“Dokdo” or “Takeshima”?
A case on the ownership of an island

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A burglar broke into a house, wounded the landlady critically by stabbing her and then kidnapped her young daughter. Back home, he declared to his neighbors, "I found the girl orphaned and totally uncared for, so I decided to adopt her."

Later, the crime was revealed, and the girl was duly returned to her mother who had recovered from her grave condition. Realizing that the adoption theory would no longer be effective, the kidnapper took a new approach by laying a second claim to the girl, this time asserting, "Actually, the girl is by blood my own daughter. I have been taking care of her since her birth. Therefore, she has to be returned to me. It was merely in jest that I said I adopted the girl!"

At this, the neighbors thought, "Then it would be easier to decide whose daughter she is. We would not need King Solomon's wisdom to know who her real and legitimate parent is. A genetic test will show scientifically whose child she is."

To the surprise of the neighbors, however, the kidnapper unabashedly added, "In case the genetic test proves unfavorable to me, I reserve the right to withdraw my second statement and return to my first statement, although this first statement is no more than a joke for the time being. Actually, I do not remember well whether it is by birth or by adoption that the girl is my child. But anyway the girl is mine and should be mine ... unless the landlady clearly proves otherwise!"

Finally, he declared, "There is only one person that I can put trust in handling 'this specific case' appropriately. I trust him because he is a 'great' lawyer and would not much depend on pseudo-scientific things like genetic tests in drawing a conclusion to a case like this. I'm sure he will attach much importance to something of really juridical flavor like 'adoption.'"

So the neighbors casually uttered, "Ah, you trust him, as he is a good lawyer. Probably you are going to trust him in other similar cases, too."

But he retorted, "No kidding! If the other side in a conflict personally knows the lawyer as I do myself, why should I put trust in him? You know, I am too smart to risk my luck on his judgment!"
1. Introduction

Dokdo is an island which, as the Koreans believe, has been part of the Korean territory for over a millennium. However, Japan started challenging Korea's territoriality over the island in this century and has insisted that Korea should agree to settle the case by submitting it to the International Court of Justice, which Korea rejects.

Dokdo, or “Takeshima,” as the Japanese call it, is composed of two islets and a few rocks, and is located midway between the Korean peninsula and the main islands of Japan. The larger of the two islets is about 0.1 ㎢ in area, and the land dimension of the whole islets and rocks constituting Dokdo amounts to less than 0.2 ㎢. The island is not suitable for sustained human habitation due to the limited supply of fresh water and mostly steep surfaces that have little top-soil to sustain plant lives.

For the most part, the island has been thought of by both the Koreans and Japanese in intimate connection with Ulungdo, another island lying within a visible distance (about 49 miles) from Dokdo but over 300 times bigger (72.8 ㎢) in size. Sometimes these two islands were treated as a pair because they are two lone islands in a rather large area of the sea. And sometimes Dokdo was considered a subsidiary to, or part of, Ulungdo rather than an independent entity, because the former was no more than a tiny and uninhabitable rock island situated in the vicinity of its much bigger neighbor island. The distance from Dokdo to the nearest point of the Japanese territory is about 86 miles.

Readers who are not yet familiar with the case are likely to have much confusion about the names of the two islands, because the Koreans and the Japanese have used separate names for each of the two islands. To make things worse, the Japanese used the names for the two islands interchangeably up to the beginning of this century, while the Koreans have used various names for each of the two. Therefore, in order to facilitate the readers' understanding, the island at issue, Dokdo or “Takeshima,” will be marked as (◉) in this paper. Likewise, the bigger neighboring island, Ulungdo for the Koreans or “Matsushima” for the Japanese, will be indicated as (●). It would also be helpful to know that “-do” and “-shima” at the end of the names mean “island” in Korean and in Japanese respectively.

2. Legal Issues

The issue of the sovereignty over Dokdo (◉), or “Takeshima,” arose in 1952 when the Government of the Republic of Korea included the island within the newly-proclaimed exclusive fishery zone, a Korean version of the exclusive economic zone. Japan protested to this initiative by the Korean Government, contending that not only was the establishment of the new zone in contravention of the international law, but Dokdo, situated within the newly-proclaimed zone, actually belonged or should belong to Japan and not to Korea. Whereas Korea regarded the island as an integral part of its territory, Japan assumed that it had owned or acquired the ownership of the island well before it had colonized Korea in 1910, thus claiming that the ownership of the island had nothing to do with Korea's independence from Japan in 1945.
In June 1953, while Korea was still embroiled in the last stage of the Korean War, the Japanese Government dispatched two patrol boats of its Maritime Safety Agency to evict the Korean fishermen working around Dokdo and take possession of the island. This, in turn, pushed the Korean Government to immediately send its Coast Guard forces to recover the island and station police forces on it on a permanent basis.

Though both Korea and Japan base their assertions on the historical title and international law, the Dokdo case between the two parties is as much a political issue as a juridical one. Whereas Japan insists on settling the case on the basis of the traditional international law (lege lata or “the law as it is”), Korea asserts that the issue must be settled by lege ferenda (“the law as it should be”). The latter can draw support of the newly independent countries constituting a majority of the world community as well as other countries, because the contents of the relevant part of the traditional law poorly reflect justice, fairness and equity. Certainly it is time that the newly independent countries were accorded their due share in amending traditional international rules. Concerning colonial occupation, the newly independent countries, including Korea, are virtually unanimous in objecting to recognizing its legal effects as an entitlement to the acquisition of territory. However, the current international law is still unclear on this point or even condones colonial occupations under some euphemistic names. Therefore, Korea prefers to avoid taking a risk of having the case settled by a court which may apply rules that Korea cannot accept.

