

Korea's Territorial Sovereignty over Tokdo

*Hee Kwon Park**

*Jong-In Bae***

I. Introduction

Tokdo, or Takeshima as the Japanese call it, is a rocky islet, located in the East Sea (Sea of Japan), 48 nautical miles east of Ullŭng Island (Ullŭng-do), Korea and 86 nautical miles west of Oki Island (Oki-shima), Japan.¹ Currently under effective possession by Korean authorities, the islet consists of two main volcanic reefs, 200 meters apart, with approximately 32 small rocks encircling them, and covers a total of less than 0.2 km².² Although offering a fishing base for the surrounding seas, it does not appear to have much economic value as territory that might be cultivated or

* Hee Kwon Park, LL. D. is a former lecturer of International Law, Korea University, Seoul, Korea and a member of the Korean Association of International Law.

** Jong-In Bae, LL.M., of Edinburgh University.

1. It will be helpful to note that both "-do" (in Korean) and "-shima" (in Japanese) at the end of a word indicate an island.
2. A detailed geographical description of Tokdo can be found in Kim Myung-Ki, ed. *Tokdo Yŏn'gu* (Studies of Tokdo) (1996) pp. 30-50; Han Sang-bok, *Haeyanghak Eso Bon Hangukhak* (Studies of Korea from the Viewpoint of Oceanography, 1988) pp. 524-530.

mined. Furthermore, the islet, having remained mostly uninhabited throughout history, is hardly conducive to sustained human settlement due to its very limited supply of fresh water and its mostly steep surface composed of rocks, which have little topsoil to sustain plant life.

The issue of sovereignty over these barren rocks of seemingly little economic significance emerged as a major source of contention between Korea and Japan on January 18, 1952, when the Korean government included the area around Tokdo within the Syngman Rhee Line Zone—a Korean version of the fishery zone or the Exclusive Economic Zone—newly proclaimed under “the sovereignty and protection of the Republic of Korea.”³ Contending the legitimacy of the zone itself, the Japanese government challenged Korea’s territoriality over this islet on the pretext that it had historically been part of Japan’s territory.⁴ An exchange of Notes Verbales defying each other’s territorial sovereignty over Tokdo ensued but failed to lead to any point of agreement. Since then, the issue has resurfaced periodically and survived a series of negotiations for normalizing diplomatic relations between the two countries in the 1960s, which settled some of the pending issues subsequent to the independence of the Republic of Korea from Japanese colonial rule.

This controversy has been recently rekindled by the ongoing two-tier negotiations between Korea and Japan, one for revising the bilateral fisheries agreement of 1965, and the other for delimiting the Exclusive Economic Zones (EEZs) pursuant to the United Nations Convention on the Law of the Sea to which both Korea and Japan are parties. As a corollary, this so far purely territorial issue has broadened to take on the dimension of a maritime bound-

3. The Presidential Proclamation of Sovereignty over Adjacent Seas, Republic of Korea, Ministry of Foreign Affairs, State Council Notice No. 14 (January 18, 1952).

4: A Note Verbale by the Japanese Foreign Ministry dated Jan. 28, 1952.

ary issue, specifically, of whether Tokdo can have its own EEZ or continental shelf, and if so, whose basepoint Tokdo serves as, for the purposes of the delineation of the EEZ or continental shelf between Korea and Japan. A literal interpretation of paragraph 3 of Article 121 of the Law of the Sea Convention,⁵ which denies giving any impact in the EEZ or continental shelf delimitation to "rocks" incapable of sustaining human habitation or economic life of their own, would render the question of Tokdo's ownership mute by simply classifying Tokdo as "rocks." Acceptance of this sort of interpretation, however, would not be amicable to Japan, which is attempting to expand its EEZs and continental shelves by using a number of its uninhabited islets scattered across the Pacific Ocean as basepoints from which its EEZs and continental shelves are measured.

Although the Tokdo issue can be viewed from a variety of perspectives, this essay will focus on the issue of sovereignty over the islet by examining some points crucial in the determination of Tokdo's legal status. Based on the analysis of Japan's territorial claims, this essay will first deal with the major questions of with what criteria Tokdo's legal status should be viewed, and then of how geographical and historical facts can be translated into legal points in the determination of Tokdo's sovereignty. Secondly, the question of which State presents a stronger case in terms of its historical title to Tokdo will be reviewed with reference to relevant historical documents and maps. Thirdly, the legitimacy of Japan's 1905 incorporation measure on Tokdo, the central basis of Japan's territorial claim, will be brought into focus. Finally, the essay will consider the issue in the context of the post-war disposition of Japan's territory.

5. Paragraph 3 of Article 121 of the Convention reads that "[R]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

II. Legal Issues

A. Analysis of Japan's Claims to Sovereignty over Tokdo

One baffling aspect for the Korean side in countering Japan's arguments is the latter's rather ambiguous bases for claims to Tokdo. Though Japan's primary argument is that the island has been its inherent territory from ancient times, it alternatively argues that the island belonged to no country, *i.e. terra nullius*, until 1905 when a Japanese prefecture annexed the island as part of its territory. Put in legal terms, Japan founds its claim to sovereignty over Tokdo, on the one hand, on the "historical titles" arising from certain activities by Japanese clans in the 17th century, and, on the other hand, on its alleged acquisition of territory (Tokdo) through "occupation" in 1905. In other words, by presupposing that the islet had been *terra nullius* until 1905 and therefore appropriate for acquisition, while simultaneously claiming that it was Japan's inherent territory, Japan is virtually asserting that it has incorporated *terra nullius* which had been its inherent territory.

A proper understanding of "occupation," however, would render impossible Japan's resorting to both bases for claims to Tokdo. "Occupation," under international law, means an original method of peaceably acquiring sovereignty over territory other than by cession or succession. As such, it is a cardinal condition of a valid "occupation" that the territory be *terra nullius* at the time of the act alleged to constitute the "occupation."⁶ From a legal viewpoint, therefore, Tokdo could not have the status of *terra nullius* and that of Japan's inherent territory simultaneously in 1905, when Japan argues it took the incorporation measure on Tokdo. If Japan had substantially established its territorial sovereignty over Tokdo before 1905 as Japan argues, there would have been no need for

6. *Western Sahara*, 1975, *I.C.J. Reports*, p. 39 (Advisory Opinion of 16 Oct.)

the Japanese government to take such an incorporation measure.

The Korean side, on the other hand, consistently maintains that Tokdo has been an inherent part of Korean territory since earliest historical times in the light of historical facts and relevant principles of international law. Korea states that it is entitled under international law to sovereignty over the islet by reason of having established a historical title supported by peaceful and continuous possession. When compared with a wide range of historical evidence from the sixth century annexation of Ullŭngdo coupled with Tokdo by the old Korean Kingdom of Silla, to the official extension of Ullŭng County's jurisdiction to Tokdo by Imperial Ordinance No. 41 of October, 1900, Japan's claims to a historical title over the islet seem unfounded and tenuous. In the same vein, Korea dismisses the alleged legal foundations of Japan's so-called incorporation of Tokdo in 1905, whether by "occupation" or by "a mere confirmation of Japan's inherent possession" on the grounds that the measure was taken in breach of Korea's long-established sovereignty over the islet. It also maintains that Japan took the incorporation measure on Tokdo at a time when Japan's colonization of Korea was so advanced that the latter's diplomacy was *de facto* subject to the whims of Japan. Further, Japan is suspected of having deliberately kept a low profile about its 1905 incorporation measure in order to avoid any protest by Korea and to evade suspicion by rival foreign sovereigns.

As the Korean side invokes a historical title in a consistent manner, the course of legal debate on the ownership over Tokdo will be dependent on which line of argument—"the claim of inherent territory" or "the acquisition of territory by prior occupation"—the Japanese side adopts. If Japan invokes a historical or ancient title to the islet, the core issue will be whether it has a superior claim to that of Korea in view of historical facts adduced to that end. This scenario would reduce the significance of Japan's incorporation measure of 1905 to a mere incidence of confirming

Japan's alleged effective occupation of Tokdo. To the extent that the debate involves competing claims based on similar titles by both countries, it is similar to the *Minquiers and Ecrehos* case.⁷ In that particular case, the deliberations on the status of *res nullius* as well as that of *condominium* with regard to the disputed islands were excluded from the beginning, and accordingly "the case did not partake of the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*."⁸ The International Court of Justice was thus enjoined to determine "which of the Parties has produced the more convincing proof of title to one or the other of these groups [of the islands], or both of them."⁹ Likewise, if both Korea and Japan assert their respective territoriality over Tokdo along a similar line of argument, the determination of which side possesses a valid title to Tokdo will be eventually based on the relative strength of opposing claims to sovereignty over the islet in view of the facts presented by each side.

Alternatively, if Japan founds its claim to sovereignty over Tokdo solely on its incorporation measure of 1905, the historical events proffered by Japan to support its ancient title to the islet would be regarded as irrelevant. The core issue will be whether Tokdo was *terra nullius* at the time of incorporation by Japan, the determination of which would be possible "only if it were established that the territory belonged to none at that time in the sense that it was open to acquisition through the legal process of occupation."¹⁰ Aside from this *terra nullius* question, another issue of

7. In that case, France and the United Kingdom, both asserting claims of sovereignty over two groups of islets and rocks in the English Channel near the French coast, founded their arguments on an ancient and original title, supported by effective possession and continuous display of sovereignty. The ICJ, to which the case was referred for resolution by a Special Agreement of 29 December 1950, ruled in favor of Britain by recognizing its historical title to the islets and reefs. (1953 *I.C.J. Reports*, pp. 52-53).

