

# Japan's Legal and Historical Claim to Takeshima/ Liancourt Rocks (Part II)

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## 竹島（リアンクール岩）に対する日本の法的・ 歴史的主張の再検討（II）

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The Dynasty of Korea changed its formal name of State into the Empire of Great Korea on 12 October, 1897. Article 2 of the 1900 Imperial Ordinance (No.41) stipulated that the whole Island of Ulleung (鬱陵島), 'Takeshima' (竹島) and Tolsom or Tokdo (石島) should be placed under the jurisdiction of the newly appointed Governor of Uldo county. The island 'Takeshima' in this Imperial Ordinance is identified as a nearby habitable islet called Boussole Rock (竹嶋 Jukdo; 竹嶼 Jukseo) on the north-eastern offshore of the main island of Ulleung, while Tolsom or Tokdo (石島) still remains unidentified.

Some historians both in Korea and Japan assert that this Tolsom (Tokdo) is nothing but Dokdo on the presumption made from the linguistic identity and geographical proximity.<sup>1)</sup> Although it is easy to see why most of the general public in Korea have accepted such presumption, Japan's position is that, even if Tolsom (Tokdo) should be today's Takeshima (Dokdo), it would be no sufficient proof in law to only invoke the fact that Korea made a law or ordinance for including the disputed island in the domain under Korea's jurisdiction without attempting to patrol Tolsom (Tokdo) or conduct any on-the-spot survey or inspection in advance or *ex post facto* as a sovereign. It might be incapable of proving sovereignty to plead for a general belief in sovereignty or having a continued but vague knowledge based on the historical documents and maps. However, it is to be noted that, by means of the 1900 Imperial Ordinance, Korea argues, it intended to 'reaffirm its inherent sovereignty over today's Dokdo', as Japan also did later on in 1905, and not to incorporate Tolsom (Tokdo) into the territory of Korea by *occupatio* of terra nullius by that Imperial Ordinance.

### III. Japan's Cabinet Decision of 28 January 1905

#### (i) *Japan's official position on the circumstances in which Japan's incorporation of Takeshima was initiated*

In 1903 an entrepreneur residing in Shimane Prefecture called Yozaburo Nakai made an attempt to catch sea lions (*zalophus*) at Takeshima (Liancourt Rocks). Although the achieved catch, indeed, was not necessarily as much as he had expected, he managed to reach an improved plan of catching in 1904, together with sales routes for skin of sea lions as a substitute product for cows' leather, sea lions' oil for whales' oil and their ground meat and bones for good fertilizer. However, Nakai himself, on the first place, might have believed that Takeshima was *Korean* territory<sup>2)</sup> on the navigational route to and from Ulleungdo, and he was also concerned about the future situation of an excessive competition among Japanese fishermen. This led him to go to Tokyo for pleading leasehold of Takeshima for ten years, and he consulted with some bureaucrats at the Ministry of Agriculture and Commerce who had the same roots in Shimane, met Bokushin Maki, a high official of Naval Hydrographic Department and Enjiro Yamaza, Director General of the Political Bureau, the Ministry of Foreign Affairs. Meanwhile, it appears that he was informed that it was not clear to which country Takeshima did appertain. Then, Nakai presented a formal petition to the Japanese Government for not only the ten-year lease of Takeshima but also the incorporation of the Island by the Government.<sup>3)</sup>

Considering Nakai's petition, the Minister of Interiors enquired for an opinion of Shimane Prefecture, and the Prefecture itself sought an opinion of the Oki Island Administrator, who returned an advisory opinion that 'it would be preferable to name the island "Takeshima"', converting a nickname of Ulleungdo among the local Japanese fishermen to the name of Liancourt Rocks because Ulleungdo was already named Matsushima in charts of western countries (although Matsushima had been long used more broadly in the Yedo period of Japan for Liancourt Rocks). Looking back from today, it would have been ill-advised to exchange island names this way only for expediency. Unfortunately this culminated in increasing subsequent misunderstandings about the island name of Takeshima both in Japan and Korea.

In the following year (28 January 1905), Japan's Cabinet of Ministers decided on the incorporation of Takeshima/Liancourt Rocks as follows:

[The Japanese Government,]

Considering the request from the Minister of Interiors regarding the possession of an uninhabited, desert island (attachment), in which it is mentioned that, whereas there is no evidence that any other State has occupied the island concerned, and

*Whereas* in 1903, two years ago, Yozaburo Nakai, a Japanese subject, built a fishery hut,

despatched his fishermen, with fishing equipment installed there, and embarked to catch sea lions, and on this occasion made a petition for the territorial incorporation and the granting of the leasehold over the island, ...