The core issue of the case appears to be the legal effects of the Japanese Government's so-called “incorporation measures” over the island in 1905. Though Japan contends as its primary argument that the island has historically been an inherent part of the Japanese territory, it alternatively argues that the island was a terra nullius, i.e. it belonged to no country, until 1905 when the island was annexed to a Japanese prefecture. Arguing that these incorporation measures of 1905 comply with the requirements for the acquisition of territory under the current international law, Japan asserts that the island should belong to Japan, unless Korea “proves” its ownership of the island by that time.

Korea, on the other hand, refutes the Japanese argument by stating that the Japanese incorporation measures were no more than an implementation of its colonialism that should not be given any legal effect. Korea finds it irrational that an island, known for centuries to both the Koreans and the Japanese and located within a visible distance from an inhabited neighbor island, could have been left a terra nullius until the beginning of this century. By making such an implausible argument, Koreans believe Japan is simply attempting to impose an unfavorable burden of proof on the victim of its past colonialism, betraying remnants of its die-hard imperialism. Furthermore, Korea contends that the incorporation measures over Dokdo were taken by Japan when the process of its colonization of Korea had been so well advanced that the latter's sovereignty was virtually in Japan's hands. Therefore, Korea maintains, the ownership of the island should be decided by the relative merits of the two countries up to 1905, if Japan sincerely believes that there is a genuine case to be settled.

Consequently, the two countries take different approaches as to the means of the settlement of the case. While Japan maintains that the case must be settled by the International Court of Justice (ICJ), an organization which is most likely to apply lege lata in reaching a juridical decision, the Korean side demonstrates more flexibility by suggesting its settlement through
either conciliation or arbitration,¹ but consistently refuses to accept a judicial settlement by the ICJ.

From the viewpoint of the Koreans, the ICJ is not an appropriate organization to settle an issue involving the legal effects of the colonial occupation. It is to be reminded that developing countries are usually reluctant to settle their disputes with a developed state by involving this court. Even less will these developing countries be ready to request the court to decide on the legal effects of the colonial occupation.

Though Japan ostensibly bases its argument regarding the ownership of the island on the historical title, its actual intention is suspected to be ultimately resorting to the incorporation measures of 1905 whose legal effects the international court might not ignore. If legal effects are granted to the colonial occupation, imposing an unfairly heavy burden of proof on the former victims of colonialism, ex-colonial countries would inevitably face unexpected difficulties in proving the ownership of their inherent territories. Korea fears that it would be all the more difficult to prove the ownership of the tiny and uninhabitable island. Unless there is a guarantee that no legal effects shall be given to colonial measures under the current international law, Korea is not willing to involve the ICJ in the case.

If Japan agrees to withdraw its claim of the entitlement to the island based on the incorporation measures, consenting to settle the case by the relative merits of the two countries based on the historical title up to 1905, there will be much more room for its settlement by an impartial third party.

3. Historical Background

In order to better understand the case, it would be helpful to know the historical background of Dokdo, or “Takeshima.” The first direct historical reference to the island by the archives of either party is found in the section “Year of 1432” of The Royal Records of King Sejong’s Reign (世宗實錄) of Korea, published in 1454. The book, which is one of a series of the most authoritative records of Korean state affairs produced by the Government, states in a chapter describing the territory of the country: "Usan (于山) and Murung (武陵) are located in the middle of the East Sea (or the “Sea of Japan,” as the Japanese call it). The two islands are located not quite far from each other, so that they are visible from each other on a clearest day." “Murung” is another name for Ulung (●), and “Usan” in this case designates Dokdo (*) beyond any doubt.

Though some Japanese like to insist that “Usan” cannot be Dokdo, there exists, in the vicinity of Ulungdo, no other island than Dokdo that matches the description. Moreover, many ensuing Korean records and maps describe Dokdo as “Usan” (于山) or “Usando” (于山島, meaning “Usan Island”). For example, The Map of Korea (大韓輿地圖) produced in 1899 by the Ministry of Education of Korea shows a small island to the east of larger Ulungdo (●),

¹ The settlement by arbitration was suggested in the late 1960s by a leading Korean scholar who advocated to establish an “International Court of Justice for Asia” to handle the case. This suggestion was certainly noticed by Japan, but Japan has so far given no reaction in any form to this proposal.
calling it “Usan.” Considering the accuracy of the location and the size of the island on the map, there is no denying that this “Usan” is no other than Dokdo of today. Not finding any other contender island in the area that can be “Usan,” some Japanese insist, "Usan and Ulung must be one and the same island," as if “one” can have two separate locations at the same time and “one” can be visible from each other!