8. *Ibid.*

9. *Western Sahara, op. cit.*, p. 39.

10. *Ibid.*

importance will be whether Japan's acquisition measure of 1905 fulfilled the conditions required for a "valid" occupation in terms of its procedures. For instance, it needs to be ascertained as to whether the acquisition was genuinely "peaceful" simply because the Korean government, which was then virtually under Japanese colonization and unaware of Japan's incorporation of Tokdo, failed to lodge a diplomatic protest.

B. Principle of Effective Occupation and its Proper Application to Tokdo

For the Korean side, two major points need to be affirmed: first, that Korea has a superior ancient title based on historical facts; second, that Korea had established its sovereignty over Tokdo prior to Japan's incorporation measure of 1905. Under the relevant rules of international law, the criteria applicable to both issues, particularly the second one, appear to be the so-called doctrine of "effective occupation," as this term has been adopted in proving historical titles as well as in assessing claims based on the establishment of exclusive territorial sovereignty. The word "effective" has meant to jurists of the past three centuries that only actual settlement and administration, coupled with at least the presumption to exclude others by force if necessary, invited the sanction of the law.¹¹ It stood in opposition to the notion of discovery then held by Spain and Portugal, and so constituted a change in legal doctrine in favour of the newly emerging maritime powers of the times.¹² Another change in the concept of effective occupation, however, took place in the late nineteenth century as Waldock rightly observed: "the emphasis has shifted from the taking of possession of the land and the exclusion of others to the manifestation

11. Grotius, *Mare Lib.*, C. XI; Vattel, *The Law of Nations or the Principles of Natural Law* (1758) Book I, Chap. XVIII, p. 208.

12. D. P. O'Connell, *International Law Vol. 1* (2nd ed., 1970), p. 409.

and exercise of functions of government over the territory.”¹³ Likewise, this time-honored mode of establishing exclusive title to territory is now generally believed to require two basic elements, *i.e.* “the intention and will to act as sovereign” (*animus occupandi*), and “some actual exercise or display of such authority” (*corpus occupandi*).¹⁴

The questions of what amounts to effective occupation, and what types of acts and to what degree such acts constitute effective occupation depend upon the varying features of the context, and especially upon the nature of the territory and the prevailing conditions of the times.¹⁵ The scholarly opinion of Professors McDougal, Lasswell and Vlasic divided newly discovered territories into three categories, and recommended varying degrees of governmental authority necessary to establish occupation in each category.¹⁶ According to them, for those areas which are poor in resources and hardly conducive to settlement, intention to occupy coupled with some display of authority, which should be continuous and uncontested, was regarded as sufficient to determine title to such lands.

Juridical precedents such as the *Eastern Greenland* case and the *Clipperton Island* award also virtually reduce the contents of effective occupation to the bare minimum in instances of small, desolate or uninhabited lands. In the former case, by upholding a territorial claim to Eastern Greenland which had been barely explored, let alone occupied, and which was isolated for long periods from the rest of the world, the Permanent Court of International Justice reduced the normal requirements of effectiveness to a

13. Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” 25 *British Yearbook of International Law* (1948), p. 317.

14. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Ser. A/B) No. 53, pp. 45-46. (Italics inserted).

15. P. Surya Sharma, *Territorial Acquisition, Disputes and International Law* (1997), p. 64.

16. Myres S. McDougal, Harold D. Lasswell and Evans A. Vlasic, *Law and Public Order in Space* (1963), pp. 46-47.

minimum, giving as its reason the inaccessibility of the territory. In the latter case, a symbolic annexation by France of Clipperton Island evidenced by the 1858 naval expedition and the French proclamation of sovereignty was regarded as sufficient to entitle France to the land. In that case, the arbitrator 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 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....¹⁷

A few Japanese scholars, overlooking the fact that the test for effective occupation differs depending upon the nature of a land, argue that historical facts presented by both Korea and Japan do not fulfill the requirements of "effectiveness" needed to establish sovereignty over Tokdo. The foregoing scholarly and juridical opinions, however, indicate that the geographical features of Tokdo as mentioned in the introduction render it sufficient as evidence of a valid title to the islet to prove a continued interest in Tokdo as its territory coupled with some appropriate display of State function. Indeed, the state activity must be such as to "show that the claimant really acted as an international sovereign would have acted in the circumstances."¹⁸ In order to establish possession of this small and uninhabitable land, accordingly, what was expected of both Korea and Japan to claim a valid title, especially before their respective abandonment of isolationism in the late nineteenth century,¹⁹ would have been for either country to genuinely consider Tokdo as its own

17. *Clipperton Island* case, English text in 26 *American Journal of International Law* (1932); p. 394.

18. Waldock, *op. cit.*, p. 336.

19. Taking into account the so-called intertemporal rule by which a juridical fact must be appreciated in the light of contemporaneous law, Professor Taijudo maintains that a set of rules different from modern international law should apply in assess-

territory and treat it as such with some display of authority.²⁰

Bearing this in mind, the assessment of a variety of historical documents from both Korean and Japanese sources should be made to determine whether either side held a genuine belief of possession over Tokdo and how this belief came to be translated into a display of authority at a later stage. It should also be noted that the Permanent Court of International Justice observed in the *Legal Status of Eastern Greenland* case that territorial disputes are often determined "with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim."²¹

C. Geo-historical Ties between Tokdo and Ullŭngdo and Their Legal Implications

Many writings dealing with the legal status of Tokdo have often overlooked the geographical proximity of Tokdo to its neighbouring island, Ullŭngdo, which is much bigger in size and thus capable of sustaining a considerable population.²² It will be useful to analyze the sovereignty of Tokdo in close connection with Ullŭngdo because Ullŭngdo and Tokdo have usually been perceived as a pair, the only two islands in a large sea.

Although about 86 miles away from Oki Island, Japan, Tokdo

ing whether Japan established possession of the land in the seventeenth or eighteenth centuries as international law did not apply to Japan before its opening to foreign intercourse. He then suggests that "if, at an earlier time, Japan truly regarded the island as Japanese territory and dealt with it as such, and if other countries did not dispute this, then it was sufficient to establish possession of the land." (Kanae Taijudo, "The Dispute between Japan and Korea with Respect to Sovereignty over Takeshima," *The Japanese Annual of International Law* (1968) No. 12, p. 9).

20. This is a formula somewhat similar to the one suggested by Professor Kanae Taijudo. (*Ibid.*, p. 9).

21. *Legal Status of Eastern Greenland*, *op. cit.*, p. 46.

22. Ullŭngdo is 72.8 km² in area and, as of now, has some 11,000 inhabitants.

is only approximately 48 miles distant from Ullŭngdo, Korea, thus within sight from Ullŭngdo during fine weather.²³ In addition, the ocean currents around the Ullŭngdo and Tokdo area, flowing in the direction from the former to the latter, provide better access to Tokdo by residents of Ullŭngdo. Traditionally, Tokdo has served as a fishing base for residents of Ullŭngdo, whereas it provided an occasional anchorage to Ullŭngdo for fishermen from Oki Island. Fishing activities and the hunting of sea lions around Tokdo have been primarily done with Ullŭngdo, rather than Okinoshima, serving as a base port, as is evidenced by a report from the Japanese warship *Tsushima* in November, 1904.²⁴ These geographical features of Tokdo and its ties to Ullŭngdo resulting therefrom must have helped entrench the views regarding this tiny and deserted Tokdo as subsidiary to or part of Ullŭngdo rather than an independent entity. These views are also confirmed by a variety of historical documents, both Korean and Japanese, which treat Tokdo as a

23. Seemingly concerned about this comparative proximity of Tokdo to Ullŭngdo than to Okinoshima, Kawakami Kenzo, the renowned Japanese expert on Tokdo, devoted a considerable volume of his treatise to proving by means of mathematics that Tokdo is not visible from Ullŭngdo. (Kawakami Kenzo, *Takeshima no Rekishi-Chirigakuteki Kenkyu*, [Historical and Geographical Study of Takeshima, 1966]) His Korean counterpart, Prof. Lee Han-key, however, accurately points out Kawakami's fallacy of assuming the dense forest of Ullŭngdo in the past must have prevented anyone from climbing up to certain heights guaranteeing the view of Tokdo. He then proved that heights of over 120m above sea level on Ullŭngdo (the altitude of the highest peak of its mountain is 985 meters) ensure a view of Tokdo, and forcefully argues that climbing up to such heights and viewing Tokdo would not have been impossible in the past, nor is it at present. (Lee Han-key, *Hankuk ui yougt'o*, [Territory of Korea, 1969], pp. 232-234.) According to accounts of residents of Ullŭngdo, Tokdo is visible from Ullŭngdo. Kawakami's fallacy epitomizes that of some Japanese writers anxious to apply to the Tokdo case a fairly simplified dogma that disregards particular circumstances, thus reducing this complicated and subtle feature of the Tokdo issue to a purely mechanical study.

24. Japanese Navy Hydrographic Dept. ed., *Chosen Suiroshi* (Korean Sealandes), 2nd revised ed., 1907, pp. 451-457. It reads that "scores of people came from Ullŭngdo to catch sea lions. They built huts on this island and stayed there for about 10 days each time."

sort of appendent to Ullŭngdo in a consistent manner. The latest of these sources is Korean Imperial Ordinance No. 41 in 1900, which formally brought Tokdo under the jurisdiction of a newly established Ullŭng county.

