freedom of trade and transit under the conditions agreed upon. ..."

Further, in the *Eastern Greenland* case between Norway and Denmark in 1933, the Permanent Court of International Justice (PCIJ) referred to "title deriving from continuous display of title" though it did not use the term "effective occupation" and cited the two examples: ① *de iure* and *animus occupandi* to act as sovereign, ② actual exercise of such authority or *corpus occupandi*.¹³⁰⁾ The first requirement is positive evidence of sovereignty over a territory, and the second one is that an adequate exercise or display of sovereignty should exist. However, on the actual exercise (effective control) and geographical conditions relative to the display of title, the PCIJ states:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claim to sovereignty over areas in thinly populated or unsettled countries. ... The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displa

yed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.¹³¹⁾

That effective possession is considered a most important factor today is shown in this PCIJ adjudication on the *Eastern Greenland* case. On the other hand, this ruling seems to accept an act of control, once considered inadequate in an area not far off from the north pole or a land hard to access, as effective management today. Thus, effective occupation or the mode of management is not invariable, nor *a priori*. It may vary by geographical conditions. The following is an examination of the *Clipperton Island* case of January 28, 1931, between France and Mexico. In this case, too, the principle of effective occupation was confirmed in the following way: "According to immemorial usage with legal validity, *animus occupandi* must be supported by not nominal occupation, but *corpus occupandi*."¹³²⁾

After the end of World War II, the most prominent ruling of the International Court of Justice (ICJ) based on this principle was the *Minquiers and Ecrehos* case, which stressed the real exercise of sovereign power for territorial rights. The most decisive importance was placed on evidence relative to the occupation of the small group of islets of Ecrehos and Minquiers, not an indirect assumption based on an event in medieval times.¹³³⁾ Historic or original title is not legally valid unless it is supported by effective occupation or control; and its legal validity is effected when a historic or original title has been replaced by another title valid according to the law of the time of replacement. Thus, the original title claimed by the French king produces no legal validity because it has not been replaced by another title valid under the law in force at the time of replacement, while the French king had the burden of proof for such replacement.¹³⁴⁾

The unique adjudication by the ICJ on a territorial dispute in the Orient is the *Temple of Preah Vihear* case between Thailand and Cambodia. Here again, actual occupation is regarded as legally decisive. The ruling did not regard as legal or decisive the geographical, historical and archaeological evidence presented.¹³⁵⁾ Also, in the *Clipperton* case, the evidence produced as Mexican historic title was rejected as not being supported by a display of sovereignty over the island.¹³⁶⁾ Likewise, a title deriving from "discovery" cannot take precedence over the manifestation of sovereignty. The *Palmas* case first applied this principle, stating that a title by discovery cannot, even in its most favorable and broadest construction, be but an inchoate title, and that this inchoate title cannot have priority over a confirmed title based on a continuous and peaceful display of sovereignty.¹³⁷⁾

Not a simple historical fact or discovery, but effective occupation provides a decisive element in the settlement of a territorial dispute. This principle is generally agreed on by jurists and in the precedents of international tribunals. Influenced by this way of thinking, a majority of Japanese scholars and the government are applying this legalistic and decisive principle to the "incorporation" of Tokdo. However, whether effective occupation can be applied to the "incorporation" of Tokdo or not should be examined objectively.

Originally, in international law, "effective occupation" does not mean "physical settlement," but real, continuous and peaceful manifestation of state functions. In the typical rulings by the inter-

national tribunals examined so far, this criterion is found in common, i.e., the exercise or display of sovereignty should be (1) peaceful, (2) real, (3) adequate enough to warrant a valid title and (4) continuous.¹³⁸⁾ By examining these requisites one by one, whether Japan's prior occupation or "incorporation" is valid under present international law (though it has many arguable points) can be seen.

1. The exercise of sovereignty should be peaceful.

The original claim to a sovereign right should not derive from "a usurpation of another's subsisting occupation nor be contested from the first by competing acts of sovereignty ." But a simple protest does not change this peaceful character of sovereignty. In the *Eastern Greenland* case, the PCIJ ruled that a simple protest from Denmark did not alter the peaceful character of the display of Denmark's state activities.¹³⁹⁾ This peaceful origin of the exercise of sovereignty is recognized as a basis for determining the period of prescription. Japan's "incorporation" or "prior occupation" of Tokdo certainly does not fulfill this requirement as this act was a "usurpation" of Korea's subsisting occupation, and was "contested from the first by competing acts of sovereignty" by Korea.

2. The exercise of sovereignty should be real.

This means that the exercise of sovereignty should be real, not a claim on paper. The arbitrator of the *Clipperton Island* case referred to the criterion of effective occupation as:

By immemorial usage having the force of law besides the animus occupandi, the actual, and not the nominal, taking of possession is a necessary condition for occupation. This taking of possession consists in the act, or a series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.¹⁴⁰⁾

How long a period of real exercise of this sovereignty should validate a title may vary according to the nature of the target area.

The PCIJ ruled on the *Eastern Greenland* case that in a thinly populated area with no competing acts of sovereignty, extremely limited exercise of sovereignty would suffice.¹⁴¹⁾ This may be termed the "spatial character" of real occupation. In the *Clipperton Island* case, it is stated:

Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its first appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed.¹⁴²⁾

This may also indicate the "spatial character" of effective occupation. Strictly speaking, in an ordinary case, occupation will be completed only when the occupying state has established an organization in a newly acquired territory for the enforcement of its municipal law, but in some areas, such an act will not be required, and this ruling will not contradict the fundamental principle of effective occupation. This decision means that in an uninhabited area, comparatively limited

exercise of sovereignty will satisfy the requirement. Therefore, the *Clipperton Island* case and the *Eastern Greenland* case recognize in common the spatial character. Schwarzenberger sees that it is neither proper nor necessary that jurisdiction should cover the whole area of a territory and be exercised at every moment.¹⁴³⁾ On this point, Judge Huber in the *Island of Palmas* case states:

the intermittence and discontinuity compatible with the maintenance of the right necessary differ according as inhabited or inhabitable regions are involved, or regions enclosed within territories in which sovereignty is uncontestedly displayed or again regions accessible from, for instance, the high seas.¹⁴⁴⁾

On the question of military occupation as the strongest mode of effective possession, Judge Basdevant states in the *Eastern Greenland* case:

From a military point of view, for the King of England to hold them, it is not necessary that he should maintain a garrison there; it is sufficient that by reason of his military and naval power he should be in a position to intervene there when he considers it appropriate without being prevented from doing so by the forces of the King of France and that by the same token; he should be in a position to prevent intervention by these forces...¹⁴⁵⁾

Tokdo is an uninhabited island, unfit for sustained human habitation. Thus, effective occupation or exercise of sovereignty for the island does not require administrative organization, defense or other real actions required for other inhabited areas. From ancient times, Korean people have regarded Tokdo as a dependency of Ullungdo and utilized the island effectively for fishing and other activities. In 1900, before the alleged "incorporation" of the island by Japan in 1905, modern legislation was enacted, placing the island under the jurisdiction of Ullung county.¹⁴⁶⁾ All considered, Korea's sovereignty over Tokdo should be considered to have been completed. Therefore, Japan's "incorporation" or prior occupation was obvious seizure and invasion of this accomplished title.

The contention Japan frequently uses that it replaced the title to Tokdo by another title valid according to the law at the time of replacement is quite different from that stated in the *Minquiers and Ecrehos* case. To criticize this effective occupation is not to question the principle *per se*, but to denounce the principle as a tool of aggression by imperialist states which, assuming themselves to be "civilized" countries, defined arbitrarily other peoples' lands as "ownerless" or "ownership undetermined" and seized them through the application of this principle of "prior occupation." Japan's prior occupation was an act of aggression, in fact, and can not be validated.

The term "aggression" against an independent state should not be used with levity. But the Japanese Foreign Ministry states that "such a serious charge against a sovereign state as terming the "incorporation" of Tokdo an act of aggression should be proved with the highest degree of certainty, and we absolutely cannot tolerate it that Korea makes such an accusation arbitrarily and in total disregard of facts."¹⁴⁷⁾ In this way, Japan is shifting the whole responsibility to Korea. It is difficult to define "aggression" in international law. In general, it is an external act of a state designed to change the status quo by forcing a demand, either justifiable or not, on the other country by use of coercion or under the threat of coercion.¹⁴⁸⁾ If this definition is applied, Japan's

"incorporation" of Tokdo was an act of aggression, to say nothing of its annexation all of Korea.