Other accounts about Dokdo or the Korean people (usually government officials and fishermen) associated with the island, are found in various ensuing publications, such as The Royal Records of King Songjong's Reign (成宗實錄) in the “Year of 1471” section, The Revised and Supplemented Geography of Korea (新增東國輿地勝覽, 1531), The Royal Records of King Sukjong's Reign (肅宗實錄, 1693) and The Royal Records of King Jongjo's Reign (正祖實錄, 1794), among others. These publications touch upon a small and uninhabitable island located in the vicinity of Ulungdo(●) under various names such as “Gajido” (meaning “Seal Is.”), “Sambongdo” (“Three Peaks Is.”) and “Sokdo” (“Rock Is.”) as well as “Usan(do).” However, the variety of the names cannot be a cause of much confusion in the identification of the holder(s) of those names, because all of these names have specific connotations related with the island, such as its contour or the species of animals abounded with only on this island. And above all, since Dokdo(◉) is the only island to be found in the neighborhood of Ulungdo(●), no other island can contend with Dokdo to be the rightful name-holder.

When indirect references are taken into account, the Korean records date further back to the 12th century. Furthermore, if the contents of the history records are duly respected, the Koreans can claim the ownership of the island by the sixth century or earlier. According to The Royal Record of the History of the Three Kingdoms (三國史記), published by the Korean Government in 1145, the government of Shilla (新羅), one of the three kingdoms in the title of the book, conquered and annexed “Usan Guk” (meaning Usan State) to itself in the year 512. As the later Korean sources make it clear, Usan State is comprised of Ulungdo(●) and Usando(◉), i.e. Dokdo. For example, ManGi Yoram (萬機要覽) of 1808 and Jungbo Munhon Bigo (增補文獻備考) of 1908, both of which were compiled and published by the Korean Government, categorically stated: "Usan State (territorially) comprises both Ulungdo(●) and Usando(◉)." The statement even went so far as to sweep aside any doubts about the identity of “Usando” by elaborating, "Usando is called 'Matsushima' by the Japanese" (“Matsushima” was the name of Dokdo(◉) by the Japanese at that time).

Thus, the Korean history records clearly demonstrate that Korea has had sovereignty over Dokdo since the year 512 at the latest, or more properly speaking, centuries before that, as Usan State itself was part of the Korean history. Throughout its history, Korea has been consistent in treating the island as part of its territory through records and maps, in spite of unfavorable factors such as its rather isolated location and tiny size. The last of the measures taken by the old Korean Government regarding the island's status came in 1900, five years before Japan's annexation of the island (1905) and ten years prior to Japan's colonization of the whole Korea (1910). Promoting the administrative status of Ulungdo(●) from a sub-county rank to a regular county unit, the old Korean Government then designated the local government of this Ulung County as the legitimate authority to be in charge of “Sokdo”(meaning 'Rock Island'), another name of Dokdo(◉).
On the other hand, the Japanese sources began referring to the island at issue much later. Interestingly enough, those references usually come in the form of confirming that the island belonged to Korea, not to Japan. The first of the Japanese sources touching upon the island is the *Onshu Shicho Goki* (隱州親聽合記) of 1667. Though the Japanese like to make reference to this book to prove their “centuries-long” knowledge of the existence of the island, the contents of the reference is actually no more than an endorsement of the Korea's ownership of the island. The book states, "In terms of the outlook or distance, Matsushima(*) and Takeshima(●) are to Korea, as Onshu (隱州) is to Unshu (雲州) [of Japan]. Consequently, this (On)shu (隱州) shall be the north-western outer limit of the Japanese territory," admitting implicitly that “Matsushima” and “Takeshima,” as a whole, to be the outer limit of Korea. “Onshu” (隱州) is another name for Okishima (隱岐島), the Japanese island located nearest to Dokdo(*), and Unshu (雲州) is a prefecture of the Japanese main islands.

The Japanese recognition of Dokdo(*) to be Korean territory had been generally maintained up to the eve of Japan's colonization of the whole Korea. Often, the old Japanese maps also implicitly recognized Dokdo to be Korean territory by displaying the island in the section of Korean territory. Very seldom, if ever, have the Japanese maps included Dokdo as part of the Japanese territory, unless they put Ulungdo(●), the neighboring Korean island, together on these maps either for the sake of convenience or out of mistake.

In some cases, the recognition of the island to be Korean territory was more than implicit. For example, an 18th century map of East Asia drawn by a then prominent Japanese scholar, Hayashi Sahei (林子平), the territory of Japan and that of Korea were painted in green and yellow respectively. Understandably, Dokdo(*), along with Ulungdo(●) and other parts of the Korean territory were painted yellow, and to make things clearer, the text: "These two (islands) belong to Korea" was written explicitly on the map next to the two islands. On another map titled *The Territory of Korea* (朝鮮國全圖), published in 1894 by Hakumonkan Publishing Company (博文館) of Japan, Dokdo(*) and Ulungdo(●), along with other Korean lands were painted yellow, whereas Japanese islands were all painted white.

From time to time, some Japanese sources took Dokdo(*), along with its neighboring island, Ulungdo(●), for Japanese territory. But these “mistakes” were usually committed by the private or civilian sector, and seldom, if any, by public officials of Japan. The fallacies in these sources can be easily inferred, inter alia, from the fact that Ulungdo(●), owned by Korea throughout its history and never by Japan, was also erroneously depicted as a Japanese island together with Dokdo. Once Ulungdo was mistaken for a Japanese island, it was a matter of inevitable course that Dokdo should be also mistaken for another Japanese island, because Dokdo is geographically located towards Japan from Ulungdo. Moreover, Dokdo(*) was usually considered subsidiary to, or part of, Ulungdo(●). It is noteworthy that these old Japanese maps reflected the deep-rooted concept of the Japanese people about the relationship between Ulungdo(●) and Dokdo(*) that they cannot belong to separate countries. The Old Korean maps showed no difference in this aspect. The only difference was that these Korean maps were consistent in depicting the two islands as belonging to Korea, and never to Japan.