The question still remains as to whether this geographical proximity may translate into a legal factor for consideration in determining territorial rights over Tokdo. Though this physical feature *per se* cannot serve as a decisive element for such purposes, the general perception resulting therefrom and thus prevailing among both Koreans and Japanese that Ullŭngdo and Tokdo are paired should count as a relevant factor.²⁵

Furthermore, these geo-historical ties of the two islands are a key to understanding one of Korea's arguments that any title to Tokdo has been historically dependent on that of Ullŭngdo. In this regard, two interesting observations deserve attention. First, geographical propinquity itself was once considered by Japan to be a decisive element for previously determining which State had a legitimate claim to Ullŭngdo. Following a brief conflict between the two countries at the end of the seventeenth century over the ownership of Ullŭngdo, Japan ultimately upheld Korea's sovereignty over Ullŭngdo in 1699 by referring to the comparative proximity of Ullŭngdo to the Korean territory.²⁶ Secondly, in the *Island of Palmas Arbitration*, the very precedent quoted by the

25. The Japanese of the past also viewed Matsushima (Tokdo) as a sort of annex to Takeshima (Ullŭngdo) by often referring to Matsushima as "a small island within the Takeshima area." (Kawakami, *op. cit.*, pp. 74-78).

26. The Kanpaku (Imperial Regent) of the Shogunate's relevant instructions included the following: (1) Takeshima is about 160 *ri* (64 km) from Oki while it is only about 40 *ri* (16 km) from Korea, and it can be considered to be Korean territory as it is nearer to the country; (2) Japanese are forbidden henceforth to make passage to Takeshima; (3) the Lord of Tsushima should communicate this to Korea; and, (4) he should also send the Osakabe Daisuke (judge) of Tsushima to Korea to officially notify the Korean government of this decision and report the result of his mission to the Kanpaku. (Quoted from Shin Yong-Ha, "A Historical Study of Korea's Title to Tokdo" in *Korea Observer* Vol. 28, No. 3 [1997] p. 341).

Japanese side for rejecting the so-called principle of contiguity as a method for settling a legal title for territory in dispute on the grounds of the method's imprecision, Judge Huber noted that "as regards a group of islands, it is possible that a group may, under certain circumstances, be regarded in law as a unit, and that the fate of the principal part may involve the rest."²⁷

III. Historical Review of Tokdo

A. Interchange of Names: Matsushima and Takeshima

In order to better understand the issue, it would be helpful to start with the diverse names given to Tokdo down through history and the confusion connected therewith. This task would not only help familiarize one with the different names representing the same islet, but would also provide some clues about the perception of Tokdo on the part of Japan. The first Western name for Tokdo, "Liancourt Rocks," which is still in use today, was given by a French whaling ship in 1849 when the ship unexpectedly encountered Tokdo in the East Sea (Sea of Japan). The other foreign names, "Menalai and Olivutsa Rocks" and then "Hornet Rock" were given respectively by a Russian ship in 1854 and a British ship in 1855, each presumably unaware of the discovery made by the other.²⁸

In Japan, Tokdo was known as "Matsushima" in former times until the name "Matsushima" began representing Ullŭngdo instead of Tokdo around the end of the nineteenth century. As a result, Tokdo came to be known as "Takeshima," the name previously used to indicate Ullŭngdo. The Japanese source ascribed this reversal of the names of the islands to a map of Japan published by

27. *Island of Palmas Arbitration*, AJIL Vol. 22 (1928), p. 894.

28. Han Sang-bok, *op. cit.*, p. 40 and p. 392.

Philipp Franz von Siebolt, in which Ullŭngdo was mistakenly identified as "Matsushima" in lieu of the correct name of the time, "Takeshima." As this defective map gained wider currency, the misnomer set in, causing the small island (Tokdo) previously called "Matsushima," to acquire the current name of "Takeshima."²⁹ However, this explanation, despite the historical documents which buttress it, gives rise to serious doubts that Japan had any in-depth knowledge of Tokdo in the very late nineteenth century. Most probably, Siebolt's map was a mosaic of authentic maps by Japanese cartographers. Thus, it can be reasonably inferred that, had Japan possessed a clear awareness of Tokdo's location and identity at that time, Japan could have prevented such an erroneous switching of the names of the islands.

B. Knowledge and Consciousness of Tokdo as Territory

When indirect reference is taken into account, historical facts recorded in Korean sources concerning Tokdo can be traced back to the sixth century. *Samguk Sagi* (History of the Three Kingdoms) states that Silla, one of the three ancient Korean kingdoms, conquered and annexed Usan-guk (Usan-State) in 512 A.D.³⁰ As Koreans generally believe, Tokdo, coupled with Ullŭngdo, was then subjugated to Silla since the Usan-State comprised both Ullŭngdo and Tokdo. For instance, *Mangi Yoram* (Handbook of State Affairs) of 1808 quotes *Yojiji* (Gazetteer) in its chapter on military administration: "Ullŭngdo and Usando were lands all belonging to the former Usan-State, and Usando was none other than what the Japanese call Matsushima," the current Tokdo.³¹

Likewise, Tokdo's former Korean name, "Usan-do," which

29. Taijudo, *op. cit.* p. 2; Han Sang-bok, *Ibid.*

30. Kim Pu-sik, comp., *Samguk Sagi* (History of the Three Kingdoms) (1146), Vol. 4: *Silla Pon'gi* (Annals of the Kingdom of Silla).

31. "Kunjong Pyon (Military Administration)" in *Mangi Yoram* edited by Sim Sang-gyu *et al.*, 1808.

had been used till *circa* the end of the nineteenth century when the current name "Tokdo" became popular,³² apparently came from the said "Usan-guk (Usan-State)." With the demise of this Usan-guk (Usan-State), such names as Ullŭngdo or Mullŭngdo began to represent Ullŭng Island separately from Tokdo. Consequently, the word "Usan," no longer referring to the ancient mini-State, came to be used as denoting only Tokdo, which had been regarded as an attachment to Ullŭngdo.³³

The first direct historical reference to "Usando" (Tokdo) as opposed to Ullŭngdo can be found in *Sejong Sillok* (Annals of King Sejong), which stated, in a chapter describing its territory, that "Usan [Tokdo] and Mullŭng [Ullŭngdo] are located in the midst of the sea just to the eastern direction of this prefecture. The distance between these two islands is not so far that these two islands can be seen from each other on a clear day."³⁴ The same contents with a slight variation are also recorded in *Sinjung Tongguk Yoji Sŭngnam* (Revised and Augmented Survey of the Geography of Korea),³⁵ which was compiled and published by the Chosŏn

32. In the dialect of Korea's Cholla Province, from which the majority of settlers on Ullŭngdo originated, the sound "Tok" means stones or rocks. This name "Tokdo" first appears in Japanese naval reports (*the Logbook of Warship Niikata's Operations*). (Lee Hoon, Dispute over Territorial Ownership of Tokdo in the Late Chosŏn Period, *Korea Observer* Vol. 28, No. 3 [1997], p. 392). An entry dated September 25, 1904, reads that "Koreans call Liancourt Rocks 'Tokdo', and Japanese fishermen use the shortened form of 'Liankoto.'" (Han Sang-bok, *op. cit.*, p. 514). From Korean sources, this name was first recorded in an official report by Ullŭngdo County Chief Shim Hung-t'aek, the details of which will be mentioned in the next section.

33. Lee Han-key, *op. cit.* p. 237.

34. In hindsight, this is a fairly accurate depiction. *Chiriji* (Gazetteer) in *Sejong Sillok* (Annals of King Sejong compiled and published by the Chosŏn Dynasty government in 1454), Vol. 153, Section on Uljinhyŏn, Kangwondo.

35. It reads that "Usando and Ullŭngdo-the two islands are located in the midst of the sea just in the eastern direction of this Prefecture... One theory has it that Usando and Ullŭngdo are one and the same island." *Sinjung Tongguk Yoji Sŭngnam* (Revised and Augmented Survey of the Geography of Korea) edited by Yi Haeng during the King Chungjong era in 1531.

Dynasty government in 1531 to authoritatively define and demarcate the territory of Korea.³⁶

The Japanese side endeavors to undermine the authenticity of the foregoing Korean historical records by quoting the section on Uljinhyŏn in the *Chiriji* (Gazetteer) in *Koryŏsa* (History of Korea, 1451) which describes Usan and Ullŭng (Mullŭng) as two different names of the same island.³⁷ In doing so, however, Japan twists the significance of the erroneous and confusing description in *Koryŏsa* out of proportion. The confusion among some, if there was any at all, most likely resulted from the similarity between the name of the island, "Usan-do" and that of the ancient State, "Usan-guk," which is considered to have consisted of both Ullŭngdo and Tokdo. Furthermore, this one-and-the-same-island theory by Japan cannot explain the existence of a majority of old Korean maps indicating Ullŭngdo and Tokdo as "Mullŭng" and "Usan" respectively.³⁸ Although some old maps may not be accurate as to the size and location of Ullŭngdo and Usando,³⁹ the fact remains that the

36. In the past, the Korean government relied on these official documents to ascertain whether a particular territory historically belonged to it or not. For instance, the Chosŏn government presented as evidence a reference of Ullŭngdo contained in *Tongguk Yŏji Sŏngnam* (Survey of the Geography of Korea) when refuting Japan's territorial claim to Isonotakeshima (Ullŭngdo) in July, 1614. (Lee Hoon, *op. cit.* p. 399).