The "incorporation" of Tokdo should not be viewed as a separate act, but as a part of Japan's overall scheme to annex all of Korea. How can this act be justified under international law if it is not an act of aggression as Japan alleges?¹⁴⁹⁾

In connection with the "spatial character" of effective occupation, another factor to be reckoned with is "restrictive nature." In the *Eastern Greenland* case, the PCIJ advocated the display and exercise of sovereignty, but it discovered Denmark's *animus occupandi* was manifested under restriction and attached importance to this.

Even if effective possession has continuously been made of an area confirmed as another state's territory by treaty, the transfer of sovereignty cannot be achieved unless the intention of the other country to abandon the area has been proved.¹⁵⁰⁾ In the *Frontier* case, Holland exercised sovereign power over two plots of land contested, but as they proved to be a territory of Belgium under the Boundary Convention of 1843, they were to be ruled to be Belgium's.

In this case, the acts relied on by Holland were mostly of a routine and administrative character by local officials and Holland, in breach of the Boundary Convention, published the contested area in a survey map. These acts were ruled to be insufficient to displace Belgium's sovereignty established by the Boundary Convention.¹⁵¹⁾ From this, it can be seen that "effective occupation" is restricted. So far as the "incorporation" or "prior occupation" of Tokdo by Japan is presumed to have been an act of seizure or aggression against Korea's title, Japan should prove this *prima facie* evidence that the act was not committed by "violence and greed." Unless this burden of proof is removed, Japan should find itself bound by the "restrictive character" under international agreements (Cairo Declaration-Postam Declaration-Surrender instruments) as shown in the *Frontier* case. Here, the relative strength of evidence, seen in the *Minquiers and Ecrehos* case, to contradicting evidence does not apply.

3. Exercise and display of sovereignty should be adequate enough to warrant a valid title.

In the *Eastern Greenland* Case, the PCIJ examined by period whether, Denmark's activities in a given space of time were adequate enough as to warrant a valid title to the country.¹⁵²⁾ The PCIJ seemed to have expected nothing more than the proven display of functions ordinarily expected of a sovereign nation in the international community under a given situation.¹⁵³⁾ It was unanimously agreed that the degree of state functions to warrant a valid title might vary according to the topography of each territory. Display of territorial sovereignty assumes different forms in different situations. From this, Korea has historically and adequately manifested its government functions for the small uninhabited island of Tokdo.

4. Exercise and display of sovereignty should be continuous.

In the *Palmas Island* and the *Eastern Greenland* cases, the tribunals regarded the continuous display of government functions, apart from "dereliction," as a requisite for a valid title by prior occupation. In principle, unless the continuity of state activities is proven, it is taken as evidencing the will to abandon a title, whether it is expressed or not.¹⁵⁴⁾

But the requisites for continuity of occupation depend on the circumstances of the territory:

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved.¹⁵⁵⁾

Max Huber's formula is applied here. According to this principle, in the *Island of Palmas* and *Eastern Greenland* cases, the display of sovereignty irregularly made between comparatively long intervals was adjudicated sufficient for effective occupation. The *Clipperton* case is an extreme case wherein this principle was applied, and effective occupation by France was recognized.

In light of this principle, the continuous display of Korea's sovereignty over Tokdo is regarded as sufficient. On account of a vacant island policy enforced toward Ullungdo for a considerably long period of time, voyages to Tokdo discontinued for a while, but this does not affect the question of continuous exercise and manifestation of sovereignty. The vacant island policy was a government policy, not Korea's "dereliction" of Ullungdo and Tokdo. In consideration of Tokdo's geographical conditions as an uninhabited island, the activities of Korea and its people preceding and following the period in which the vacant island policy was in force concur with the principle of continuous manifestation of sovereignty.

III. Practical approach toward the settlement of the Tokdo question

A. Modern trends in territorial acquisition

So far the question of effective occupation has been examined and it has been seen that this principle is subject to the "spatial character" and "restrictive character" under international treaty. Territorial acquisition or effective occupation by force or under threat of force, in particular, is subject to this restriction. In other words, acquisition of a territory by aggression becomes null and void.

When a change in a territory takes place by means other than aggression, consensus reached by the expression of the free will of the people involved and recognition by the third country should be honored. When the requirements of effective, continuous and peaceful exercise of sovereignty have been fulfilled, a title becomes absolutely valid for every one (*erga omnes*), but at the present stage of the world community, not adequately organized, acquisitive and extinctive prescription has not been clearly defined and systematized into international law. Therefore, agreement or recognition is required as a legal basis. So far as the other country continues protesting and denying recognition, territorial sovereignty cannot be considered to have been completed despite effective occupation of the area in question.

An important change is occurring in territorial acquisition, not basing it simply on a unilateral

act of effective occupation, but on the consolidation of such various formulas as agreement or recognition.¹⁵⁶⁾ This phenomenon is an important change in traditional international law that admitted no right of the third country to intervene in a change in territorial rights of the other country. Japan did not obtain Korea's agreement on the "incorporation" of Tokdo, nor recognition by the third country. Japan ignored Korea's title, arbitrarily defined it not as a *terra nullius*, but an island whose ownership was undetermined and "incorporated" it. The validity of Japan's effective occupation of Tokdo is questionable while its title to the island is not sufficiently consolidated under today's international law. Therefore, Japan has no grounds on which to claim Tokdo. As all the territories Japan acquired after the Sino-Japanese War are assumed to have been grabbed by "violence and greed" in the provisions of the Cairo Declaration, Tokdo should be recognized as Korean territory until Japan has proved otherwise and convincing.

The principle of effective occupation deriving from many precedents by international tribunals from the *Palmas* case to the *Minquiers and Ecrehos* case is not universally valid as seen in the *Frontier* case. To try to identify the Tokdo question with the *Minquiers and Ecrehos* case and apply mechanically the same principle is to ignore the particular circumstances of Tokdo. In case territorial rights are subject to certain restrictions internationally, the consolidation of title by real exercise of sovereignty or by the application of acquisitive and extinctive prescription will not work. Contradistinction of relative strength as applied in the *Minquiers and Ecrehos* case and presumption of illegality of effective occupation based on the restrictive character of territorial rights are two essentially different problems, each with its separate objectives for judgment.

B. Political character of the Tokdo question

The Japanese government and some scholars maintain that the Tokdo question is a "legal dispute,"¹⁵⁷⁾ because each government invokes jurists' views and international law and practice in support of its argument, and there exist "legally opposing or contradicting views" between the two countries.¹⁵⁸⁾ At the same time, Japan invokes Article 36 of the Charter of the United Nations that provides for submitting a legal dispute to the International Court of Justice when the U.N. Security Council recommends peaceful settlement of a dispute, and acts as if Korea were breaching an international code of ethics or international law by rejecting the submission of the Tokdo question to the ICJ. Japan goes on to argue that the "instruments exchanged on the settlement of disputes" signed when the Korea-Japan Treaty was concluded were prepared with the Tokdo question in mind.¹⁵⁹⁾ Thus, Japan insists that the Tokdo question be settled by submitting it to arbitration according to the procedures agreed on in the instruments.

No lengthy explanation is needed to confute this contention. First, Japan's view of the Tokdo question as an international dispute, particularly a legal dispute, reveals its lack of understanding of the nature of the question. True, the Korean government is putting forward a legal argument in order to defend its position. However, like many other territorial disputes, the Tokdo question is taking on a political character and becoming a dominant political issue. It may be symbolic of a political dispute to press the other party for a demand based on legal grounds which the other country finds hard to accept. This is true of Korea's position.¹⁶⁰⁾

Argentina proposed that the U.K. refer the case of the Falkland Islands, militarily occupied by the U.K., to the ICJ, but the proposal was rejected for a long time. Argument and counter-argument by both sides were naturally based on legal grounds, but they involved a challenge to traditional legal principles and were, essentially, a desire for a peaceful change. Additionally, this type of dispute can be seen in Panama's demand for revision of the Hay-Bunau-Varilla Treaty (1903), Yemen's demand on Aden, and Ethiopia's demand on Somalia. When, in 1940, the U.S. proposed that a legal question on Mexican expropriation of oil fields be submitted to the world court, Mexico turned it down out of hand.¹⁶¹⁾ It is not reasonable to insist on the application of positive law without reflecting on its substance and origin. In a case where means other than positive law are excluded in the settlement of a dispute, international despotism or resorting to violence may prevail unless the validity of positive law is proved. In the constantly changing world community, how should people continue using the positive law frozen at a certain point in time in history? In the settlement of an international dispute, the question is not to maintain positive law under any circumstances, but how to settle the dispute itself. Submission to arbitration for decision by an international tribunal is not the goal, but disposition is; For the maintenance of peaceful international relations, positive law should not be exaggerated.¹⁶²⁾

Apart from the question of whether Korea has an obligation in the strictest sense of the word to abide by the Charter of the United Nations, it is also doubtful whether a member state of the United Nations has an obligation to refer a legal dispute to the ICJ when it does not have such an obligation under a treaty. As seen in the *Corfu Channel* case, the recommendation of the U.N. Security Council based on Article 36 of the U.N. Charter does not establish compulsory jurisdiction of the ICJ.¹⁶³⁾ Because the Korea government has not agreed to the jurisdiction of the ICJ, it cannot be placed under an obligation of submission to the ICJ. Concurrently, it is doubtful if an international code of ethics places any such obligation upon a state.¹⁶⁴⁾ Submission to the ICJ is a political question, not a legal one. There is no legal principle demanding that human beings decide on whether a certain issue can properly be settled by certain legal means. A "legal" dispute deriving from a demand on the basis of present legal rights is to be distinguished from a "political" dispute originating in a demand to change the present legal rights; there is no obligation to make a clear distinction between the two. Nor is such distinction made in actuality.