*Whereas* the Minister of Interiors, on this occasion, as it is necessary to give it the name of an island, intends to designate it as Takeshima and, from the present onward, put it in the possession of Shimane Prefecture, placing it under the jurisdiction of the Oki Island Administrator,

*Considering* that, as it is clear from the relevant documents, since 1903 a subject called Yozaburo Nakai has moved onto the island concerned and engaged in fisheries,

*Regarding it as the fact tantamount to occupatio*, incorporate it into our nation's territory and put it in the possession of Shimane Prefecture, placing it under the jurisdiction of the Oki Island Administrator; ...<sup>4)</sup>

In passing, as discussed later in Appraisal I, despite the above-underscored wording ‘*occupatio*’ of this Cabinet Decision, the Japanese Government somehow appear to cling to its official position that it only reaffirmed its inherent sovereignty over Takeshima since the Yedo period by that Cabinet Decision in accordance with modern international law.

Needless to say, Korea's position is that Dokdo has been long since its intrinsic territory. It claims that, even if Japan's annexation should be based on *occupatio* of terra nullius, such *occupatio* without notification to Korea had no effect, while Japan asserts that, having already acquired the original, historical title to Takeshima early in the Yedo period, Japan reaffirmed its intention to occupy it in accordance with modern international law and made it known to the public; that it was a lawful measure to incorporate territory by a Cabinet Decision with a notification issued by the Prefecture concerned, which followed the then Japanese practice on territorial incorporation, such as the precedent of incorporating Minami-torishima (Marcus/Weeks Island) in July 1898; and that, at the time of Japan's incorporation and before that, Takeshima had not ever been Korean territory, and the formal notification to the States concerned was not required to be made in then customary international law and practice. The point is that there has been neither ‘actual occupation’ (such as regular patrol or any exercise of law enforcement) nor replacement with any conclusive title on the part of Korea.<sup>5)</sup>

The Minister of Interiors instructed the Governor of Shimane Prefecture to issue a prefectural notification, and the latter issued the notification No.40 (22 February 1905), a remaining copy of which stated:

It is notified that an island 85 miles to the west-north of Oki Islands, located at 37 degrees, 9

minutes and 30 seconds (Latitude North), 131 degrees, 55 minutes (Longitude East), has been named Takeshima, and that from now onward it is placed under the jurisdiction of the Oki Island Administrator in the possession of this Prefecture.<sup>6)</sup>

After that, a survey on area and charting of Takeshima was conducted on the instruction from the Governor of Shimane Prefecture. On this survey, for the first time, the Prefecture registered it as state property in the Land Registry. Moreover, in April 1905, the Prefecture revised fisheries regulations to introduce a licensing system about sea-lion catching and in June it gave permission for fisheries to Nakai's Takeshima Fisheries Company, Ltd. In the following year, a five-year lease of Takeshima was authorised to that Company.<sup>7)</sup> That was all after the sea battle offshore of Tsushima (27-29 May 1905) between the Japanese and Russian fleets was won by the Japanese Navy. It is wondered whether it was a real reason for the formal incorporation of Takeshima to authorise Nakai, a private citizen, to engage in catching sea lions and lease it to him, while Japan was faced with the Russian war, the Baltic fleet seafaring near Japan. It might be worth examining the national security issue on the Japanese side at the time.

(ii) *Japan's real motives for incorporation (presumed): naval strategic purposes and national security, establishing a watchtower with wireless or submarine cables, and preparing for a predicted sea battle off Tsushima during the 1904-5 Russo-Japanese War*

Although the Japanese Government have never mentioned this point, it is very difficult to think that Japan really incorporated Takeshima only as a mere step for authorising a private person to lease it from the Government and engage in catching sea lions, while Japan itself faced a moment of crisis of national security relating to a predicted sea battle with Russia's Baltic Fleet in the Japan (or Eastern) Sea in Spring 1905. It is often pointed out that Japan's motives for annexation of Takeshima included its military value for the purposes of thereon building a watchtower, with wireless apparatus, covering the movement of the Russian squadrons or firmly inhibiting espionage for Russia. And, for this purpose, it has been argued or understood that Dokdo became the first concrete victim territory of Japan's imperialism and colonisation of Korea.<sup>8)</sup> Although it is for sure admitted that Japan's incorporation of Takeshima was made on the background of an already initiated plot or process of subjugation and colonisation of Korea and so there was some relevance on the incorporation (as discussed in detail below), however, the former is to be distinguished in law from the latter.<sup>9)</sup> It is worth noting that, although it was true that Japan's real motive for incorporating Takeshima was presumably for purposes of secret preparations for building a watchtower with submarine cables or wireless facilities, it would not necessarily follow that such strategic and national security considerations could prove Japan's first attempt to annex Korean territory in