37. It reads that "Ullŭngdo is situated in the midst of the East Sea [Sea of Japan] and was called Usan-guk during the Silla Dynasty. It is also known as Mullŭng or Ullŭng... According to one theory, Usan and Mullŭng were originally two separate islands; they were not so far apart, and were visible from each other on a clear day."

38. The first Korean map to show Usando separate from Ullŭngdo is a map included in *Tongguk Yoji Sŏngnam*, 1499. (Choe Suh Myun, "Kochizu Kara Mita Tokdo [Tokdo Seen from Old Maps], *Toitsu Nippo* [Unification Daily], May 27-29, 1981, pp. 28-29).

39. In the maps of the early seventeenth century, Usando is often shown to the west of Ullŭngdo or bigger than Ullŭngdo, due to a lack of cartographical skills. In this regard, it is interesting to note that the location and size of Usando (Tokdo) in the maps of the later eighteenth and nineteenth centuries gradually began to correspond to geographical reality, that is to say, Usando is shown southeast of Ullŭng-

Chosŏn Dynasty of Korea distinctly regarded Tokdo as part of its territory, administratively under Uljinhyŏn (Uljin Prefecture). It is also noteworthy that the inaccuracies as to the size and location of Tokdo in the seventeenth century Korean maps were gradually rectified in the eighteenth and nineteenth century maps, which indicates an increasing knowledge of Tokdo among Koreans.

The oldest Japanese historical reference to Tokdo (Matsushima) is found in *Onshu Shicho Goki* (Records on Observations in Oki Province) edited in 1667. Japan argues that it not only attests to the perception of Tokdo by old Japanese, but also indicates that Tokdo belonged to Japan. The following interpretation of the record suggested by the Korean side, which appears to be more objective, however, in fact implies that Takeshima (Ullŭngdo) and Matsushima (Tokdo) belong to Korea rather than Japan:

These two islands (Takeshima and Matsushima) are uninhabited In terms of the visual outlook or distance, Matsushima and Takeshima are to Korea, as Onshu (Okishima) is to Onshu (a Japanese prefecture nearest to Okishima). Therefore, Oki marks the northwestern boundary of Japan.⁴⁰

Furthermore, a few old Japanese maps indicate that both Ullŭngdo and Tokdo are possessions of Korea. Among those, the *Sangoku Setsujozu* (A Map of Three Adjoining Countries) published in 1785 by Hayashi Shihei (1738-1793), an eminent scholar of the time, for the purposes of showing international boundaries, depicted Ullŭngdo and Tokdo in yellow whereas it coloured Japanese islands in green. Some subsequent Japanese maps followed this method until

do and smaller in size. For instance, the *Taehan Chondo* (Map of the Whole of Korea) produced in 1899 by the Ministry of Education of the Korean Government indicates a small island with the name of "Usan" to the east of Ullŭngdo.

40. Saito Hosen, *Onshu Shicho Goki* (Records on Observations in Oki Province), Vol. 1 (Kokudaikibu) in Kawakami Kenzo, *op. cit.*, p. 50. According to Kawakami's interpretation, the last sentence cited above should be changed to the following: "And thus Takeshima and Matsushima mark the northwestern boundary of Japan."

the late eighteenth century.⁴¹

C. Treatment of Tokdo as Territory

1. Evacuation Policy of the Korean Government: Abandonment of Territory by the Chosŏn Dynasty?

The Chosŏn Dynasty adopted the so-called evacuation policy (a policy of vacating the island) for Ullŭngdo in 1417 for the purpose of forbidding the settlement of Koreans on Ullŭngdo and leaving the island uninhabited. The aim of the policy was multifaceted; not only was the island exposed to frequent pillaging by Japanese pirates, but also sea voyages to the island from the mainland were dangerous. The fact that the island had long provided a safe haven for men fleeing from military conscription and tax evaders had probably been taken into consideration as well. As opposed to Japan's argument that this evacuation policy was an actual abandonment of Ullŭngdo, and Tokdo, by the Korean government,⁴² the policy did not extend to the renunciation of territorial sovereignty over Ullŭngdo and its attached island, Tokdo. This can be illustrated by the fact that there were regular dispatches of inspectors to Ullŭngdo.⁴³ There appeared to be no reason to extend the evacuation policy to Tokdo, as the islet was not then inhabited. Nevertheless, when dispatching Kim In-woo to Ullŭngdo in 1425, King Sejong

41. For instance, *Soezu* (A Complete Illustrated Map) of the latter part of the eighteenth century, which uses colors to distinguish national boundaries and territories, marked Ullŭngdo and Tokdo in yellow as opposed to Japanese lands shown in red. Although this map did not identify the two islands by name, it marked them in accurate positions and described them as "Korea's possessions."

42. Kawakami, *op. cit.*

43. In addition to the dispatch of inspectors, King Sukchong and government officials of the Chosŏn Dynasty once seriously discussed setting up a garrison on Ullŭngdo fearing that the regions of Kangnung and Samchok would suffer if Japan occupied Ullŭngdo. (*Sukchong Sillok* [Annals of King Sukchong] 20th year, July) Chang Han-sang was then actually sent to Ullŭngdo to prepare for a garrison installation. (*Ibid.*, August).

gave him the title of "Commissioner for Usan-Mullŭng," thus placing Tokdo and Ullŭngdo within the areas of the evacuation policy.⁴⁴ In fact, the evacuation policy is in itself an indication that the Korean government was exercising its jurisdiction over the whole Ullŭng area including Tokdo. As far as Tokdo is concerned, a visual observation or confirmation by other means would have been sufficient, as one of the reporters, Chang Han-sang, did in 1694.⁴⁵

2. Japanese Fishermen's Activities on Ullŭngdo and Tokdo and Their Legal Implications

With Ullŭngdo being uninhabited in accordance with Korea's evacuation policy, some Japanese occasionally sailed to Ullŭngdo. A major basis for Japan's claim to historical title to Tokdo is related to this. In 1618, Otani Jinkichi and Murakawa Ichibei of Yonago applied to the Japanese government for a license to sail to Ullŭngdo. Upon obtaining the license in 1618, the Otani and Murakawa clans alternately dispatched ships to Ullŭngdo, mainly for logging purposes. In 1661, they also received a permit for passage to Matsushima (Tokdo) and appear to have engaged in occasional fishing activities off the islet. Japan contends that these permits by the Tokugawa Shogunate for the two Japanese clans to sail to and utilize both Takeshima (Ullŭngdo) and Matsushima (Tokdo) amount to a display of sovereignty over the two islands. In order to demonstrate the knowledge of Matsushima (Tokdo) by the Japanese, it also presents a few documents in which Japanese fish-

44. *Sejong Sillok*, Vol. 29 and 30. In fact, Kim In-woo was previously sent to Ullŭngdo as Anmusa (Commissioner for Pacification) by King T'aejong in 1416 with a view to bringing the settlers back inland. At that time, Kim In-woo was titled "Commissioner for Mullŭng." (*T'aejong Sillok*, [Annals of King T'aejong], 16th year, September).

45. He reports: "There was an island in the middle of the sea when I looked eastward, and it is situated far in the direction of the southeast, and is less than one third of Ullŭngdo and the distance is barely 300 ri [92 km]." (Shin Kwang-bak, *Ullŭngdo Sajok* [Historical Remains of Ullŭngdo] as cited in Lee Hoon, *op. cit.* p. 394).

ermen, who stopped over at Matsushima (Tokdo) en route to Takeshima (Ullŭngdo), described having visited the former islet (Tokdo).

As many Korean historians and Professor Hori Kazuo of Japan rightly point out, however, what the Shogunate gave the two Japanese clans were "permits for passage" to the islands.⁴⁶ Furthermore, the Japanese families' main destination, or main area of activity, was Takeshima (Ullŭngdo) not Matsushima (Tokdo), with the latter being utilized only incidentally for the voyages to the former. Accurate as they might be, the documents about Matsushima (Tokdo) recorded by the Japanese in the seventeenth century are not only of a private character but also mere factual descriptions of Matsushima (Tokdo), rather than indications of any sense of sovereignty over the islet. As the arbitrator stated in the *Brazil-British Guiana Boundary* case in 1901,⁴⁷ acts of non-sovereign character are irrelevant since the basis of title must be the exercise of sovereign jurisdiction. Even hypothetically supposing that Japan established a competing title to Ullŭngdo or Tokdo, the title may not have been valid as of 1905, in that Japan, following its formal recognition of Ullŭngdo as Korea's territory in 1699, had mostly abandoned Tokdo under the belief that it belonged to Korea.

3. Determination on Ullŭngdo's Sovereignty

Although the Chosŏn Dynasty government adhered to the evacuation policy, Korean fishermen along the southern and eastern coasts still fished in the rich fishing grounds off Ullŭngdo. Meanwhile, as was mentioned, in the late seventeenth century, Otani Jin-

46. Hori Kazuo, "Japan's Incorporation of Takeshima into Its Territory in 1905," *Korea Observer* Vol. 28, No. 3 (1997), p. 485.