On "the instruments exchanged on the settlement of disputes" 1 in the Korea-Japan Treaty, Japan's contention that they apply to the Tokdo question is diametrically opposed to Korea's counter argument that they apply only to a dispute arising from the Korea-Japan Treaty.¹⁶⁵⁾ At no stage of the Korean-Japanese negotiations was the question of Tokdo ever taken up and no phrase on Tokdo is found in the instruments exchanged. The Japanese view is based on a far-fetched construction of the instruments. The Korean government has no obligation to declare whether the Tokdo question is a legal dispute or a political contention. Its distinct political character makes the prospects of judicial settlement dim. Even if the Tokdo question were depoliticized tomorrow, the distrust prevailing among developing countries in the current composition of judges in the ICJ and in the laws it applies would not easily be dispelled.¹⁶⁶⁾ It is why the creation of an International Court of Justice for Asia (ICJA) is proposed, which would settle territorial disputes between the colonialists and the colonized in Asia on the basis of oriental wisdom, not on western

n traditions to justify the imperialist mode of territorial acquisition.¹⁶⁷⁾

It is believed this proposal agrees with the spirit of the U.N. Charter, encouraging the settlement of regional disputes by regional organizations.¹⁶⁸⁾ Only when both parties have reached a political agreement on the composition, procedures, and applicable laws, would the Tokdo question be depoliticized and become a legal dispute in the strict sense of the term, making judicial settlement possible.

Japan regarded the Tokdo question a dispute and proposed to entrust the case to the ICJ, but was turned down by the Korean government on the grounds that Tokdo is a group of small uninhabited islets, but became the first victim of the overall process of imperialist Japan's aggression against Korea and became its spoils in its advance toward Manchuria and China. Some unbiased Japanese scholars share this view.¹⁶⁹⁾

The "incorporation" of Tokdo was made when Korea was nominally an independent country, but in actuality, Korea had been reduced to a *de facto* protectorate of Japan. Therefore, it is natural to question the validity of the "incorporation."

A sense of justice is one of the strongest emotions inherent in human beings, but it is another question whether this Korean position can be supported by an international tribunal in its application of current international law.

When the Tokdo question is brought before the ICJ, what positive international law would apply in the settlement of a territorial dispute of this nature? "Effective occupation" is the legal principle that has been drawn from a series of precedents by international tribunals on the *Palmas Island* case (1928), the *Minquiers and Ecrehos* case (1953) and other cases following these classical cases. Particularly, in the *Minquiers and Ecrehos* case, "what is of decisive importance. ...is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possessions of the Ecrehos and Minquier group."¹⁷⁰⁾ Japanese scholars and the Japanese government apply this in the "incorporation" of Tokdo as direct evidence. Despite all the above-mentioned historical facts, Japan either denies its aggression toward Tokdo or maintains that "by using such a flagrant term as 'aggression,' Korea seems to recognize indirectly the fact of effective occupation [by Japan] and the absence of the fact of 'effective management' by the country [Korea]." Japan turns the term "aggression" around so it fits its convenience.¹⁷¹⁾

In this way, Japan is justifying its imperialist colonial policy, and Korea refuses a trial based on such a legal principle.¹⁷²⁾ Korea has its own presumption on laws to be applied and rejects the principle of positive law which it considers irrational and detrimental to its cause. Because of this, the Tokdo question is colored by political character, but every sovereign nation in the world community retains this right. Exercise of such a right is not illegal nor immoral.

Today, the attitude of Asian and African countries, including Korea, toward the existing international law system is optional.¹⁷³⁾ Korea could opt for recognition of part of the rules compatible with or needed for its view. It does not want to be bound by the rules formulated in a process in which it did not participate. Korea prefers and hopes that as modes of settlement of all international disputes including territorial issues, settlement by *lege ferenda*, which accepts the idea that Korea's justice should be applied, not present positive international law which is advantageous for imperialist colonialists. But Japan, geographically in Asia, but a western imperialist in

nature, is not likely to accept this Korean position. On the other hand, Korea is at present predominantly under the influence of the west, but its way of thinking and mode of behavior still retain an Asiatic character.¹⁷⁴⁾

C. *Some possibilities for settlement of the Tokdo question*

In conclusion, some means of settlement will be presented. First come the judicial solutions. One is to use the existing ICJ in the Hague, and another is the creation of a regional tribunal, an ICJA whose composition and applicable laws will be different from those of the ICJ. In addition, an arbitration court may be used.

In this case, however, the first requisite is to depoliticize the Tokdo question. Korea's position not to view this question as a legal dispute is evidence that it is a political dispute. However, the character of a dispute changes as international relations change, and no one could say for sure Tokdo will not become depoliticized at any time in the future. Only then will both parties be able to agree on the mode of trial. Conversely, agreement or failure of agreement on the mode of trial will make this question either depolitical or political.

When the Tokdo question is depoliticized and submitted to the ICJ, there remain the difficult questions of its composition and laws to be applied, as seen already. Most judges of the court are westerners who have been trained in western jurisprudence. The ICJ does not represent the major legal systems of the world and geographical distribution in a fair way.

None of the cases ever submitted to the ICJ so far, including the *Minquiers and Ecrehos* case, the *Temple* case, or the *Frontier* case had the same characteristics as those of Tokdo's. The principle of "effective occupation" that has become all decisive in the settlement of territorial disputes may be a more useful instrument to western countries than to small weak nations.

When the question of Tokdo is referred to an arbitration court, the question of applicable laws also becomes thorny. It is difficult to find a fair and impartial arbitrator. This is not to say that there do not exist such competent jurists as Judge Max Huber, but that it is difficult to find an arbitrator competent enough to create eclectic legal principles on the higher plane when the colonialist and colonized countries with different legal perceptions are directly opposed as are the countries trying to apply *lege lata* and those advocating *lege ferenda*.

Compared to this, the ICJA anticipates no such difficulties. There are some procedural difficulties expected such as the composition of the court and laws to be applied, but its creation is in complete agreement with the spirit of the U.N. Charter as already mentioned. Here oriental wisdom, not western experience, is called for; required here is not the international law designed to legalize imperialist colonialism, but the creation or rediscovery of international rules to return the lands seized by imperialists to their original owners.

The second is a political mode called arbitration in its broad sense. Intervention of such politically influential countries as the U.S. is desirable. The U.N. or other international organizations may intervene. Political mode provides only a recommendation. In this mode of settlement, the U.S. is perhaps in the best position, but it is negative and reluctant about approaching this question. Therefore, no proper arbitrator is in sight.

The third is through diplomatic channels, or direct Korea- Japan negotiation. The Tokdo question has never been an agenda item in the negotiations conducted between the two countries. But there has been no bilateral negotiation solely dedicated to this question. As the writer has already mentioned, the Korean position is that the "instruments exchanged on the settlement of disputes" do not apply to the Tokdo question. In the *Minquiers* and *Ecrehos* case, judicial as well as political means were applied: While the question of sovereignty was submitted to the ICJ, the fishery question was settled separately through negotiations. Therefore, the case is considered a good example wherein legal and diplomatic methods were used for a reasonable and peaceful settlement.