accordance with its colonialism, for it still remains to see whether or not Takeshima might have been *terra nullius*, as well as whether or not it was Korean territory.

From a perspective of Japanese academics, it could be presumed that, as far as Takeshima was concerned, by utilising a plea from a private person for the incorporation and lease of Takeshima, Japan succeeded both in incorporating it as *terra nullius* and covertly establishing a watchtower with wireless apparatus for military and national security's purposes, although it was in August 1905, almost three months after the sea battle off Tsushima, that the watchtower was in reality built and put into use.

On 30 May 1904, before the 1905 sea battle off Tsushima, the Japanese Navy decided on the original plan for establishing a wireless station on Matsushima (so the Japanese Navy called Ulleungdo at that time), a provisional watchtower on the Korean mainland and submarine cables to and from the Liancourt Rocks (so the Navy called Takeshima).<sup>10)</sup> In fact, Russia's Vladivostok Fleet later used this sea route and destroyed lots of Japanese troopships and supply ships around Tsushima. On 5 July 1904 the Navy changed its plan, including adding one more watchtower on Ulleungdo.<sup>11)</sup> It appears that the planned watchtower on Liancourt Rocks was for the time being postponed because of difficulty in natural conditions for effective use.

On 15 October 1904, the Baltic Fleet started navigating from Ribau for Lüshun. Battleship Tsushima surveyed Takeshima for inspection on the possibility of routing submarine cables and found it still difficult to implement the original plan on account of its natural impediments. So, a provisional watchtower had not been established on Takeshima until after the sea battle off Tsushima of May 1905. In June, after that sea battle, Battleship Hashidate inspected Takeshima about natural conditions again, and in July 1905, the plan for building a watchtower on Takeshima was implemented. The watchtower on the east island of Takeshima was built on concrete and brick with logs, having wireless apparatus.<sup>12)</sup> On 19 August 1905, the facilities started to be utilised. In consequence, the original plan for establishing submarine cables to and from Takeshima was given up because of a great difficulty in maintaining lines.<sup>13)</sup>

As for the watchtower itself on Takeshima, in July 1906, the Navy sold the provisional watchtower to Yozaburo Nakai.<sup>14)</sup> Subsequently, in 1933, it is said that the watchtower was destroyed by Shotaro Hamada for the use of building log huts.<sup>15)</sup>

(iii) *the 1906 Report by Shim Heung-taek (沈興沢), Governor of Uldo county*

After Japan's incorporation of Takeshima, Matsunaga, Governor of Shimane Prefecture, inspected Takeshima in August 1905. In the following year, when Korea's right to diplomacy had been already under Japanese protection in accordance with the second Japanese-Korean Convention of 17 November 1905, Kaminishi, Head of the Third Department, together with specialists of fisheries,

agriculture, public health and charting, in March 1906, visited Takeshima and went on to Ulleungdo to greet Shim, Governor of Uldo county, saying: ‘Your island, and Takeshima over which we have jurisdiction, are very near between… I would be obliged if you could provide kindness for all.’ This was *de facto* notification to the Korean authorities of Japan’s incorporation of Takeshima. According to a travelling companion, Governor Shim did not make any reference to Takeshima. However, Governor Shim conveyed a report to the Inspector-General of the mainland sub-prefecture and therein said: ‘Although Dokdo, which appended to this county, was located over 100 miles, a Japanese official and his entourage visited my office and said himself that Dokdo is now Japan’s territory and so they have visited Ulleungdo on the way from Dokdo.’ According to the survey on the Korean side, the sub-prefecture concerned submitted a report to the Korean Government, which in turn instructed the sub-prefecture to only conduct further survey.<sup>16)</sup> Judging from this, it proves that Governor Shim used the term ‘Dokdo’ for the first time; he believed in the appendage of Dokdo to Korea; but the Korean Government, for some political reason, did not appear to initiate any move to lodge protest against Japan’s annexation of Dokdo, while indeed Korea had abolished the Ministry of Foreign Affairs as a result of the above Japanese-Korean Convention of 17 November 1905 (for protection of Korean diplomatic relations with *third* States) but in theory and law at least, it is presumed that the Prime Minister of the Korean Cabinet, as deputy of the Korean Emperor, still retained its negotiatory power relating to *bilateral* relations and conventions with Japan.