47. In this case, the King of Italy as the arbitrator stated that:

"to acquire the sovereignty of regions which are not in the dominion of any State, it is indispensable that the occupation be effected in the name of the State which intends to acquire the sovereignty over those regions." (B.F.S.P., Vol. 99 [1905-1906], p. 930).

kichi and Murakawa Ichibei of Yonago also entered Ullŭngdo without notifying the Korean government. In 1693, An Yong-bok and other Korean fishermen, who were on a fishing expedition from Tongnae and Ulsan, clashed with a group of Japanese from the Otani family at Ullŭngdo. As the Otani family brought the matter before the Shogunate, this developed into what became known as the "Takeshima (Ullŭngdo) Incident," a confrontation between Korea and Japan through diplomatic channels, over the ownership of the island. Mindful of Korea's possession of Ullŭngdo ever since the Silla period, the Japanese government eventually prohibited the Otani and Murakawa families from continuing to enter Takeshima (Ullŭngdo) in 1696. Subsequently, in January 1699, the Japanese authorities recognized in a formal letter that Ullŭngdo belonged to Korea. Despite the absence of any specific reference to the status of Tokdo in that letter, the Japanese then regarded the island as appendent to Ullŭngdo, and thus its ownership was considered to have been settled in favor of Korea. For the Shogunate government, which conceived Matsushima (Tokdo) as a mere milestone for voyages to Takeshima (Ullŭngdo), there apparently was no reason to covet Matsushima (Tokdo). Further, no historical data show that the Shogunate government consciously distinguished Takeshima (Ullŭngdo) from Matsushima (Tokdo), with the latter being considered as attached to the former.⁴⁸ As a matter

48. According to *Tsushima Soka Kamonsho* (So Family of Tsushima Records kept in the library of NHCC, No. 4751), the Shogunate government once inquired of the family of Tsushima about the location of Ullŭngdo and its adjacent islands as well as its territorial ownership, and Tsushima replied as follows:

Question) Do Takeshima and a small island of Matsushima about 40 ri [98miles] away both comprise Ullŭngdo, or is Takeshima Ullŭngdo, but Matsushima outside of Chosŏn?

Answer) There is a record of the Genroku period that Matsushima is located near Takeshima, and the Japanese went there to fish. We understand that it is the island, together with Takeshima, where Japanese are forbidden to fish, but it is difficult to answer that the injunction was so definitely made.

(The above are cited from Lee Hoon, *op. cit.* p. 417).

of fact, no one from the Otani or Murakawa clans sailed to Matsushima (Tokdo) as their sole destination in the wake of the settlement on "the Takeshima Incident."⁴⁹

4. A Sense of Exclusive Sovereignty over Tokdo: The Second An Yong-bok Incident

Mention also needs to be made of An Yong-bok's second venture to Japan for the purpose of confirming recognition by Japan of Korea's sovereignty over Ullŭngdo and Tokdo. According to *Sukchong Sillok* (Annals of King Sukchong of the Chosŏn Dynasty, 1728), An and other Koreans went to Ullŭngdo and again encountered a group of Japanese in 1696. The Koreans vehemently protested that the Japanese were trespassing on the Korean territory of Ullŭngdo. The Japanese replied that they lived on Songdo ("Matsushima" in Japanese). In response, An is quoted as saying, "Songdo, in other words, is 'Usando.' It is also our territory and how dare you intend to go there?" Then An and his crew followed the Japanese to Usando (Songdo/Tokdo) and evicted them from the islet. An's activities did not end at this point. He actually sailed to Oki Island and, impersonating a Revenue Supervisor for the two islands of Ullŭngdo and Usando, obtained the Magistrate of Honkishu's promise that any future infringement of Ullŭngdo and Tokdo by the Japanese would result in severe punishment for trespassers.

An's demands and the Magistrate's acceptance could hand-somely qualify as a display of sovereignty by one party and acquiescence by the other, if An had acted on behalf of the Korean government. Nevertheless, he acted under the conviction that the sovereignty of Tokdo belonged to the Chosŏn Dynasty and he had to protect the territorial integrity of, and fishing rights around, Ullŭngdo and Tokdo. Furthermore, the Magistrate's acceptance of An's demands was made under the assumption that his counterpart

49. Hori Kazuo, *op. cit.*, p. 485.

was from the Korean government. And, surely, no other documents, whether from Korean or Japanese sources, more vividly attest to a clear sense of exclusive sovereignty displayed at the very site of the conflict. Japanese scholars challenge the authenticity of An's statements on the grounds that they were made during the interrogation by the Bibyonsa (Border Defense Council) for his having gone abroad without governmental permission.⁵⁰ Taking into account the repercussions that An's two ventures had on diplomatic relations between the two countries, however, denial of the facts by reason of their statements having been made during interrogation does not weaken their validity.

D. Display of State Function or Authority: Imperial Ordinance No. 41 of the Korean Government, October 1900

In assessing the relative and probative force of the arguments presented by each side in support of its case, the events immediately preceding the critical date may count as crucial evidence as was stated in *Minquiers and Ecrehos*: "What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."⁵¹ Toward the end of the nineteenth century, the display of sovereignty intensified as the Korean government found itself in a position to reconsider its evacuation policy, when faced with a report from its inspector on the frequent illegal entry of some Japanese onto Ullŭngdo for timbering. In April 1882, the newly established Korean Empire accordingly sent an official to report on the site for a new county to be established on Ullŭngdo as well as to determine the distances from Ullŭngdo to adjacent Songjukdo and Usando (Tokdo). In 1883, the Korean government terminated the evacua-

50. Kanae Taijudo, *op. cit.*, p. 5.

51. *Minquiers and Ecrehos*, *Ibid.*

tion policy and encouraged its subjects to settle on Ullŭngdo, and appointed Kim Ok-kyun, a leader of the progressive political group, Commissioner for the Development of the Southeastern Islands and Whaling.⁵² Kim's official title, with the plural form of "island," shows the government's intent to include not only Ullŭngdo, but also Tokdo, in his duties as Commissioner, as there are only two notable islands belonging to Korea in the East Sea (Sea of Japan).

Concerned about clashes between Korean settlers and visiting Japanese and also eager to develop the islands in the East Sea (Sea of Japan), the Korean government promulgated Imperial Ordinance No. 41 on October 25, 1900. Article 2 of the Ordinance, which had the basic purpose of restructuring the administrative district of Ullŭngdo by setting up a new county unit, expressly designated the county to administer Tokdo.⁵³ The significance of such legislative acts was also stressed in the *Eastern Greenland* case wherein the PCIJ considered Denmark's legislation extending to the disputed land as a particularly significant form of exercising sovereignty. The absence of any Danish expedition to a particular territory did not militate against the court's upholding Denmark's sovereignty by reason of the inaccessibility of the territory. Further, the dispatch of an inspector by the Korean government to the Ullŭng area to obtain specific information on Tokdo as well as the designation of Kim Ok-kyun as being in charge of the islet also clearly demonstrates sovereignty.

52. *Kajong Sillok*, Mar. 16, 1883.

53. *Official Gazette*, No. 1716, Oct. 27, 1900. Article 2 of the Ordinance specified two islands, "Chukdo" and "Sokdo," under Ullŭng County. "Sokdo" was regarded as the current Tokdo, while "Chukdo" was the present "Chukseo," a rocky islet adjacent to Ullŭngdo. As has been said, "Tok" means a rock, the Chinese letter of which is pronounced, "Sok."

IV. Legitimacy of Japan's Incorporation of Tokdo in 1905

A. Japan's Incorporation Measure of 1905 with Regard to Tokdo

Given the relative paucity of evidence enabling Japan to claim a historical title to Tokdo, the apparent sole ground for Japan's territorial claim seems to be its measure taken in 1905 of incorporating Tokdo as part of Japanese territory. The process of how the Meiji government arrived at this decision is rather well documented.⁵⁴ In September 1904, a Japanese national, Yozaburo Nakai, submitted a request to the Home, Foreign and Agriculture/Commerce Ministries to incorporate "the Liancourt Rocks" into the territory of Japan and subsequently lease it to him for exploitation, in particular, to catch sea lions. The Ministry of Home Affairs was clearly opposed to the request on the grounds that the benefit of incorporating these rather useless barren rocks, which it understood to be under Korean jurisdiction, would be outweighed by the risk of heightening the suspicions of wary foreign countries that Japan was anxious to annex the whole Korean territory. On the contrary, the Foreign Ministry supported the application, taking into account that, in order to carry out surveillance on enemy (Russian) ships, the incorporation of the islet was urgently needed so that it could be used as a strategic post for an observation tower equipped with marine cables.⁵⁵ Likewise, this so far neglected islet attracted the

54. According to Mr. Nakai's Resume and Plan of Administration for Takeshima attached thereto, which were submitted to Shimane prefecture in 1910, he initially intended to prevail upon the Ministry of Agriculture and Commerce in Tokyo to allow him to apply to lease the island from the Korean Government, as he also believed that the Liancourt Rocks belonged to Korea. Later, he changed his mind after consulting government officials in Tokyo, who encouraged him to submit the request. (*Shimane Ken Koho Bunshoka* [Public Information and Document Div., Shimane Prefecture], 1953, Vol. 1.

55. On August 19, 1905, the observation post was set up on Tokdo by the Japanese Navy. Presumably, the purpose of this post was to keep the still volatile Russian

attention of the Japanese government as a strategic post lying in the East Sea (Sea of Japan), which was about to become a battle ground between Russia and Japan. In this regard, it is to be noted that in 1905, when Japan incorporated the islet, the Russo-Japanese War was at its height with both Japan and Russia vying for hegemony over the Korean Peninsula.⁵⁶ The question remaining for the Meiji government must have been how to circumvent the concerns raised by the Home Ministry.