The fourth is acquiescence by both countries in the status quo of Tokdo. From this both sides gain nothing and lose nothing, without revoking each other's assertion and without inciting revanchist emotional outbursts in both countries. Once Japan asked Prof. Andre Gros, French government spokesman for the *Minquiers* and *Ecrehos* case for his opinion on Tokdo and was advised to take an effective action immediately. To take an effective action for an island already occupied by a Korean marine police unit might mean a war against Korea. Japan does not want to place itself in a state of war with Korea; therefore, Japan is seeking all the methods available not to accept the status quo of Tokdo. In other words, Japan wants neither improvement of the status quo nor its destruction, taking every possible means to keep it from developing into a situation where "an illegal act generates a right (*ex injuria oritur jus*)."¹⁷⁵) Japan is resorting to every possible means, such as diplomatic protest and submission of the question to an international tribunal (or arbitration court). A protest related to Korea's denial of submission to an international tribunal is designed to keep such a preventive measure in force as long as possible.¹⁷⁶) Especially, Japan invokes the theory of critical date¹⁷⁷) recognized in the *Minquiers* and *Ecrehos* case and does not recognize the measures Korea has taken since the critical date in 1954 when the Tokdo question was submitted to the ICJ. Japan maintains these activities are taken to improve the legal status of Korea and refuses to take them as evidence of effective occupation.

The last solution suggested is to blow up Tokdo. This implies how difficult and delicate the Tokdo question is, but it cannot be a constructive move because explosion does not only deprive sea lions and other marine resources of their habitats, but frustrates Korean people in that they have lost a part of their territory.

If Tokdo is considered a only small outcrop of rocks, this suggestion has some validity. But if the Tokdo question relates directly to the question of the entire Korean peninsula, what is gained by destroying Tokdo? The fate of Tokdo cannot be separated from that of Korea and thus the question becomes serious. When fortunes deserted Korea at the end of the Choson dynasty, Korea first lost Tokdo and this eventually led to the fall of an independent Korea.

Protagonists and time in history have changed; as the 1970s of the 20th century are dawning, and as the world, particularly this part of the world, is in a state of great flux, the role of Japan is becoming relatively greater. Korea should stand guard against both the "tiger at the front gate and the wolf at the back gate" because of Korea's geopolitical location, and Korea should not repeat the same error of the past in coping with the Tokdo question..

However, Korean people should not respond with infantile nationalism against Japan over the

Tokdo question. Both countries should seek a reasonable settlement of the question to improve partnership in this troubled age. The settlement of this question should not be made by such old means as the use of force or disruption of economic relations as some Japanese advocate.¹⁷⁸⁾ For a reasonable settlement, the question of sovereignty and that of fisheries should be separately treated as in the *Minquiers and Ecrehos* case. According to a recent press report, new trout and salmon fishing grounds, richer than in the north ocean, have been found off Tokdo.¹⁷⁹⁾ The Japanese seem to show an interest in this.¹⁸⁰⁾ Here again, patience and self-restraint, shown in the conclusion of the Korea-Japan fishery agreement, should continuously be applied.

- 1) This is a translation of "Chapter II: Tokdo" in *Han'guk ui yongt'o* (Korea's Territory) by Lee Han-key (Seoul: Seoul National University Press, 1969), pp. 227-303.
- 2) Former Professor of International Law, Seoul National University, Korea.
- 3) Before Public Notice 40 was published, the Japanese cabinet meeting decided on Jan. 28, 1905 to place Tokdo under the jurisdiction of the head of Okinoshima, Shimane prefecture and rename it Takeshima. The Home Minister sent an instruction to this effect to the governor of Shimane. Kawakami Kenzo, *Takeshima no rekishi chirigakuteki kenkyu* (Historical and Geographical Study of Takeshima) (Tokyo: Kinkoshoten, 1966), p. 212.
- 4) All the exercise of sovereign acts by the Korean government vis-a-vis Tokdo since 1952 is considered as concrete expression of its protest against Japan's incorporation of Tokdo in 1905. See Lee Han-key, "The *Minquiers and Ecrehos* case ui yon'gu: Tokdomunje e kallyon toen 'sirhyojok chomyu' ui wonch'ik e taehan pip'anjok koch'al 01 chungsimullo" (A Study on the *Minquiers and Ecrehos* case with Reference to a Critical Examination of the Principle of 'Effective Possession' as Applied to *Tokdo*), *Pophak* (Law), Vol. 9, No.1, August 1967.
- 5) On the background of the establishment of a peace line aimed at the preservation of marine resources, see *Ran 'ilhoedam paekso* (The White Paper on Korea-Japan Negotiations) (Seoul: Republic of Korea Government, 1952), pp. 75-76.
- 6) Ministry of Foreign Affairs (MFA) Political Affairs Bureau, *Tokdo yongyu kwon e kwanhan han'ilgan wangbok munsO* (Notes Exchanged between Korea and Japan on Tokdo) (Seoul: MFA, 1956), pp. 4-5. *Notes Exchanged* hereinafter.
- 7) This is a "temporary suspension" of a dispute. See Lee Han-key, "Kukchae pun-jaenggwa Chaep'an (An International Dispute and Trial), *Pophak* (Law), Vol. 10, No. I, Aug.1968,p. 11.
- 8) According to a Japanese record, this is referred to as "An Agreement between Shiina and Foreign Minister Lee on the Modes of Settlement of Tokdo." Sekino Teruichi, "Nikkan kankei nen'pyo (Chronicles of Japan-Korea Relations)," *Nikkan kankei no kenkyu*(Study of Japan-Korean Relations), Vol. 64, Nos. 4 and 5 (Mar. 31, 1966), p. 239. The writer has so far failed to confirm this in any Korean documentary record.
- 9) From the start, Korea-Japan negotiation was considered significant in that it would serve to consolidate the U.S. Far Eastern strategy. Oyakawa Takeo, "Nikkan kyotei no hoteki fomureshon no kento (Examination of Legal Formulation of Japan-Korea Treaties)," *Horitsu shiho* (Journal of Law), Sept. I, 1966. p. 4; "Nikkan kihon joyaku (Japan-Korea Basic Treaty)" in *kokusaiho gaiko zasshi* (Journal of International Law and Diplomacy); *Study of Korea-Japan Relations, op. cit.*, p. 28.
- 10) U.S. Hydrographic Bureau Notification No.43, dated Oct. 1908. A survey by the ...' Japanese warship *Matsue* shows the location of the East Islet of Tokdo at lat. 37;4 ' 18" N,and long.

131:2' 22".

11) Shin Sok-ho, "Tokdo ui naeryOk (A History of Tokdo)," *Tokdo* (Seoul: Taehan konnonsa, 1955), p. 17.

12) *Ibid.* p. 18; Hwang Sang-ki, "Tokdo munje yOn'gu (A Study on the Question of Tokdo)," *Tokdo*, p. 218; Ch'oe Nam-sOn, "Ullungdo wa Tokdo (Ullungdo and Tokdo)," serialized in the *Seoul sinnum* from Aug, 10, 1953. Ch'oe refers to this as the *Annals of Chongjong*, but is considered to have been a typographical mistake. It is the *Annals of Chongjo* which records 24 years (1777-1800) of his reign as the 22nd monarch. The *annals* was compiled by Yi pyong-mo, et. al. in July 1805.

13) Kawakami kenzo, *op. cit.*, p. 290.

14) Shin Sok-ho, *op. cit.* p. 20.

15) *Ibid.*

16) Kawakami Kenzo, *op. cit.*, pp. 279-283

17) *Ibid.*, pp. 281-282.

18) Ch'oe Kyu-jang, "Tokdo subidae pisa (A Hidden History of the Tokdo Garrison)," in *Tokdo, on. cit.*, p. 313.

19) Kawakami Kenzo. *op. cit.*, p. 282.

20) *Samguk sagi* (History of the Three Kingdoms), Vol. 44, *Yoljon* (Biographies of Celebrities), entry for Isabu. The history was compiled in 1145 in the 23rd year of King Injong of Koryo dynasty and is the oldest extant history of Korea.

21) *Sejong sillok chiriji* (Gazetteer in the Annals of King Sejong) is a geographical survey of eight provinces of Korea appended to the end of the annals. This is a slightly augmented edition of *Sinson p'aldo chiriji* (New Gazetteer of Eight Provinces) edited by Yun Chun and and Sin Chang, and was published in 1454.

22) Shin Sok-ho, *op. cit.*, p. 20.

23) *Koryosachiriji* (Gazetteer of the History of Koryo) was compiled by Yang Song-ji, known for his geographical knowledge, in 1451. Chronologically, the *Gazetter of the Annals of Sejong* precedes the *Gazetteer of the History of Koryo*.

24) *Tongguk yoji sungnam* (Survey of the Geography of Korea) published in 1481 was revised twice and published as *Augmented Survey of the Geography of Korea* in 1530.