IV. Cairo Declaration (27 December 1943) and Potsdam Declaratoin (26 July 1945) ; SCAPIN No.677 (29 January 1946) and SCAPIN No.1033 (22 June 1946)

At the Cairo Conference in 1943, the United States (F. D. Roosevelt), China (Chiang Kai-shek) and the United Kingdom (W. Churchill) made public a general statement regarding their military action, and it stated *inter alia*:

Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

Japan was obliged by this paragraph through its acceptance (on 14 August 1945) of the Potsdam Declaration of 26 July 1945<sup>17)</sup>, Paragraph 8 of which required that all the paragraphs of the Cairo Declaration should be implemented, and on 2 September 1945 this was all formalised in document by the conclusion of the Japanese Instrument of Surrender on the deck of USS Missouri in Tokyo Bay. Postwar Japan’s sovereignty was placed under the Supreme Commander for the Allied Powers (D. MacArthur). Thus, the future independence of Korea was reaffirmed, although the Japanese position is

that, as far as Takeshima is concerned, it, as Japan's inherent territory (or as territory appended to it by *occupatio* of terra nullius) does not fall within the realm of 'all other territories which she has taken by violence and greed'.

On 29 January 1946, however, the Supreme Commander for the Allied Powers Instruction Note (SCAPIN No.677), Paragraphs 1 and 3, directed Japan to provisionally 'cease exercising, or attempting to exercise, governmental or administrative authority over any area outside of Japan...', and separated or excluded 'Liancourt Rocks (Takeshima)' from Japan.<sup>18)</sup> But the same Instruction Note, Paragraph 6, said that '[n]othing in this directive shall be construed as an indication of Allied [*sic*] policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration.'

And, on 22 June 1946, another Instruction Note (SCAPIN No.1033) expanded the areas where Japanese were permitted to engage in fishing and whaling (the so-called 'MacArthur Line'), while the Instruction Note stated that 'Japanese vessels or personnel thereof will not approach closer than twelve miles to Takeshima (37°15' North Latitude, 131°53' East Longitude) nor have any contact with the said island' (Paragraph 3). The same Instruction Note, however, stated that '[t]he present authorization is not an expression of allied [*sic*] policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area' (Paragraph 5).<sup>19)</sup>

Although these instructions were issued by the local General Head Quarters in Japan and apparently constituted the provisional suspension of Japan's administrative power over some areas, so being no final determination of territory, it is to be noted that the US Department of State for the moment of 1946, as discussed below,<sup>20)</sup> began to prepare its early version of a draft treaty of peace with Japan on the premise that Takeshima/Dokdo be excluded from Japanese territory. It would appear that there was some confusion, or there was not enough knowledge, about Japan's colonisation process of Korea and the Island's history on the part of both the US Government and Military Head Quarters at least in those days. Meanwhile, it may be that overlapping jurisdiction had been exercised over Takeshima by the Supreme Commander for the Allied Powers in Korea and in Japan, as it is asserted that there was a map of 'SCAP Administrative Areas' (undated and from unknown sources).<sup>21)</sup> Fishermen from Ulleungdo began to engage in fisheries at Takeshima/Dokdo, while a Korean fishing vessel met with an accident with some casualties, involved in US Navy's bombing exercise on Takeshima in June 1948.<sup>22)</sup>

The abolishment of the so-called 'MacArthur Line' was directed in 25 April 1952, and, on 28 April 1952, the San Francisco Treaty of Peace came into effect, which consequently nullified those directives (or map concerned) to cease Japan's governmental and administrative authority over Takeshima.

In any case, all these provisional instructions and maps during GHQ postwar occupation of Japan are not conclusive in law, so long as they were all measures for post-war occupation of Japan, while it is extremely important to see how the 1951 Treaty of Peace, Article 2 (a), regarding the determination of



Japanese and Korean territories, should be interpreted.