The Japanese Cabinet thereafter decided to place the island under the jurisdiction of Shimane prefecture on January 28, 1905, as follows:

Having hereby reviewed the attached question of the ownership of the uninhabited islet located at 37° 9' 30" NL, 131° 55' EL at a distance of 85 ri from Okinoshima, no trace of any other sovereign occupying it has been found... Given the relevant documents evidencing that ever since the 36th year of the Meiji (1903) Mr. Nakai moved to these islets and engaged in fishing activity, which is recognised as occupation in terms of international law, it is therefore to be approved that these islets be incorporated as part of this country and under the administration of Shimane prefecture.⁵⁷

Navy under surveillance, even though Japan had won the naval warfare against Russia on May 27, 1905.

56. The Russo-Japanese War began on the night of February 8, 1904, when Japanese forces made a surprise attack on Russian warships in Port Arthur. It ended with the signing of the Portsmouth Treaty on September 5, 1905. The treaty formally sanctioned victorious Japan's territorial expansion on the Asian mainland. Japan supplanted Russia in southern Manchuria and Korea. Specifically, Japan acquired Russia's lease the Liaotung Peninsula and the South Manchuria Railway, and Russia recognized Japan's "paramount" economic, military and political interests in Korea. (*Encyclopaedia Americana* Vol. 22, p. 432.) It can be inferred, then, that Japan was eager to accomplish its imperialist designs on the Korean peninsula and in Manchuria in 1905, and that the incorporation measure of Tokdo in 1905 was part of the series of aggressive acts committed by Japanese colonialists, which had already begun after the Sino-Japanese War in 1894.
57. The correct location of Tokdo is 37° 14' NL and 131° 52' EL (Han Sang-bok, *op. cit.*, p. 520).

This Cabinet decision was conveyed to Shimane prefecture, which subsequently posted its Notification No. 40 on February 22, 1905, to the effect that "the Liancourt Rocks" would thereafter be referred to as "Takeshima" and would fall under its administrative jurisdiction. Yozaburo Nakai then obtained official permission from the Japanese government to undertake the hunting of sea lions near the island and to build cottages on the island for his fishermen employees.

According to the Japanese side, this incorporation measure and subsequent issue of the permit neatly fall within the purview of the accepted idea of international law at that time; in order to establish territorial sovereignty over any extension of land, a State is required to have an intention of making the land a part of its territory and to exercise effective administration thereupon. The Japanese side further argues that Japan's jurisdiction over Tokdo had never been questioned by any foreign country from the year 1905 until the Korean government took control of it in 1952.

B. Inconsistency of the Meiji Government's Position on Tokdo's Ownership

The reasoning articulated in the Cabinet decision, which expressly mentioned such terms as "occupation" and "international law," hinges on the doctrine of occupation of *terra nullius* in international law.⁵⁸ The premise of Japan's incorporation measure,

58. International law demands that the occupation, as a modality of peaceably acquiring *terra nullius*, be effective. The main criterion of this effectiveness is the continuous and peaceful display of state function, the extent of which differs according to the conditions of time and place. In the *Island of Palmas* case, Judge Huber elaborated on certain factors for establishing that the Netherlands had fulfilled the conditions of acquisition of sovereignty. Among those, mention needs to be made of the following two factors: first, the absence of contestation or protest against the exercise of territorial rights by the Netherlands over the distant island during the period of 1866-1906, thus establishing that the display of Dutch sovereignty was peaceful; and second, the display of sovereignty being open and public and not

therefore, was that Tokdo was *terra nullius* and thus legally exposed to territorial acquisition by any country at that time. The Korean side finds this assumption unacceptable on the grounds that an island, *albeit* uninhabited, visible from neighboring Ullŭngdo and known to Korea and Japan for ages, could not have been *terra nullius* in the early twentieth century. Japan's incorporation of Tokdo in 1905, when Korea possessed a valid title over the islet by way of peaceful and continuous exercise of her sovereignty under international law, constituted a violation of the existing legal situation and was accordingly unlawful and invalid.⁵⁹ Korea has repeatedly pointed out that the Japanese incorporation measure was, in the least, a farce or, at most, an implementation of its colonial policies toward Korea under the guise of "occupation" of new territory under international law.

Setting aside Korea's position for the time being that the islet belonged to it long before 1905, Japan's *terra nullius* argument was, in fact, a deviation from the previous stance of the Meiji government on Tokdo's ownership. The question of to whom the islet had belonged was a familiar one to the Meiji government even around the end of the nineteenth century. The following references to official Japanese documents from the Meiji era dealing with the ownership question well illustrate the viewpoint, *albeit* internal, of the Meiji government prior to 1905.

Most importantly, in 1876 the Ministry of Home Affairs, in undertaking a cadastral survey of the Japanese territory, acknowledged an official question from Shimane prefecture as to whether to include Takeshima (Ullŭngdo) and another island in the East Sea (Sea of Japan) as part of its prefecture. Although five months of research into the issue led the Home Ministry to reach the con-

clandestine in conformity with usages as to the exercise of sovereignty over colonial States.

59. The Permanent Court also viewed as illegal and invalid Norway's attempted occupation of Eastern Greenland. (*Eastern Greenland case, op. cit.*, p. 64).

clusion that "Takeshima and another island have nothing to do with Japan," the Ministry referred the matter to the Dajokan (the Council of State)—the highest government organ in Japan at that time—together with the relevant diplomatic documents between Korea and Japan in view of the gravity of territorial questions. The Dajokan replied to this referral by formally instructing the Home Ministry to take note of the fact that Takeshima and the other island had nothing to do with Japan.⁶⁰

In another case, the Japanese Foreign Ministry sent three high ranking government officials to Pusan in December 1869 to explore the possibility of resuming diplomatic relations with Korea. One of the instructions given by the Japanese Foreign Ministry was "to report circumstances under which Matsushima (Ullungdo) and Takeshima (Tokdo) had become part of Korean territory."⁶¹

The foregoing instances of recognition by the Meiji government that Matsushima and Takeshima both belonged to Korea might not be interpreted as an acquiescence in international law in that they were internal rather than external. These documents, however, clearly attest to a sudden shift of the Meiji government's position on the question of Tokdo's ownership from a possession of Korea to *terra nullius*. A strong presumption would be that, in making the incorporation decision in 1905, the Meiji government deliberately ignored its late nineteenth century documents as well as the then prevalent views held within circles of government officials that Tokdo belonged to Korea.

60. Dajokan decision dated March 20, 1877. The original script is reprinted in Hori Kazuo, "Japan's Incorporation of Takeshima into Its Territory in 1905," in *Korea Observer*, Vol. 28, No. 3, p. 491.

61. Diplomatic Archives of Japan, Vol. 3, p. 137 (Cited by Shin Yong-Ha, *Dokdoui Minjokyeongtosa Yongu* [Studies of Tokdo's Territorial History], 1996, pp. 156-164.

C. Procedural Aspects of Japan's 1905 Incorporation of Tokdo

Many Korean scholars categorically denounced, among other things, the rather clandestine manner in which the aforementioned incorporation was announced. The Japanese government did not announce the Cabinet decision in the official gazette, nor make a public announcement at the central government level. Thus, even the Japanese public was not aware of the incorporation until long after 1905. There was virtually no way the Korean government could have come to notice the incorporation announcement made in that manner. According to the Korean side, this procedural omission on the part of the Meiji government is inexplicable without concluding that there was an ulterior motive on the part of the Japanese government to circumvent any protest from the Korean side and subsequently any suspicion from other foreign countries including Russia. Furthermore, that sort of announcement in no way amounts to a notification from the standpoint of international law and, as a result, could not affect Korea's sovereignty over Tokdo, which had been established long before the year 1905.

In response to this argument, the Japanese side maintains that the incorporation measure taken in respect to Tokdo was in line with Japanese domestic procedures for territorial acquisition at the time as well as with the accepted principles of international law. This particular announcement of incorporation was made by the Shimane Prefectural Governor in compliance with the Cabinet decision and, therefore, irrespective of the manner in which the notification was made, there is no doubt that it expressed the intentions of the Japanese government. Moreover, it was then the accepted practice in Japan to make announcements in the aforesaid manner for the acquisition of territory, as is shown by such cases as the incorporation of Marcus Island.⁶² At least on the domestic plane,

62. The incorporation of Marcus Island was announced in the form of a notice by Tokyo prefecture. (Kanae Taijudo, *op. cit.*, p. 11).

then, it could be said that the foregoing measure was not a deviation from prevalent domestic practices of the time. On the international level, the Japanese side maintains that no notification to foreign countries is required for the acquisition of territory in modern international law, citing the judgements rendered in the cases of the *Island of Palmas* of 1928 and of *Clipperton Island* of 1931.

Despite Japan's efforts to reduce Korea's argument to an unfounded conspiracy theory, there is no denying that Japan's manner cannot be properly perceived as a public announcement in the domestic or in the international sense. In this regard, it seems appropriate to delve into the standard procedures the Meiji government adopted in incorporating *terra nullius*. In the case of the Bonin (Ogasawara) Islands in 1876, for instance, the Meiji government provided notifications to consular offices in Tokyo, such as those of the United States, France and Germany.⁶³ Afterwards, the Meiji government decided to incorporate the islands and instructed a relevant local government agency to do so. Likewise, the standard procedure the Meiji government followed seems to have been to verify whether the territory concerned belonged to any other sovereign by means of notification in advance of referring it for a final Cabinet decision. As far as Tokdo is concerned, however, these notification and verification procedures were conspicuously omitted despite the Meiji government's strong presumption of Korea's territoriality over Tokdo.