Though there was a very short period of conflict between the two countries over the ownership of Ulungdo(●) at the end of the 17th century, the Japanese Government had soon
confirmed the traditional ownership of the island by Korea and had to commit to prohibiting its people from approaching Ulungdo (1696). Since then, the Japan Government had never claimed the ownership of Ulungdo again. When the Japanese Government found its injunction violated by its people, Japan honored its commitment to the Korean Government, sometimes by punishing or executing the Japanese violators and sometimes by withdrawing those people by force from the area. At one stage, a protest from the Korean Government against the illegal sojourn of some Japanese people on the island led the Japanese Government to apologize to its Korean counterpart and immediately withdraw all 254 Japanese people on the island (1883).

The archives of Japan's Ministry of Foreign Affairs include a document of 19th century that is titled *The Circumstances in Which Takeshima(*) and Matsushima(*) Have Become Korean Territory*. This document was prepared by three officers of the said Ministry who had been sent to Korea to investigate the details of the circumstances specified in the title of the document (1869).

In 1877, while Japan's Ministry of Internal Affairs was preparing the land register for the entire country, it enquired the local government of Shimane-ken, the nearest prefecture to the island, about the status of “Takeshima”(*) and “Matsushima(*)”, and was duly informed by the latter that both islands belonged to Korea. Considering the important character of making a decision on the scope of the national territory, the said Ministry referred the matter to the Office of the Premier (太政官). Responding to this, the Premier's Office explicitly endorsed the opinion of this Ministry that both islands belonged to Korea. Thus, the conclusion was unanimous among all of the Japanese government authorities involved: the local government of Shimane-ken, the Ministry of Internal Affairs and the Premier's Office. Furthermore, when the Ministry of Internal Affairs referred the decision of the Premier's Office to the Ministry of Foreign Affairs in 1881, the latter found no reservations to it, let alone objections. And around the same time, at the filing by some Japanese of the applications to “develop” Takeshima and Matsushima, a Director-General of the Japan's Ministry of Foreign Affairs, Tanabe Taiichi (田邊太一), commented, "Matsushima is a Japanese name, but actually it designates Usan(*) which is part of Ulungdo(●) of Korea." Subsequently, the applications were turned down.

In 1903, when a Japanese fisherman named Nakai Yosaburo (中井養三郎) wanted to trap seals near “Takeshima(*)”, he decided to "file a relevant application not with the local government but with the central government, because he knew that Takeshima belonged to Korea." He expected the central government to exercise some influence on Korea and obtain the appropriate permission for him. Therefore, he filed the application with the Ministry of Foreign Affairs as well as with a couple of other concerned Ministries of the central government. However, the fisherman was pressed by a navy executive officer, Kimotsuki Keneyuki (肝付兼行), to change the description in the application from "Korean Territory Takeshima" to "terra nullius Takeshima." The involvement of a high-ranking Navy Officer in the case implies that, at the height of Japan's war against Russia, the Japanese Navy saw the strategic worth of the island and was looking for a pretext to take over the island from Korea.

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2 This fact is recorded in *Shimane-ken-shi(島根縣誌)* of 1923, a Japanese compilation of regional affairs of a local prefecture in charge of Takeshima(*) since the “incorporation” of the island by Japan in 1905.
Upon accepting the above-mentioned application of the fisherman in September 1903, the Japanese Government sent a warship to investigate the situation of the island. However, the government received a report that tens of Koreans were fishing around the island and thus did not approve the application. If Japan had believed, rightfully or erroneously, that the island belonged to it, the warship would have either evicted the Korean fishermen from the site or at least requested them to withdraw from its territory. Since the Japanese knew that the Koreans were fishing outside of the area under Japan's jurisdiction, or more probably that they were fishing in their own territory, the officers on board the warship decided that they had neither the right nor responsibility to take measures against the Korean fishermen. The Japanese Government in Tokyo did not feel that there was a violation on its territory, but instead, it was planning to take the island over from Korea soon. The final approval of Yosaburo's application came in February 1905, just after the Japanese Government had formally ‘incorporated,’ or colonized, Dokdo.

The circumstances of the confusion about the names for both islands and of the ultimate switching of the two names on the part of Japan is another definitive evidence that Japan had no animus in the ownership of Dokdo. Japan admits that “Takeshima”(*) was formerly called “Matsushima” and vice versa until the first half of the 19th century. From around the mid-19th century through the beginning of this century, there has been much confusion about the nomenclature of the two islands.

The Japanese usually explains that this confusion was brought about after a European cartographer had mistakenly switched the two names in putting them on his new map. Could this have happened, if the Japanese had really believed that one of the islands was their own while the other belonged to Korea? Evidently, the Japanese must have thought that the two islands shared the same status concerning their ownership, but they clearly knew that the bigger of the two islands belonged to Korea. Then what would the confusion signify? The ultimate settlement by the Japanese Government further betrayed its belief that neither islands belonged to Japan by that time. In order to shake off the decades-long confusion, that Government finally decided to switch the names considering the general practice of the time.