25) Japanese memorandum dated Feb. 10, 1954; Kawakami, *op. cit.*, p. 99.

26) *Note Exchanged, op. cit.*, pp. 92-93.

27) Hwang Sang-ki, *op. cit.*, p. 227.

28) Kawakami, *op. cit.*, p. 114.

29) Shin Sok-ho. *op. cit.*, p. 21.

30) *Ibid.*, p. 22. Kawakami confutes Shin Sok-ho's view, see Kawakami, *op. cit.*, p. 131.

31) *Notes Exchanged, op. cit.*, pp. 96-97. *Chungbo munhon pigo* (Augmented Reference Compilation on Documents) was published in 1908.

32) *Notes Exchanged. op. cit.*, pp. 61-62.

33) *Ibid.*, p. 204.

34) Minagawa Ko, "Takeshima funso to kokusai hanrei (The Dispute on Takeshima and International Precedents)," *Kokusai hogaku no fhomondai* (Problems in International Law), (Keio tsushin, Keio University Correspondence Course), 1963, p. 363.

35) Japanese memorandum dated Sept. 20, 1956 in *Notes Exchanged. op. cit.*, p. 161.

36) Korean memorandum dated Jan. 7.1956, *Notes Changed. ibid.* pp. 204-205.

37) *Ibid.*, pp. 205-206.

38) Kawakami. *op. cit.*, pp. 136, 138.

39) Okuma Ryoichi, Takeshima shiseki (Historic Remains of Takeshima), (9), *Nippon chiyu minshuro seisaku geppo* (Japan, Liberal Democratic Party Policy Monthly), Vol. 141, Oct. 1967, n. 121.

40) Kawakami, *op. cit.*, pp. 137-138; Okuma Ryoichi, *ibid.*, pp. 121-122.

41) For Japanese counter-argument, see *Notes Exchanged. op. cit.* pp. 254-256.

42) Director Watanabe recommended that an inquiry be sent to Shimane prefecture and a warship to the area for fact finding as the ownership of the two islands was not clear.

Kawakami, *op. cit.*, p. 39.

43) Japan's Memorandum dated Sept. 20, 1956 in *Notes Exchanges*, pp. 166, 174.

44) *Ibid.*, Korean memorandum dated Jan. 7, 1956, pp. 207-8.

45) Shin Sok-ho, *op. cit.*, p. 26.

46) Taijudo Kanae, "Takeshima funso (The Dispute over Takeshima)", *Kokusaiho gaiko zasshi* (Journal of International Law and Diplomacy), Vol. 64, Nos. 4-5; *Study of Japan-Korea Relations*, *op. cit.*, March 1966, p. (394) 114.

47) Notes Exchanged (Korean memorandum dated Sept. 25, 1954), p. 10.

48) Taijudo, *ibid.* p. (393) 113.

The Japanese side holds that what the shogunate issued to Otani and Murakawa families was not the Red Seal (Shuin) but a license for voyaging for monopolized management of the island. Also, it maintains that a ban on voyaging was placed only to Ullungdo, not to Tokdo. Japan continues asserting that, since passage to Takeshima (Ullungdo) was already licensed in this way. Tokdo was considered Japanese possession as the island is located en route to Ullungdo and licenses of voyage were issued to Tokdo in 1656 and prior to this time. Thus, the Japanese side goes so far as to persist in its view that Japan perceived not only Matsushima (Tokdo) but Takeshima (Ullungdo) as its territory and issued licenses for passage there. Later, Japan abandoned the idea for Takeshima (Ullungdo), but continued laying claim to Matsushima (Tokdo).

49) Shin Sok-ho, *op. cit.*, p. 29: Yi Son-giin, "Ullungdo nrit Tokdo t'amhom sogo (A Thought on the Exploration of Ullungdo and Tokdo)," *Tokdo*, *op. cit.*, p. 101.

50) Empire of Korea Cabinet Record Bureau, ed., *Popkyu yup'yon* (Compendium of Laws), Jan. 1896.

51) The Korean government points out the fact that the island is called "Tokdo" by Korean people is evidence that they perceive Tokdo as their territory:

In the dialect of Kyongsang province, tok means stone or rock. "Tokdo" means "stony island" or "rocky island." "Tokdo" (石島 岩島 ocky island) is identical in sound with today's Tokdo (獨島 Lone Island). Tokdo being in reality a group of islets, the name of the island has become quite fitting and symbolical for Korean people. (*Note verbale* by the Korean Mission in Japan dated Sept. 9, 1953)

Ch'oe Nam-son, in "Ullungdo and Tokdo," states: "In recent years, people in that area thought that the island resembled a tok (jar) in shape and called it Toksom (som: island) and tok (獨 identical in sound to tok (jar) does not have relation to the Chinese character of tok (獨 "

Shin Sok-ho has a different view, which is explained in "The Origin of Tokdo": "On the origin of 'Tokdo,' some people in Ullungdo say the island is called by this name as it stands 'lonely' in the middle of the East Sea, while the other think that all the island is formed by rocks and in the dialect of Kyongsangdo, *tot* becomes *tok*, hence Tokdo."

52) *Maech'on yarok* (Personal Accounts of Maech'on) (Seoul: National History Compilation Committee, 1997), This was written by Hwang Hyon (Maech'on being his pen name) drawing on the newspapers, *Hwangsong sinmun* (Capital Gazette) and *Taehan maeil sinmun* (The Korea Daily News).

53) Shin Sok-ho, *op. cit.*, p. 31. Kawakami refutes the Korean side statement that there was none of Japanese was living on Ullungdo in 1904 when the warship *Tsushima* conducted the

survey:

"The Korean government protested the Japanese Foreign Ministry that seven Japanese were felling trees on Ullungdo in 1881. In 1883, a total of 254 Japanese living on Ullungdo were all evacuated. Later in Nov. 1889, Japan-Korea Fishery Agreement was concluded and Ullungdo became a fishing base for Japanese. According to a report on the on-the-spot survey by the Japanese consulate in Japan, Japanese had been living there since 1891 and there were about 100 Japanese at the time of the survey."

Kawakami, *op. cit.*, pp. 186-187. It seems true that some Japanese were living there before 1905. Yi Son-gun, *op. cit.*, pp. 118-122.

54) Japan's memorandum dated Feb. 10, 1954 *Notes Exchanged*, p. 68.

55) *Notes Exchanged*, p. 69.

56) Japanese memorandum dated July 13, 1962. *Notes Exchanged*, pp. 252-253; another Japanese scholar, like the Japanese government, holds western maps accountable for this question: Nakamura Eiko, *Nihon to Chosen* (Japan and Korea). shinsho (paperbound) edition on Japanese history. published by Shubundo (date unknown), pp. 244-245.

57) Korean memorandum dated Jan. 7, 1959, *Notes Exchanged*, p. 209. To this memorandum, the Japanese side counters as follows: "The Korean government maintains that the 'good knowledge of the geography' was acquired for marauding and does not entitle Japan to claim territory. Prerequisite to this assertion, the Korean government should prove that Korea effectively managed Tokdo before Japan did, but there is none of such evidence, so this assertion is totally groundless." Japanese memorandum dated July 13, 1962. *Note Exchanged*. pp. 245-246.

58) As a French whaler Liancourt discovered this island in 1849, Japanese are said to have called Takeshima (Tokdo) "rianco" island. Japan called the island "Matsushima" before the Meiji era, "Takeshima" after that, and "rianco" thereafter. The confusion is considered an evidence that Japan's knowledge of Tokdo was inaccurate.

59) Kawakami, *op. cit.*, p. 209.

60) *Ibid.*, pp. 209-211.

...At receipt of this application, the Home Minister made a proposal entitled "on the ownership of an uninhabited island" to the effect: "There is no trace of evidence that the island was occupied by a foreign country; in 1903 a Nakai Yozaburo of this country submitted an application pending for incorporation of this island and for its lease to him; and it is necessary to determine its jurisdiction and designation. Therefore, it is proposed that the island be named Takeshima and placed under the control of the head of Okinoshima." Accordingly, the cabinet on Jan. 28, 1905 decided: "Having examined the case, it has become clear from the related papers presented that Nakai Yozaburo has settled down there and engaged in fishing since 1903, and that occupation of the island was made under international law. Therefore, there will be no impediment to take possession of the island as our country's, and to place it under the control of the head of Okinoshima." The cabinet notified this to the governor of Shimane prefecture, who in turn announced, through public notice No.40, on Feb. 22, 1905 that "...an island 85 miles northwest of Okinoshima shall be named Takeshima and be placed here- after under the jurisdiction of the head of Okinoshima of this prefecture." On the same day, a directive was sent to the office of Okinoshima, notifying it of this action. From this, it is clear that the Japanese government "incorporated" an island whose ownership was undetermined, not prior occupation of a *terra nullius*.