D. Notification as a Requirement for Territorial Acquisition

In an effort to provide a legal foundation for its 1905 incorporation, the Japanese side *inter alia* extracted from a few international precedents a formula that notification to foreign countries is not an essential requirement for incorporating *terra nullius*. Neither

63. Kanae Taijudo, Japan's Early Practice of International Law in Fixing its Territorial Limits, *Journal of Japanese International Law* No. 22 (1978), pp. 8-12.

the *Palmas Island* case of 1928 nor the *Clipperton Island* case of 1931 rendered such notification obligatory as a condition for the acquisition of territory. In particular, the decision delivered in the latter case further affirmed that, by whatever means it might have been taken, it was enough if notoriety was attached to the act of the acquisition of territory.

This argument, however, cannot be sustained. Japan's incorporation measure of 1905 might be interpreted as having fulfilled the first requirement of a valid occupation, *i.e. animus occupandi* ("the intention and will to act as sovereign"). Inasmuch as the second requirement of occupation, *corpus occupandi* ("some actual exercise or display of such authority") is concerned, the display of sovereignty should be open and public enough to solicit the attention of any sovereigns interested in the territoriality over a particular land, and thus sufficient enough for the acquisitioning State to legitimately claim the acquiescence or recognition of other sovereigns over its newly established territoriality. Or, at least, even if one takes into account the fact that the imposition on the acquisitioning sovereign of a duty to notify many and unspecified foreign sovereigns may appear too draconian, a unilateral and stealthy occupation by one sovereign of a territory—thus without any external manifestation—in total disregard of any potential objecting State may not obtain the sanction of international law. Thus, in upholding the Netherlands' title over the island, Judge Huber in the *Palmas Island* case noted that the Netherlands' display of sovereignty was open and public and not clandestine in conformity with usages as to the exercise of sovereignty over colonial States.⁶⁴

In this sense, few jurists agree that notification to foreign countries as a method of inviting any adverse claim is absolutely unnecessary. Such factors as the geographical proximity of Tokdo to Ullŭngdo as well as Japan's express affirmation of Korea's

64. *Island of Palmas*, *op. cit.*, p. 868.

sovereignty over Ullŭngdo makes the Tokdo case distinguishable from other international precedents. Above all, given its prevailing perception that Tokdo belonged to Korea, or at least its doubts regarding the ownership of Tokdo, the Japanese government should have formally solicited an opinion from the Korean side. In other words, Korea should have been given an opportunity to raise an adverse claim.

In comparing the Tokdo case with other international precedents, it is to be noted that, in the case of *Clipperton Island*, the Hawaiian government did receive notification, and that the establishment of French sovereignty over *Clipperton Island* was announced in English in the "Polynesian," a newspaper published in Hawaii. In the *Palmas Island* case, the Permanent Court of Arbitration admitted that notification to foreign countries as well as other official measures taken by the Dutch government served as conditions justifying the Dutch action in respect to Palmas Island, and it never implied that notification was absolutely unnecessary in that case. It simply concluded that, since no stealthy exercise of sovereignty was possible over such an inhabited territory as Palmas Island, the obligation of notification as in cases of original acquisition of territory in Africa was not deemed necessary.

E. Korea's Reaction: Absence of Adverse Claims?

In order to create an original title by means of occupation, the exercise of sovereignty must be peaceful; no adverse claims by any other country should exist. The PCIJ likewise stated in the *Legal Status of Eastern Greenland* case:

Another circumstance, which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.⁶⁵

As mentioned, the Japanese side claims that its acquisition of Tokdo was peaceful in the sense that it was disputed by neither the Korean government nor other foreign countries. One of the arguments put forward by the Japanese side is that the Korean side could have lodged a protest against the Japanese incorporation measure as the Korean Empire retained *de jure* rights to diplomatic intercourse up until November, 1905, when the Second Korea-Japan Agreement entered into force to transfer to Japan the right of the Korean government to conduct diplomacy. Korea, in turn, contends that Japan's annexation of Tokdo in February 1905, took place at a time when Japan's colonization of Korea had proceeded to such a point that the latter's sovereignty, and the right of protest, was virtually in Japan's hands.⁶⁶ At that time, Japan had been interfering with the inner workings of the Korean government by having installed Japanese or pro-Japanese advisors in major Korean ministries. As such, Korea had already engaged an American, Durham Stevens, as a diplomatic advisor as recommended by Japan in accordance with the First Korea-Japan Agreement of August 1904. Despite Japan's contention that services by the advisor were for Korea rather than Japan, a newly discovered document provides fresh insight into the question of what sort of working relationship Stevens and the Meiji government maintained at that time. The secret instructions given by the Japanese Foreign Minis-

65. *Legal Status of Eastern Greenland*, *op. cit.*, p. 46.

66. Professor Lee Ki-baik summarizes the effects of this treaty in his book, "A New History of Korea" (1984, translated by Edward W. Wagner and Edward J. Shultz) as follows:

"The Treaty of 1905, first of all, gave full authority over all aspects of Korea's relations with foreign countries to the Japanese Foreign Office. Secondly, it forbade the Korean government from concluding any treaties of an international nature except through the medium of the Japanese government. Thirdly, it provided for the appointment of a Japanese resident-general to a position directly under the Korean emperor, to take charge of Korea's foreign relations. In sum, Japan had completely divested Korea of the sovereign power to maintain relations with foreign governments."

ter, Komura Jutaro, to Stevens clearly demonstrate that he, being employed by the Korean government as recommended by Japan, was charged with bringing all important diplomatic activities of Korea in line with Japan's strategy toward Korea and, if deemed necessary, to consult with the Japanese Consulate stationed in Seoul.⁶⁷ Against this backdrop, one can reasonably infer that any protest by the Korean Empire, even if it had been aware of Japan's 1905 incorporation measure, would have been virtually blocked. Given these circumstances, interpreting an absence of adverse claims by the Korean government as an acquiescence under international law is preposterous, and can be regarded as an attempt to justify Japanese colonialism.

In fact, Korea learned of Japan's incorporation measures in March 1906 through a Japanese delegation which visited Ullŭngdo after making an inspection of Tokdo. The Shimane prefecture delegation informed the Ullŭng County Chief, Shim Hung-tack, of the Japanese incorporation of Tokdo taken the previous year. Shim immediately submitted to the central government a report in which he described the visit of the Japanese delegation. In that report, he did not miss pointing out the assertion of the Japanese officials that "Tokdo, which is under the jurisdiction of Ullŭng County" had become Japanese territory.⁶⁸ The report was relayed to the Acting

67. The instructions read as follows: "...Upon your installation in the new important post, you are desired to act principally on the lines given below for your guidance;

1. ... in order to have the foreign policies of the two countries (Korea and Japan) kept in complete harmony, you will deal with all important affairs under your direction in consultation with the Japanese Representative at Seoul and upon obtaining his concurrence.
2. The course of our policy *vis-a-vis* Corea will from time to time be confidentially made known to you through our Representative at Seoul and you will always be careful not to act in divergence therefrom.
3. In all matters of high importance in the Korean foreign intercourse, you will promptly and frankly communicate with the Japanese Representative..."

(Diplomatic Archives of Japan).

68. Yang Tae-jin, *Hanguk Kugguong Yongto Kwangye Munhonjip* (References on Korean Territory and Boundaries), p. 11.

Magistrate of Kangwon Province, Yi Myong-nae, who in turn reported the matter respectively to the Home Minister and the Uijongbu (State Council). Upon receipt, the Chamjong Taeshin of the Uijongbu—the acting head of government—issued its Directive No. 3 calling for an inquiry on the activities of the Japanese while mentioning that “Japan’s alleged acquisition of Tokdo is grossly unfounded.”⁶⁹ The Home Minister is also said to have stated that the claim that Tokdo had become Japanese territory was groundless.⁷⁰ Further, Korea’s main newspapers of that time, the *Hwangsong Shimun* (Capital Gazette) and *Taehan Maeil Shinbo* (Korea Daily News), both covered the issue in a serious and bitter manner, vehemently protesting Japan’s newly alleged territorial sovereignty over Tokdo.⁷¹

Likewise, Korea’s local and central governments as well as civilians all deemed Japan’s incorporation of Tokdo as groundless. The reason those views failed to coalesce into a formal diplomatic protest by the government is simple. By the time Korea was informed of Japan’s incorporation of Tokdo, the Korean Empire had been *de jure* deprived of its right to diplomacy under the terms of the 1905 Protectorate Treaty with Japan. Under these circumstances, there were neither institutional nor diplomatic channels through which a written protest could have been made against Japan. Moreover, doubts are duly raised on whether it was a mere coincidence that Japan informed the Korean side of its 1905 incorporation in March 1906, by that time the latter had already been effectively stripped of any method to raise its legitimate claims over Tokdo against Japan.

69. *Ibid.*

70. *Taehan Maeil Shinbo* (Korea Daily News), May 1, 1906.

71. *Ibid.*; *Hwangsong Shimun*, May 9, 1906.

V. Tokdo in the Context of the Post-war Disposition of Japan's Territory

Territorial disputes are invariably matters of States raising overlapping claims to one territory. The foregoing sections demonstrate the illegality of Japan's 1905 incorporation measure as well as the weaker historical title by Japan prior to 1905 with regard to Tokdo. Based on the firm position that Tokdo had been an inherent part of Korean territory before and after 1905, the Korean side can justly claim and enjoy its sovereignty over Tokdo regardless of the post-war measures taken by the Allied Powers. Logically speaking, the critical questions in determining sovereignty over Tokdo are which of the two countries has a stronger historical title to Tokdo and, if the Japanese side argues for the legitimacy of its 1905 acquisition measure, whether the measure was legitimate in terms of international law. It is the Korean side, however, that first put the Tokdo matter into the framework of the disposition of Japan's territory after the Second World War.⁷² Korea's position actually accorded with the basic principles of the Allied Powers concerning the determination of Japan's territory after the war; those territories which were seized by Japan illegally reverted to their original owners.