Certainly, Japan did not mind exchanging of the names of the two islands, because it believed that maintaining the correct names for the islands was none of its concern, while neither of the islands belonged to it. If the Japanese Government had, whether rightfully or erroneously, the slightest notion that one of the two islands was its own, it would have been unimaginable for it to decide to switch the name of its own island with that belonging to a neighbor country. That would be no more likely than for a person of sound mind to decide to switch the name of his own child with that of a neighbor child, simply because a passerby mistakenly switched the names of the two children in calling them.

The last, but not least, disclaimer by Japan of any historical title to “Takeshima”(*) is found in its own incorporation measures over the island. In 1905, the Japanese cabinet decided to annex the island to the Japanese territory, declaring that the island had been a terra nullius appropriate for acquisition by occupancy. It goes without saying that Japan used the tactics of the European colonial powers in taking possession of the territories of other countries.

Notwithstanding, even imperial Japan at the peak of its colonialism did not dare to go so far as to claim that the island was part of the Japanese inherent territory. Instead, it had to resort to a fiction of its own creation that the island, that’s existence had been very well-known to
itself as well as to Korea for centuries, abruptly turned into something which was “up for grabs” by any country at the beginning of this century, as if it had been a terra incognita.

4. Japan's Incorporation Measures of 1905

On the question of the legal effects of the colonial occupation or the so-called “possession of a terra nullius,” Korea's position is simple and clear, that is, the measures based on colonialism should be treated as null and void, regardless of whatever the lege lata (existing law) says. It is inter alia this position on colonialism that prevents Korea from agreeing to the judicial settlement of the case through the ICJ which is likely to apply the lege lata. The appropriate law to be applied in this case would be the lege ferenda, the law reflecting the spirit of the law - justice, fairness and equity, thus drawing support of the newly independent countries as well as others. What are the circumstances in which Japan 'incorporated' Dokdo in 1905? Why has Korea continuously insisted that Japan's incorporation measures were no more than an implementation of Japan's colonialism on Korean territory?

On January 28, 1905, the Japanese Cabinet decided: “As there is no evidence to recognize that the uninhabited island … has been occupied by any country, the island shall be incorporated into the Japanese territory and shall be under the control of the local government… The island shall be called Takeshima.” The public notice of the incorporation of the island into a Japanese prefecture was posted by the local government concerned on February 22 of the same year. In order to take possession of the island from Korea, Japan decided to fabricate the notion that the island is a terra nullius, therefore free to take by any country up to that time.

As was explained before, these measures of the Japanese government were triggered by the filing of the application of a Japanese fisherman to get permission to undertake seal-trapping business at Dokdo. According to the Japanese sources, he filed the application with the central government, because he knew that the island belonged to Korea and expected that the central government would be able to exercise some influence on the Korean Government in obtaining the appropriate permission for him. Anyway, it would have been impossible for him to get such permission from any Japanese local government, because there was no local government in charge of the island that did not belong to Japan. Later, he was pressed by a navy officer of his country to change the description "Korean Island Takeshima" in his application to "terra nullius Takeshima." The Japanese Government held the application pending for as long as one whole year and a half until it finally colonized Dokdo.

While Korea strongly objects to granting any legal effects to the Japanese incorporation measures, Japan argues that she legitimately acquired the ownership of the island through those measures, “though the island had already been inherently Japanese territory on the basis of historical title.” According to Japan, Korea was still an independent country at the time when Japan took the measures; therefore, Korea should have protested to the Japanese measures, if it had had any objections to the measures.

However, what Japan insists is equivalent to saying that even a person critically injured by a burglar has to take responsibility for his failure to stop burglary, so long as he is still breathing. Put it in another way, the unrepentant Japanese can be compared to a burglar who has broken into a house, stabbed the householder almost to death, took the property in the
house, and then later insists, "I never took the property by force. I just picked it up which belonged to nobody. If somebody had objected to my taking the property, he should have stopped me. As he did not do so, it legitimately belongs to me!"

The colonization of a country is, so often, not a momentary step but a long process that takes years. The colonization of Korea by Japan was no exception. Though Japan took the final step of colonizing Korea in 1910, the process had started many years before. For example, in October 1895, i.e. twenty years before Dokdo was taken by Japan, a gang of Japanese ruffians who were instigated by their government ransacked the Korean royal palace and brutally murdered the Korean Empress with impunity. The Empress, who was considered to be a major obstacle to implementing Japanese colonialism on Korea as well as the most influential figure in Korean state affairs at that time, was stabbed and burned to death by the Japanese. There was nothing the Korean Government could do to punish these criminals who were protected by the Japanese Government. Instead, the Korean Emperor himself had to flee from his own palace to seek asylum at a foreign legation in his own capital and escape from the imminent danger of being slain by the Japanese (1896).

By the time Japan took Dokdo, Korea was a colony of Japan in everything but name. In the year preceding the incorporation measures of 1905, Japan had, by threat of force, compelled Korea to agree, *inter alia*, that any part of Korea's territory could be occupied by Japan for strategic purposes, and that on diplomatic, financial and other important matters Korea should “take advice” from the Japanese and other foreigners who were installed by the Japanese Government. Not only was the legal justification provided for whatever political and military actions Japan would take in Korea, but the actual administrative authority had already passed into the hands of Japan. It was only the fear of drawing the intervention of other foreign powers that deterred Japan from completely overtaking Korea. The time was perfectly ripe for Japan to take from Korea, without much disturbance, a small island which was least likely to draw the attention of the other powers that were interested in the Korean affairs.