61) When the Korean memorandum (Sept. 25, 1954) and that of Japan (Feb. 10, 1954) are

examined in comparison, the latter's counter-argument seems awkward. *Notes Exchanged*, pp. 104-105. and pp. 66-67.

62) *Ibid.*

63) Yamabe Kentaro, *Nikkan heigo shoshi* (A Short History of Korea's Annexation by Japan), Iwanami shinsho No.587 (Tokyo: Iwanamishoten), pp. 17-18.

64) *Ibid.*, p. 153.

65) *Ibid.*, p. 157.

66) *Ibid.*, p. 156.

67) In addition, three more advisors were posted: Police Inspector Maruyama Shigetoshi to the police; former minister in Korea, Kato Masuo, to the Imperial Household Agency and Lt. Col. Notsu Nakatake to the army. In this way, Japanese virtually controlled the Korean government machinery. This politics by advisors proceeded to the tighter control by the Resident-General under the Treaty of Protectorate. *Ibid.*, p. 164.

68) Shin Sok-ho, *op. cit.*, pp. 33-34.

69) At the second Korea-Japan negotiation in 1953, senior Japanese representative Kubota used the repugnantly wild language, notoriously known as "Kubota bogen: Kubota's abusive language" that the Cairo Declaration was simply the hysterical emotional outbursts of the Allied Powers during the second World War. This remark ruptured the meeting.

70) Basic Allied Powers' post-war policy toward Japan was made clear in a series of policy statements, which all defined Japan to include the four main islands of Honshu, Kyushu, Hokkaido and Shikoku, and such minor outlying islands as the Allied might determine. Thus, "outlying islands" were to be defined by post-Potsdam Declaration measures.

The U.S. Initial Post-Surrender Policy for Japan announced on Sept. 22, 1945 states that these "outlying islands" would be determined by the Potsdam Declaration and "other agreements to which the U.S. is or may be a party," and it is not clear whether they included Tokdo or not. In the Basic Initial Post-Surrender Policy for SCAP, Tokdo is not one of the "small adjacent islands" nor is it listed as Tsushima Islands were. Therefore, it is reasonable to construe this directive excluded Tokdo from Japanese territory.

On Dec. 19, 1945, General McArthur as SCAP issued a directive, almost same in the contents as the other two mentioned above, for the U.S. forces under his command. Unlike the other two mentioned above, this directive applies not geographical definition, but the scope of Japan's sovereignty.

71) *Ibid.*

72) SCAPIN 677 states "*the Imperial Japanese Government is directed to cease exercising, or attempting to exercise, governmental or administrative authority,*" and expressly excludes *Liancourt Rocks (Tokdo) from the definition of Japan.*

73) John F. Dulles first used this term "residual sovereignty" at the San Francisco Conference on a Peace Treaty with Japan in 1953, which he attended as a U.S. delegate. The sense of the term is not clear. It is understood as "part of sovereignty ceded and its residue retained" (AJIL. Vol. 49. 1955. pp. 89-90) or as "latent" sovereignty.

74) On June 22, 1946. SCAPIN No.1033 was announced on the establishment of a zone permitting fishing and whaling by Japanese, popularly known as the McArthur Line. Tokdo was placed outside this zone and Japanese vessels were prohibited from coming within the area nearer than 12 nautical miles of Takeshima (Tokdo) (later changed to 3 nautical miles by another SCAP directive made public on Sept. 19, 1949) and from having any access to the islands.

However, paragraph 5 of the memorandum disclaimed that it was Allied Powers' policy on ultimate determination of this zone or any other zones, sovereignty of a state, national boundary or fishing rights.

On Apr. 25, 1952, another directive was issued to abolish the line, and, three days thereafter, on Apr. 28 the Peace Treaty with Japan became operative, thus invalidating SCAPIN No.677

San Francisco Peace Treaty will not be affected by the McArthur Line. However, if a question arises on the status of Tokdo in construing the Peace Treaty, the fact that the McArthur Line separated Tokdo from the exercise of Japan's administrative powers should be taken into account. 75) Kawakami. *op. cit.*, p. 252; Ueta Katsuo, "Takeshima no kizoku o meguru nikkansunso (Japan-Korean Dispute over Takeshima)," *Hitotsubashi ronso* (Journal of Hitotsubashi Univ.), 54-1, 1965; Taijudo Kanae, *op. cit.*, p. (408) 128; *Notes Exchanged* (Japanese memorandum dated July 13, 1962), p. 270; Minakawa Ko, *op. cit.*, p. 368, Minakawa Ko, "Takeshima sunso to sono kaiketsu tetsuzuki (Dispute over Tokdo and Procedures for Its Settlement)." *Horitfu fhiho* (Journal of Law), 37-10, p. 40.

76) Park Kwan-sook, *Tokdo ui popchok chiwi* (Legal Status of Tokdo), *Tokdo* (Seoul: Taehan kongnonsa, 1965), p. 62.

77) Ueta, *op. cit.*, p. 25; Taijudo, *op. cit.*, p. (410) 130.

78) Ueta, *ibid.*; Minakawa, "Dispute over Tokdo and International Precedents," *ibid.*, p. 360, Taijudo, *ibid.* pp. (405)129-(408)128. Prof. Taijudo says: "Korea, by overly stressing "appendant," indirectly admits that Korea's absence of effective management. [of Tokdo]."

79) *Note Exchanged* (Japanese memorandum dated July 13, 1962), p. 270.

80) Park Kwan-sook, *op. cit.*, p. 74.

81) This is countered by some Japanese maintaining that Tokdo was a Japanese territory before Korea was annexed into Japan. Ueta states to the effect: When, under the San Francisco Peace Treaty, Japan recognized the territory Korea had at the time of its annexation into Japan, not any Japanese territory existing prior to that time. As Tokdo was formally incorporated into Shimane prefecture in 1905 and SCAPIN No.677 became inoperative as the San Francisco Treaty came into force, Tokdo reverted to the jurisdiction of Shimane prefecture and was not annexed into Korea. Ueta, *op. cit.*, p. 24.

Taijudo argues in the similar way: Japan recognized Korea's independence under the San Francisco Peace Treaty, but this means that the Korea prior to the time of annexation was separated from Japan and became independent, not that any part of the Japanese territory existing prior to the annexation was ceded to the newly independent Korea. Tokdo was Japan's inherent territory from ancient times and not acquired by "violence and greed" as stipulated in the Cairo Declaration.

82) *Notes Exchanged* (Japanese memorandum dated July 13, 1962), p. 232. Also, Minakawa and Taijudo, *op. cit.*

83) *Notes Exchanged* (Korean memorandum dated Jan. 7, 1959 in particular), p. 200.

84) *ICJ Reports*, 1953, p. 53.

85) Ueta, *op. cit.*

86) *Notes Exchanged* (Japanese memorandum dated July 13, 1962), p. 232.

87) *Ibid.*, pp. 234-237.

88) The intention to abandon, *animus dereliquendi* or *derelictio*, should be clearly expressed. Abandonment is one of the modes whereby a territory is lost and is opposed to occupation. Occupation requires ① intention to acquire the territory. Likewise, abandonment requires ② intention to abandon ③ intention to acquire the territory. Likewise, abandonment requires ④ intention to abandon

sovereignty over the territory. Oppenheim-Lauterpacht, *International Law*, 7th ed., Vol. I, p. 531. In Roman law, *derelictio* occurs when the owner has no will to recover or maintain any relationship with the object and leaves the venue where it is.

89) "As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries." Separate opinion of Judge Hsu Mo, *The Anglo-Norwegian Fisheries Case* (Dec. 18, 1951), *ICJ Reports*, 1951, p. 157.

90) *Note Exchanged* (Japanese memorandum dated July 13, 1962), p. 240.

91) Japan Foreign Ministry, ed, *Dainippon gaiko bunsho* (Japanese Diplomatic Documents), Vol. III. p. 137.

92) Yamabe Kentaro, "Takeshima mondaino rekishiteki kenkyu (Historical Perspective of the Question of Takeshima)," *Koria hyoron* (Korean Review), 7-2, Feb. 1965, p. 4.

93) Kawakami, *op. cit.*, pp. 209-211.

94) *Notes Exchanged* (Korean memorandum dated Jan. 7, 1959), p. 223.

95) Japan Foreign Ministry, *Kaigai chosa geppo* (Overseas Research Monthly), Nov. 1954.