The post-war disposition of Japanese territory by the Allied Powers was based on a series of international instruments ranging from the Cairo Declaration to the Peace Treaty between the Allied Powers and Japan. The Cairo Declaration of November 27, 1943, states 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 and that Japan will also be expelled from all other territories which she has taken by violence and greed."⁷³ The subse-

72. Lee Han-key, *op. cit.*, pp. 264-270.

73. It also states that "The aforesaid three Powers (USA, Great Britain, and China), mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent." (United States, *Department of State Bulletin*, Vol. IX [Washington D.C.; U.S. Government Printing Office,

quent Potsdam Declaration endorsed the Cairo Declaration by stating that "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 determine."⁷⁴ Japan's express acceptance of the Potsdam Declaration on September 2, 1945,⁷⁵ thus, giving a legally binding force to both Declarations, which had been thus far viewed as unilateral acts devoid of any legal obligations. In the same vein, it is also to be recalled that Japan recognized, by the Peace Treaty, the independence of Korea and solemnly pledged to the Allied Powers to return all inherent Korean territory to the Republic of Korea. It is evident to the Korean side that the so-called acquisition of Tokdo by Japan in the form of an announcement of the Japanese local government in 1905 was "an act of violence and greed," taking advantage of the moribund Korean government.⁷⁶ At the very least, the 1905 incorporation measure taken by Japan was *null* and *void* because of Korea's prior establishment of its sovereignty over Tokdo and because of the measure's procedural defects. Insomuch as the 1905 measure does not have any legal impact on Korea's sovereignty over Tokdo, then Tokdo, from a legal standpoint, was annexed by Japan together with the whole of Korea in 1910.

The United States Initial Post-Surrender Policy for Japan of September 6, 1945, provides that "Japan's sovereignty will be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and

1943], p. 393.

74. United States Congress, Senate Committee on Foreign Relations, *A Decade of American Policy: Basic Documents, 1941-1949* (Washington D.C.; U.S. Government Printing Office, 1950), p. 50.

75. It reads: "We,..., hereby accept the provisions in the declaration issued by the heads of the Government of the United States, China, and Great Britain on 26 July, 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics,...We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith."

76. Lee Han-key, *op. cit.*, p. 265.

such minor outlying islands as may be determined, in accordance with the Cairo Declaration and other agreements to which the United States is or may be a party." Following the Post-Surrender Policy, the Supreme Commander for the Allied Powers' Directive (SCAPIN No. 677) of January 29, 1947,⁷⁷ clearly provided that the Liancourt Rocks (Tokdo) are excluded from Japanese territory in the following terms:

1. The Imperial Japanese Government is directed to cease exercising, or attempting to exercise, governmental or administrative authority over any area outside of Japan, or over any governmental officials and employees or any other persons within such areas.
3. For the purpose of this directive, Japan is defined to include: the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately 1,000 smaller adjacent islands, including the Tsushima Islands...; excluding Utsuryo (Ullung) Island, the Liancourt Rocks (Take Island) and Quelpart (Saishu or Cheju) Island...
5. The definition of Japan contained in this directive shall also apply to all future directives, memoranda and orders from this Headquarters unless otherwise specified therein.

In response to this express reversion of Tokdo to Korea, the Japanese side cites Paragraph 5 of the same Directive, which reads that "Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration." The Japanese side then resorts to the San Francisco Peace Treaty, which did not mention Tokdo as one of the islands expressly excluded from Japan's territory. Article 2 of the Treaty simply states that "Japan, recognizing the independence of Korea, renounces all right,

77. Even the Japanese Government scrupulously followed the terms of SCAPIN No. 677 and issued some domestic legislation terming "Tokdo" as part of the foreign territories.

title and claim to Korea, including the Islands of Quelpart, Port Hamilton and Dagelet." From this perspective, the Japanese side argues that the absence of any reference to Tokdo in the San Francisco Peace Treaty, the final verdict on what constitutes Japan's territory, implies Tokdo's reversion to Japan.

In direct contradiction to Japan's argument, the rational interpretation of all the post-war instruments would lead to the conclusion that, unless any express decision provides otherwise, SCAPIN No. 677 would take precedence. The Peace Treaty's mere omission of mentioning Tokdo as part of Korea's territory does not amount to the cession of Tokdo to Japan. And a fair interpretation would be that the islands mentioned in Article 2 of the Peace Treaty should be illustrative rather than enumerative given the large number of islands scattered around the Korean Peninsula. Even if its absence of any reference causes various interpretations over the status of Tokdo, this would by no means alter the illegality of Japan's 1905 incorporation measure.

VI. Conclusion

A proper understanding of the legal status of Tokdo invariably necessitates a balanced assessment of historical, geographical, and legal materials. Attempts to apply to this unique case a simple dogma extracted from fractionous historical or legal references are bound to defy any meaningful discussion. Mindful of this, it has been shown that any possible geographical, historical or legal basis for Japan's insistent claim to Tokdo is simply tenuous, at best, in comparison with that of Korea. First, any fair analysis of historical records, documents and maps, including ones from Japanese sources, would find that Korea's connection with Tokdo is long and strong, easily surpassing any such connection Japan may historically have had. Second, continued interest coupled with some

display of authority by the Korean government with regard to this small, uninhabitable and uncontested island legitimately entitles Korea to a valid historical title, thus negating Japan's contention that this islet was *terra nullius* in 1905. Third, the incorporation of Tokdo, by Japan in 1905 does not satisfy the requirements for acquisition of territory under international law since, most of all, Tokdo was not *terra nullius*. It is absurd to assume that Tokdo which is located at a visible distance from the Korean island of Ullŭngdo, and which is rich in fishery resources, had been *terra nullius* until the early twentieth century, and, thus, was free to be taken by any country. Additionally, it was pointed out that the publicity or notoriety attached to Japan's 1905 incorporation, if any, falls far short of acceptable standards. The Japanese government's alleged incorporation measure of Tokdo was, in fact, no more than an extension of its colonialist policy, which can be granted no legal impact whatsoever. In this regard, it is to be recalled that in 1905, when Japan incorporated the islet, Korea was virtually under the control of Japan as Japan had planted its puppet "advisors" in the Korean government to manipulate Korea's foreign and financial affairs. Therefore, Korea was not in a position to lodge a protest against the Japanese incorporation measure. Finally, the post-war restitution measures justly imposed upon Japan by the Allied Powers bring a moral imperative for the return of all lands seized by Japan during her imperial expansion. This, in itself, serves to supersede Japan's legal defense of its nefarious 1905 incorporation measure.

Japan has continuously tried to undermine Korea's legitimate sovereignty over Tokdo by presenting an unfounded claim that there is a legal dispute over the islet, and that Japan is willing to settle this so-called "territorial dispute" through the International Court of Justice. It is quite interesting, however, to observe that Japan tries to avoid or even objects to submitting other territorial disputes involving Japan to the ICJ. Neither in the dispute with

China over the Senkaku (Diaoyutai) Islands nor in the case against Russia over the so-called "Northern Territories" has Japan shown any willingness to submit these issues to the ICJ. This apparent contradictory position on the part of Japan seems to stem from its belief that it has nothing to lose in the case of Tokdo, whatever the judgement of the ICJ might be. In this regard, it should be pointed out that international law provides the means for settling legal disputes between states, but it does not provide how to deal with prevaricated claims which only encourage disputes. To prove the existence of a dispute, it is not sufficient for one side to simply assert that a dispute exists with the other side. The views concerning a question expressed by a party should be coherent, reasonable and substantial enough to be submitted to a third party. The Korean side believes, however, that Japanese allegations over Tokdo are tenuous as well as unjust. Japan is attempting to conjure up a territorial dispute where none exists.

After extensive examination of the Tokdo issue, it is worthwhile to take note of common Korean public perceptions of the whole affair. Some compare Korea's position to an innocent man who is asked to go to a court of law to prove that his beloved wife really belongs to him because another man appears and sues him, arguing, "Your wife is mine, we have a legal dispute and I am willing to settle the legal dispute in court." Other people might suggest to the innocent man, "If you are so sure of her, why don't you go to court to settle the matter for good?" The answer of the husband would be short but clear, "I will never go to a court of law to argue over one who has always been with me. Would you?"

It seems to Koreans that Japan's attempt to dispute the ownership of Tokdo might be a legacy of Japanese colonialism and imperialism. Unlike other countries once involved in colonialist adventures, Japan has not shed its colonial legacy entirely. This Japanese historical baggage, in our view, still remains an important stumbling block to matching its economic strength with the prowess

necessary to play a leading role in shaping international affairs. In light of Japan's fundamental foreign policy to increase its diplomatic stature on the world stage, it seems to be counter-productive and even damaging to Japan to argue over such an unsubstantiated territorial claim to this small Korean islet. Peace is a product of justice. History shows that greed and injustice have sometimes shaken the peace and stability of a State, a region, or the world. By washing away its imperialist stains and by giving up once and for all what it took in times of imperialism, Japan can contribute to peace and stability in Northeast Asia.