In the same year that Japan took Dokdo from Korea (1905), the Japanese prime minister met with the U.S. Secretary of War and received U.S. recognition of Japan's interests in Korea in return for Japan's promise not to interfere with U.S. rule in the Philippines. A similar agreement was reached with Britain in exchange of Japan's promise to support the British rule in India. Russia also conceded its political, military and economic interests in Korea to Japan after its military defeat in the Russo-Japanese War. Korea was formally turned into a protectorate of Japan. All of these events took place in the same year that Japan took Dokdo from Korea.

Even at this stage, Japan was wary that the dying householder might make a last desperate attempt to protect his own property, thus disrupt the former's scheme. The Japanese Government delayed the notification of its incorporation measures to its Korean counterpart for over a year, until after Korea had finally turned into a Japanese protectorate and Korea's Ministry of Foreign Affairs had been completely dismantled. This notification again took a bizarre form. It was the local governor of Ulung(●) County, who was not in a position to make any formal communications with the central Japanese Government, that was first informed by a group of visiting Japanese Government officials of the Japanese incorporation measures of Dokdo(●), and that in a very casual way. Thus, Japan notified the incorporation
measures to Korea only after the latter was rendered a non-entity under the international law, and in a form hardly to be called a formal notification.

Notwithstanding, the reaction of the Korean governor who was stunned at the egregious utterance of the visiting Japanese eloquently reflects the animus of the ownership the Koreans had over the island. He immediately reported to the central government: "Dokdo has been part of this Ulung County. But a group of Japanese Government officials came to this county on the fourth of this month, saying: 'The purpose of our visit is to see Dokdo which has become Japanese territory.' Investigations of the case are strongly suggested." However, the central government of Korea, under the "protection" of Japan, was not in a position to protect a remotely located, tiny island from the avarice of Japan, its "protector." It was just a matter of time before the whole country would be taken over by Japan. Thus, Maechon Yarok (梅泉野錄), a diary-form historical record of the final days of the last Korean Dynasty, written by a Korean historian, contains an entry in the section of "5 April 1906" that reads: "Dokdo used to be part of Ulungdo, but Japan took it by force."

It is noteworthy that the Japanese recognition of Dokdo as part of the Korean territory was so deep-rooted that, even after the incorporation measures by the Japanese Government, some Japanese sources kept on treating the island as belonging to Korea. For example, New Geography of Korea (韓國新地理), written by a Japanese scholar Tabuchi Tomohiko (田淵友彦) and published half a year after the incorporation measures, clearly described Liancourt Island as belonging to Korea. "Liancourt Island" is another name of Dokdo commonly used outside of Korea and Japan.

Also in 1930, Hibatake Sekko (桶畑雪湖), in a thesis entitled The Japanese-Korean Relations over Takeshima, which was in the Japanese journal, History and Geography (歷史地理), stated: "Takeshima(●) and Ulungdo(●) belong to GangWon Province of Korea, and they constitute the eastern outer-limit of Korea." Twenty-five years after the Japanese incorporation measures, this Japanese scholar still believed that the island belonged to Korea. Again in 1935, Shakuo(釋尾), a Japanese historian, stated in a book on Korea and Manchuria: "the eastern outer-limit of Korea is Ulungdo(●) and Takeshima(●)." No reservations were expressed about the above-mentioned statements by any other Japanese scholar or by the Japanese Government at the time.

Sometimes sources prepared or approved by the Japanese Government itself also referred to the island as belonging to Korea, or at least implied this. The Japanese History and Geography (日本歷史地理) of 1933, which was approved by Japan's Ministry of Education as a textbook for high school students, described Takeshima(●) as part of Korea. Japan's Ministry of the Navy included a detailed description of Takeshima in The Hydrography of the Korean Coast (朝鮮沿岸水路誌) without putting the same description in the equivalent edition on Japan. The latter, which was titled The Hydrography of the Honshu Coast (本州沿岸水路誌), only referred to the name of the island without giving any further details. These two publications were prepared simultaneously and published in 1923.

Against this backdrop, it was out of common sense that the Allied Powers, after World War II, decided to exclude the island, along with Ulungdo(●) and other Korean islands, from the area over which the Japanese Government could exercise its administrative authority (SCAPIN 677, 29 January 1946).
5. Conclusion

As mentioned above, Japan argues that Dokdo has been part of the Japanese inherent territory based on the historical title, but as an alternative argument, it contends that the island became Japanese territory by its incorporation measures of 1905. These two arguments of Japan are completely contradictory to each other and therefore incompatible with each other. By claiming that, on the one hand, the island had been a *terra nullius* in 1905 and consequently appropriate for acquisition, and on the other, that it had been Japan's inherent territory before acquisition, Japan is virtually asserting that the island which had been a *terra nullius* in 1905 turned into "inherent" Japanese territory from time immemorial. What Japan actually implies is: "No matter what, the island should belong to Japan. Any and every burden of proof shall be shouldered on Korea." Thus, Japan picks a quarrel on the one hand, and keeps the door for its settlement closed on the other.