96) Japan, Shimane prefecture, ed., *Takeshima no kenkyu* (Study of Takeshima); *Notes Exchanged* (Japanese memorandum dated Feb. 10, 1954), pp. 70-71. Japan concluded the Korea-Japan Protocol largely from military consideration. As the prospect of Japan's victory seemed assured, Japan pushed for greater demands on Korea than these contained in the protocol and worked out 7-point "Policy Guide- lines for Korea" in 1904 and began economic aggression against Korea. This was embodied in the Treaty of Protectorate (Second Korea-Japan Treaty) in 1905. Japan took the first step toward making Korea its protectorate by concluding the protocol and consummated it under the third Korea-Japan Treaty in 1907. Yamabe Kentaro, *A Short History of Korea 's Annexation. op. cit.*, pp. 157-158.

97) *Nihon to Chosen (Japan and Korea)*, Azia afrika koza (Discourse on Asia and Africa), Vol. III. p. 115.

98) Japan Foreign Ministry Research Div.(Chosabu), ed., *Nihon gaiko bunsho* (Japanese Diplomatic Documents), and *Nihon gaiko nenpyo* (Chronicles of Japan's Diplomacy).

99) *Notes Exchanged* (Korean memorandum dated Sept. 25, 1954), p. 112.

100) Yamabe, *op. cit.*, pp. 156-157.

101) G. Schwarzenberger, "Title to Territory," *AJIL*, Vol. 51, (1957), p. 321.

102) *Notes Exchanged* (Japanese memorandum dated July 13, 1962), p. 259.

103) At the Japanese cabinet meeting on Jan. 28, 1905, Nakai Yozaburo's settlement in Tokdo for fishing from 1903, which was evident from the papers presented by Nakai, was taken as an evidence of occupation under international law and the decision was made to incorporate Tokdo into Japanese territory .In other words, the theory of prior occupation was applied. This contradicts Japan's assertion that Japan's title to Tokdo that it had acquired was replaced by another title valid according to the law of the time of replacement by incorporating the island into Japan's modern administrative system.

104) For example, see Ueta Katsuo, *op. cit.*

105) Tahata Shigejiro, "Azia afrika shinko shokoku to kokusaiho (Newly Emerging Asian and African Countries and International Law)," *Shiso* (Thought), Oct. 1965,p.11.

106) On the process of the establishment of the legal theory of prior occupation in international law, see Taijudo Kanae, "Kokusaihojo no sensen ni tsuite-sono shiteki kenkyu (On Prior Occupation in International Law: A Historical Study)," *Hogaku ronso* (Collection of Legal Treaties), Vol. 61, No.2.

107) Application of the principle of prior occupation to an area settled by indigenous people, regarding it as a *terra nullius*, was justified by white peoples (peoples of Christian states composing European civilization) who thought they had a duty to protect uncivilized people. This idea is a consolidation of European civilization and capitalist economic system.

108) In the 15th and 16th centuries, an age of geographical discovery, European advance to the Orient was motivated economically by modern mercantilist capitalists and their ambition to tap their colonial markets. From this originated modern international law to regulate the relations among European countries. Europeans recognized equal rights and obligations among them, but regarded non-Europeans and non-Christians otherwise. The latter's lands were considered *terra nullius* to which the theory of prior occupation applied for colonization.

109) To cite an example, on Dec. 18, 1961 India seized Portugal's Goa by force. When the U.N. discussed the case, Asian and African countries supported the Indian action, and this was a manifestation of their attitude toward traditional laws. Q. Wright comments on this: "The significant feature, however, of the Goa situation was the many of the new states, and also the Soviet Union, felt that colonialism was such an evil that the use of force to eliminate it should be tolerated.

"Throughout Asia and Africa it is argued that ex-colonial peoples cannot be expected to accept the validity of the claims of colonial Powers to overseas territories acquired and maintained by force, on the theory, prevalent in the age of discoveries, that territories not in the possession of a Christian prince were "*territorium nullius*" subject to acquisition by Papal grant or by discovery and occupation without regard to the wishes of the native inhabitants." *The Goa Incident*, A.J.L. Vol. 56 (1962), p. 629.

110) On the *Minquiers and Ecrohos* case, ICJ rules: "For the purpose of deciding the present case, it is... not necessary to solve these historical controversies... 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 1204 and following years. Such an alleged original 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. It is for the French Government to establish that it was so replaced.. ." Japan is invoking this principle. *ICJ Reports*, 1953, p. 56.

111) *Ibid*

112) *Notes Exchanged* (Japanese memorandum dated Feb. 10, 1954), p. 77.

113) *Notes Exchanged* (Korean memorandum dated Sept. 25, 1954), pp. 119-120. Here the Korean government produces an evidence that the Shimane Prefecture's Public Notice was not made known not only to foreign countries but to the general public in Japan; in the standard world map (6th edition) authorized and published by All Japan Educational Publications, Ltd. (Nihon zenkoku kyoikutosho kabushiki kaisha) in June 10, 1952, "Takeshima" in Chinese characters (竹島 is transcribed not as "Takeshima" in Japanese, but as "Chiyu-kudo" in Korean. This indicates Japanese perception of Tokdo as Korea's. On the other hand, that Tokdo was a dependency of Ullungdo at the time of Japan's incorporation was clearly stated in some publications of the day: *Kankoku shin chiri* (New Korean Geography) by Tabuchi Tomohiko, a Japanese scholar, is one example.

In page 308 of this book (Teikoku hyakkajiten [The Imperial Encyclopedia], Vol. 134, 2nd ed., 1906) and the Korea map attached to the book, Takeshima (Liancourt) is shown as Korea's te

territory. Another example is *Kankoku engan suirosshi* (Sealanes of Korean Coastal Areas) by the Japanese navy (2nd revised ed., 1907), which states in pages 451 to 452: "Korean people wrote it as 松島 [Songdo in Korean, Matsushima in Japanese] while Japanese called it "riancoto (to: island)." From these two examples, it is clear that Japanese perceived Tokdo as Korean possession, in contradiction to the Japanese government assertion today. Also, in *Nihon rekishijiten* (Japan's Dictionary of History), Vol. I, today's "Takeshima" is used for an appendant island of Ullungdo and "Liancourt" as its western name in the footnote. This indicates that Takeshima, usually called "Liancourt" by Japanese, was perceived in Japan as a dependency of Ullungdo. Tokio Shunjo's *Chosen to Manshu annai* (A Guide to Korea and Manchuria) published in 1935 describes Takeshima (Tokdo) as the easterly boundary of Korea.

114) Kawamoto Hideyoshi, *Dokuto no rekishiteki hoteki chii: dokuto no ryoyuken* (Historical and Legal Status of Tokdo: Ownership of Tokdo), 1960, p. 30.

115) *Notes Exchanged* (Japanese memorandum dated Sept. 20, 1956), p. 186.

116) The decision of the arbitrator (King Emmanuel of Italy) includes the following points: It admits that Clipperton Island was "in the Legal situation of *territorium nullius*" when France proclaimed her sovereignty over it on Nov. 17, 1858 and "susceptible of occupation"; the regularity of the French occupation was questioned as the other countries were not notified of it, but Art. 34 of the Act of Berlin does not apply to this case because "there is good reason to think that the notoriety given to the act, by whatever means, sufficed at that time "; France did not lose her right by derectio because "she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected." Herbert W. Briggs, ed., *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (NY: Appleton-Century-Crofts, 1952), pp. 247-250.

117) L. C. Green, *International Law*, Vol. I, 8th ed., (1955), p. 359.

118) "Johnes v. United States" in E.D. Dickison, *Cases and Materials on International Law*, (1950), p. 210.

119) Oppenheim-Lauterpacht, *Intrnational law*, Vol. I, 8th ed., (London: Longman, 1955), p. 359.

120) T. Guggenheim, *Traite'de Droit Internationale Public*, (Geneva: George, 1954), Tome I, p. 441.

121) R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Univ. of Manchester Press, 1963), p. 39.

122) John Westlake, *International Law*, Part I, (1904), pp. 100-101.

123) Taoka Ryoichi, *Kokusaiho kogi* (Discourse on International Law), Vol. I, (1955), p.338.

124) General Act of Berlin Conference (1885). Article 34.

125) R. Schwarzenberger, "Title to Territory," *op. cit.*, p. 321.

126) Charles C. Hyde, *International Law*, 2nd ed., Vol. I (Boston: Little Brown, 1947), p.343.

127) Japan quotes the following facts for establishment of effective authority over Tokdo: A on-the-spot survey of Tokdo by Gov. Matsunaga Takeyoshi of Shimane prefecture in Aug. 1905; another survey by Kanda Yoshitaro, Director of Division III of the prefecture; entry of Takeshima into the land register as government land on May 17, 1905; revision of Fishery Regulation on Sea Lion Hunting by Prefectural Ordinance No.18 dated Apr. 14, 1905; issuance of license for Nakai and three others on June 6 in the same year; continuing fishing activities until disrupted by the Pacific War in 1941; annual payment of land use taxes by license holders; and revisions of the Fishery Regulation for several times; transfer of Tokdo as naval property to Kure Naval Base on Aug. 17, 1940; and issuance of a permit by the commander of the base to

a man called Hachiman Chotaro for use of the island.

128) In the *Chamizal* case with Mexico in 1911. the U.S. asserted title by acquisitive prescription. but in the *Palmas Arbitration* case. the country maintained that acquisitive prescription was not a principle established in international law

129) P.C. Jessu.p, "The Palmas Island Arbitration," *AJIL*. Vol. 22, pp. 739-740.

130) *PCIJ*, series A/B (1931),53, pp. 45-46.

131) *Ibid.*, pp. 45-56.

132) E. D. Dickinson, *Cases and Materials on International Law* (1950), p. 184.

133) *ICJ Reports*, 1953, p. 57.

134) *Ibid.*, p. 56.

135) *ICJ Reports*, 1962, p. 15.

136) Briggs, *op. cit.*, p. 249.

137) *Ibid.*, p. 246.

138) Majories M. Whiteman, *Digest of International Law*, Vol.III (Washington D.C.: US Gov't Printing Office, 1964), p. 1032.

139) *PCIJ*, Series A/B, 53 (1931), p. 62.

140) *AJIL*, Vol. 26 (1932), pp. 390, 393.

141) *PCIJ*, Series NB, 53, pp. 45-46. However, under no circumstances mere exercise of sovereignty is considered valid for occupation.

142) Briggs, *op. cit.*, p. 249; *AJIL*, Vol. 26 (1932), p. 390. But this decision is not against the principle of "effective occupation." Oscar Svarlien, "The Eastern Greenland in Historical Perspective," p. 57.

143) Schwarzenberger, *op. cit.*, p. 316. This view is shared by Judge Max Huber. *AJIL*, Vol. 22 (1928), p. 877.

144) *AJIL*, *ibid.*, pp. 867,877.

145) *ICJ Reports*, 1953, p. 78.

146) Uichongbu (State Council) General Affairs Bureau, ed., *Popkyu yuy'yon* (Compendium of Laws), No. II, May 1, 1901, pp. 304-350.

147) *Note Exchanged* (Japanese memorandum dated July 13. 1962), p. 266.

148) Strupp-Schlochauer, *Worterbuch des Volkerrechts*. (Berlin: 1960), pp. 63-64.

149) Japanese annexation of Korea is considered "conquest." For effect of conquest, see Jennings, *op. cit.*, pp. 62-67, Jennings denies the acquisition of title by conquest.

150) Briggs, *op. cit.*

151) *ICJ Reports*, 1959, p. 229.

152) *PCIJ*, series A/B 53 (1931), pp. 51,52,54,63.

153) Verdross defines effective possession as display of functions expected of any ordinary state under a similar situation. *Recueil de Cours*, 30 (1929), p. 369.

154) Whiteman, *op. cit.*, p. 1034.

155) *AJIL*, *op. cit.*, pp. 867, 877.

156) ". ..the consolidation of territorial titles appears in its proper context of the evolution and expansion of international society. ..[it] is normally a gradual process. .. in the beginning, every title is necessarily a relative title, and its holder aspires to transform it into an absolute title. ..the more absolute a title becomes, the more it rests on multiple foundations." Schwarzenberger, "Title to Territory," *op. cit.*, I.. 311.

157) Minakawa ko, "Dispute over Takeshima and Procedures for Its Settlement," *op. cit.*, Sept. 1965. p. 38.

158) According to the *Mavrommatis Palestine Concessions* case, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *PCIJ*, Series A, No.2 (1924), p. 11; E. Hambro, *The Case Law of International Court*, I (Leyden, 1952). p. 267.

159) In "Nikkan kankeishi (A Chronicle of Japan-Korea Relations)," supplement to " *Kokufaiho gaiko zasshi* (Journal of International Law and Diplomacy), Vol. 64, ~ Nos, 4-5, Mar. 31,1966, *op. cit.*

- 160) Prof. D. Bowett, too, does not see this as a legal dispute. *Review of Contemporary Law* No.2 (Brussels, 1965), p. 14.
- 161) As seen in the U.S. Supreme Court ruling on the *Sabbatino* case, the criteria for determining legality of expropriation of foreign capital or nationalization do not seem to have been established in international law.
- 162) J. Kunz, "Compulsory Adjudication and Maintenance of Peace," *AJIL*, Vol. 38 (1944), p. 676. View of Kunz on positive law contrasts with that of Kelsen.
- 163) Chung Il Yung, *Legal Problems Involved in the Coifu Channel Incident* (Geneva: Librairie E. Druz, 1959).
- 164) H. J. Morgenthau, *Politics Among Nation.*" (1948), pp. 184-196.
- 165) Settlement of the Tokdo question may become different according as the 'instruments exchanged'. constitute a part of the Korea-Japan Treaty or not. The writer believes they are doubtlessly a part of the treaty.
- 166) R. Anand, "Role of the New Asian-African Countries in the Present Legal Order," *AJ/L*, 1962, pp. 383-393. See also Anand, *Compulsory Jurisdiction of the International Court of Justice* (India: 1961), p. 42.
- 167) Lee Han-key, "Background Papers at Hong Kong Conference on International Law," *Korean Journal of International Law*, Vol. 12, No. I, March 1967, pp. 181-182.
- 168) Articles 8 of the U. N. Charter.
- 169) For example, see Yamabe Kentaro. *op. cit.*
- 170) *ICJ Reports*, 1953. p. 57.
- 171) Taijudo. *op. cit.*, p. 126.
- 172) Mr. Jha's speech on Dec. 18, 1951, *Council Verbatim Records*, S/pv. 987, p. 26.
- 173) J. J. G. Syatauw, "Some Newly Established Asian States and the Development of International Law," *Hague PCIJ Publications*. 1961, p. 221.
- 174) This does not mean that the Korea's attitude toward international tribunals is hostile. In Article 9 of the Fisheries Agreement in the Korea-Japan Treaty, and Article 3 of the Agreement for Settlement of Problems Related to Property and Claims, Korea agrees to submit to international arbitration. Earlier in the Korea- U.S. Treaty of Friendship. Commerce and Navigation, Korea also agrees to refer disputes to ICJ (Article 24).
- 175) Taijudo, *op. cit.*, pp. 133, 413.
- 176) Minakawa. "Dispute over Takeshima and International Precedents," *op. cit.* p. 371.
- 177) Lee Han-key, "Kuritical teitu ui yon'gu (A Study on Critical Date)," *Collection of Articles in Commemoration of Dr. Yu Chin-o's Sixty-first Birthday (KJIL, Vol. 11, No.I), May 1966, p.421.*
- 178) The following passage shows Japan's typical attitude toward Tokdo: The government and the party in power have persistently stated this question [Tokdo] is a dispute. If it is a "dispute," the question is to be settled in accordance with the "instruments exchanged": first it is to be settled through diplomatic channels and then by arbitration in accordance with the procedures agreed on by two governments. However, as reported already by newspapers and other media, the Korean government does not regard this as a dispute and is making it a *fait accompli* that the island is its inherent territory beyond doubt. Further on Nov. 13, 1965. Prime Minister Chung Il-kwon declared; "as the island has been our territory for 19 years to this date, our police unit is being stationed there; immediately since 1948 when it was established, the Republic of Korea has exercised administrative and judicial rights over the island; and SCAP GHQ has recognized this." Thus, the other side will not agree to settlement through diplomatic channels, nor by arbitration. Within a state a law can be enforced and we may overrule a *fait accompli* legally. However. in international relations, the importance of a *fait accompli* is very great. There are only three means to reverse this; first is resort to force; second is to exert

pressure to bear [on Korea] by appealing to world opinion, or enlist the support of a majority of countries in applying such non-military means as economic sanction; and third is to apply pressure by cutting off trade. Eito Shinkichi, *Mukono tami to seiji* (Innocent People and Politics), pp. 282-283, (Section 6: Real Picture of Korea-Japan Negotiation).
179) *Seoul sinmun*, March 27, 1967.
180) *Asahi shimbun*, March 28, 1969.