One can easily assume that, since Japan realizes that its claim of the historical title to the island has little ground to stand on, it feels that it needs another tenet to rely on: the colonial theory of acquisition of a *terra nullius*. However, Japan certainly realizes that it would be hardly tenable to claim that an island, located within a visible distance of another Korea island had been "up for grabs" for any country until 1905, as if it had been a *terra incognita*. Therefore, Japan must be finding it inevitable to hide again behind the hypothesis that the island has been part of the Japanese inherent territory based on the historical title.

Korea finds it hard to believe that a tiny island it has owned from time immemorial needs a decolonization process that is separate from the one for the rest of its territory, simply because that small island was annexed to Japan five years earlier than other parts of the Korean territory. Neither do the Koreans find the contentions of the Japanese government coherent or plausible. Therefore, the Koreans assume that the cause of the dispute is not an innocent misunderstanding on the part of the Japanese Government but its malicious longing for "the glorious past of Imperial Japan." In order for Japan to appear sincere in the claim of ownership of Dokdo, it must stop equivocations and should demonstrate coherence as to what is the genuine ground upon which it claims the ownership of the island.

If Japan decides to claim that it acquired the ownership of the *terra nullius* Dokdo based on the incorporation measures of 1905, then it would have to abandon the incompatible argument of the historical title and instead prove in a convincing way that the measures taken on the eve of the complete colonization of Korea were innocent ones that had nothing to do with its colonial policies on Korea. Japan would also have to explain plausibly why its predecessor governments and civilians usually “mistook” the island as belonging to Korea, and why it had avoided annexing the island into the Japanese territory until the beginning of this century, notwithstanding its centuries-old recognition of the existence of the island located not far from its other islands. It goes without saying that the position of Japan cannot stand even if all these requirements are satisfactorily met, once the island is found to be a non-*terra nullius* by 1905, i.e. by the time Japan took the measures.

Then again, if Japan believes that its historical title to the island dates back well before 1905, it has to make its position clear since when it believes it has had the ownership of the island, and on what grounds and official sources that belief is based. Japan would also have to explain why so many Japanese sources declaring that the island belonged to Korea, not to
Japan are not to be trusted. It would be also inevitable for Japan to explain why its former governments had committed the “blunders” of treating the island as a non-territory of Japan and decided that incorporation measures were inevitable. Prior to all these, the current Japanese Government must ask itself if it is not in a fallacy when it believes something that its predecessor governments had not believed.

The Japanese Government often bases its argument of the historical title on some old Japanese maps which depicted Dokdo(*) as belonging to Japan. However, it should heed to the fact that, as a rule, Ulungdo(●) as well as Dokdo(*) were depicted as Japanese territory on these maps. That is to say, the mistake on the status of Dokdo was no more than a corollary of the misconception on the status of Ulungdo: geographically Dokdo is located between Ulungdo and the Japanese islands, and conceptually Dokdo has been considered subsidiary to, or part of, Ulungdo. Until recently, it was very hard for both the Japanese and the Koreans to imagine that the two islands could belong to separate countries. Virtually all of the old Japanese maps depicted both islands together as Korean territories or, in case of fallacy about the ownership of Ulungdo, together as Japanese domain. If Japan would like to claim that Dokdo belonged to Japan on the basis of old Japanese maps, it would be inevitable for Japan to present those old maps which depict Dokdo(*) as Japanese while showing Ulungdo(●) rightfully to be Korean, without making a mistake on the status of the latter.

The Japanese Government sometimes bases its claim of the historical title on the past fishing activities of some Japanese fishermen around the island. However, even under the international laws of the colonial era, the activities of some private people did not bring a legal title for acquisition of territory for the country those people are affiliated with. Moreover, as the Koreans believe, the island has been part of the Korean territory, and the fishing activities of the Japanese fishermen were no more than illegal activities within Korean territorial boundaries. Some Japanese fishermen's illegal fishing activities around Dokdo cannot turn the island into a Japanese territory, any more than can similar activities around Hawaii can turn this island into Japanese territory.

Until Japan meets the basic requirements of presenting its position in a plausibly coherent and unambiguous way, Korea finds it hard to believe that there is a genuine territorial dispute over Dokdo substantial enough to be submitted to a third party. In addition, if Japan sincerely believes that there is really a case to be settled against Korea, and that the case has to be settled amicably, it has to be ready to show flexibility on the means to settle the case. Japan has steadfastly insisted on the settlement of the issue solely through the ICJ. Korea has rejected this and suggested other means instead. As explained before, Korea does not consider it appropriate to blindly apply *lege lata* to this case if this *lege lata* contains obsolete rules reflecting the interests of the past colonial powers at the expense of their former victims. It has to be borne in mind that the ICJ is not necessarily enjoying the confidence of countries when conservatism is not deemed desirable. At the Third UN Conference on the Law of the Sea, most of the countries of the world had agreed to establish a permanent court as separate from the ICJ to handle maritime issues. They decided this even at the apparent risk of weakening uniformity of international jurisprudence because of the greater concerns about the conservativeness of the ICJ.3

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Moreover, Korea finds the ICJ option still less preferable in this specific case against Japan because of the composition of the court. Not only are there many judges who are from former colonial powers seated on the ICJ, but Japan has virtually had a standing judge of Japanese nationality seated in the court whereas Korea has had none. It is interesting to observe that Japan avoids or even objects to submitting other territorial disputes involving itself to the ICJ. In the dispute against China over the Diaoyutai/Senkaku Islands and the case against Russia over the four islands located between Japan and Russia, Japan did not show any willingness to settle the case through the ICJ. This self-proclaimed adherence to the ICJ is actually proposing settlements of disputes by the court only when the composition of the court is expected to work explicitly in its favor.

Perhaps Japan cannot afford to run a risk of losing what it believes is its own territory by the judgment of the ICJ. It is noteworthy that this is consistent with Japan’s attitude, even when an equal basis against the other side is assured. Would this not mean that Japan is insisting on judicial settlement of the case, simply because it clearly knows that it has nothing to lose in this case, whatever the final decision of the court may be? Then why should Japan expect Korea to agree to run a risk of losing what is undoubtedly its own land by an ICJ decision, and that, certainly on an unequal basis? By claiming something unconvincing on the one hand, and by insisting on the settlement of the ensuing conflict through the very means that the counterpart would never accept on the other, Japan is actually aiming at perpetuating a non-issue as an issue.

The Koreans are confident that Korea would not have much difficulty in winning the case against Japan over the ownership of Dokdo, only if there is an assurance that legal effects of the colonial occupations will not be granted. Of course, an assurance of impartiality in the handling of the case will be an absolute necessity. The Koreans assume that Korea will easily win the case even at the ICJ, in spite of all the disadvantages it will have to take, because evidences are overwhelmingly in its favor. However, they object to taking a risk, if that risk is unjustifiably inflated. They also find that the risk they have to shoulder by submitting the Dokdo case to the ICJ is certainly bigger than justifiable because of the limitations of this court in terms of its composition and the laws that would be applied.

To Korea, the stake in the case is not simply the ownership of one of its thousands of islands but a symbol of its national independence, and that from Japan. As the Koreans vividly remember, Japan first took Dokdo from Korea, calling the island a terra nullius, and then laid claim to the whole territory of Korea, as if the entire peninsula had been a terra nullius. Now, with deep concerns and indignation, the Koreans again observe Japan coveting Dokdo, this time calling it inherent Japanese territory instead of a terra nullius. The Koreans observe some similarities between the Japanese contentions over Dokdo and the ridiculous sophistry of an impudent kidnapper illustrated at the beginning of this essay.

This is an era in which governments are strongly urged to settle all disputes peacefully. Japan seems to grossly misinterpret or distort this message by claiming that Korea has to agree to submit the so-called “Dokdo dispute” to the ICJ. As the Koreans believe, the message of urging peaceful settlements of disputes does not mean that Japan may start a conflict at discretion and insist that the “dispute” should be settled by the very means that Japan favors. In order for a country to be respected as a mature member of the international community, it must be ready on its part to respect the legitimate rights of others. The avoidance of starting
gratuitous trouble or conflicts comes prior to peaceful settlements of disputes. And, if a country should unavoidably accuse another country of violating its rights and contend that there is a dispute to be settled, it is natural that the claimant should present its position in a sincere and convincing way for the other side and other members of the international community to comprehend. Coherence of the claims in substance and consistency in the favored means for settlements of similar cases would be a basic requirement. In the case of Dokdo, however, Japan seems to have failed in meeting these fundamental requirements.

Japan must ask itself what would be the cause of its dilemma of claiming something on one side and being unable to prove it on the other. More specifically, Japan must ask whether or not it is the lack of courage of admitting its fallacy rather than the lack of evidence that is the cause of all the problems. Japan would also do well to consider more seriously what has made it virtually a unique country in this world in having territorial frictions with all the neighboring countries: Russia, China (and/or Taiwan) and Korea. On the one hand, Japan is not ready to give up what it has acquired at the point of a bayonet as can be seen in the Dokdo case. On the other, it claims that the so-called “Northern Islands” should be returned to Japan because Russia took it from Japan by force. It is no wonder that no country in the neighborhood of Japan can avoid territorial conflicts with the latter!

To make things worse, whenever there are specious occasions, the Japanese Government seems to have no qualms about aggravating conflicts by misinforming its people that something important is at stake. For instance, on the occasion of the impending full-fledged implementation of the Exclusive Economic Zone (EEZ) in 1996, the Japanese Government aired a possibility of employing the uninhabitable Dokdo Island as a base point of drawing its own EEZ. However, the UN Convention on the Law of the Sea, by which the EEZ regime is governed, stipulates: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" (Article 121, Para. 3). It is clear that, regardless of the ownership of the island, the uninhabitable Dokdo cannot bring any increased scope of the EEZ to its owner state. Therefore, it was difficult for an outsider to grasp the genuine intention of the Japanese Government. To ordinary Koreans, the attitude of the Japanese Government looked like that of a brazen-faced culprit who was claiming childcare benefit for a neighbor’s still-born baby, and that, at the office of that neighbor who happened to be in mourning as the expected father of the baby. Perhaps the self-styled law-abiding Japan did not intend to violate the hard-bargained international agreement willfully. Then Japan is at least suspected of having seized the opportunity to highlight the Dokdo issue by fanning the national sentiment of its people based on a sense of profits domestically.

In conclusion, Japan seems to need a refreshed self-adaptation to this new era in order to live with other countries, not just without armed conflicts but more amicably. (May 1996)