V. *Japan's interpretation of the 1951 San Francisco Treaty of Peace, Article 2 (a)*

The Japan's position regarding the interpretation of Article 2 (a) of the 1951 Peace Treaty is that it should be read *verbatim*, or construed in the opposite way, as meaning Japan's non-renunciation of Takeshima because the Article concerned stipulates that Japan shall renounce 'all right, title and claim to Korea including the islands of Quelpart [Jejudo], Port Hamilton [Ge(K)omundo] and Dagelet [Ulleungdo]' only, and so Takeshima, way outside the range of those three islands, is not regarded as a renounced island.<sup>23)</sup> And the term 'Korea' therein should also be construed as the Great Empire of Korea prior to Japan's diplomatic protection (1905) or annexation (1910) of Korea, while Takeshima had been reaffirmed as, or incorporated into, territory of Japan and placed under the Oki Islands District Office, Shimane Prefecture (on 28 January and on 2 February 1905 each) before the 1905 Convention of Protection was concluded (17 November 1905).<sup>24)</sup> Moreover, in Japan's view, the term 'Dagelet' (Ulleungdo) therein should not be construed as including Takeshima/Liancourt Rocks as a dependency or integral part of the former, so long as Korea has not established in law and history that Takeshima/Liancourt Rocks was the integral part of the main Island Ulleungdo, the former being [*circa*] 50 nautical miles (92 km) far from the latter.<sup>25)</sup>

VI. *The colonisation process of Korea by Japan and the incorporation of Takeshima*

In this section, Japan's colonisation process of Korea will be summarised, looking back to several main treaties concerned from a perspective of international law. That is partly because the knowledge of the colonisation history for the period of 1904-1910<sup>26)</sup> is essential to squarely see Japan's incorporation/appropriation of Takeshima/Dokdo, regardless of their legal positions, and partly because it appears that there might be a misunderstanding in historical knowledge amongst third-State scholars that Japan's incorporation of Takeshima, no doubt, was the first-step of colonial annexation of *Korean territory*,<sup>27)</sup> although it is admitted that the incorporation was implemented, indeed, on the background of both the process of colonising Korea and the Russo-Japanese War (1904-5).

(i) *The Japanese-Korean Protocol of 23 February 1904*: In 1904, just before the Russo-Japanese War was initiated by Japan, it had negotiated with the Korean authorities to conclude a basic Protocol for preventing Korea to declare neutrality towards the forthcoming War and for making facilities and privileges provided for the Japanese forces to pass through or use Korean territory, and both States succeeded in drafting three articles of a Protocol on 20 January 1904.<sup>28)</sup> Soon after that, through the political turmoil within the Korean Government, the Emperor of Korea declined to give imperial sanction to the Protocol and made declaration of neutrality on 21 January. Thus, Japan had to give up signing the original Protocol on 23 January, and entered into hostilities with the Russian Imperial

Navy at Lüshun and Inchon on 8 and 9 February 1904. Meanwhile, the Japanese Army landed from Inchon and brought Seoul under control, irrespective of Korean neutrality.

On the background of such state of affairs, a new Protocol was negotiated and eventually signed between Japan and Korea on 23 February 1904, with several new, critical articles added to the original Protocol:

Article I For the purpose of maintaining a permanent and solid friendship between Japan and Korea and firmly establishing peace in the Far East, the Imperial Government of Korea shall place full confidence in the Imperial government of Japan and adopt the advice of the latter in regard to improvements in administration.

...

Article IV... The Imperial Government of Japan may, for the attainment of the above-mentioned object, occupy, when the circumstances require, such places as may be necessary from strategical points of view.

Article V The Government of the two countries shall not in future, without mutual consent, conclude with a third Power such an arrangement as may be contrary to the principles of the present Protocol.

(Article VI [Paragraph III of the original protocol] Details in connection with the present Protocol shall be arranged, as the circumstances may require, between the representative of Japan and the Minister of State for Foreign Affairs of Korea.)<sup>29)</sup>

As regards advice on the ‘administration’ in Article I, it is said to have been construed, at that moment, as only meaning reforming the Korean system of taxation, Korean State treasury having been on the brink of bankruptcy.<sup>30)</sup> Unfortunately, however, the Korean negotiators did not appear to have requested to the Japanese for making *notes of exchange on it*, limiting the interpretation of that article to that effect. By this Article for Japan’s right to advise, accordingly, Korea could not refuse any advice on administration at large if Japan tried to give one, and, by Article VI, Korea could not refuse even negotiations regarding any matter under the Protocol.

This was quite similar to ‘subsidiary treaties’ (*or sanads*) concluded as peace treaties in the eighteenth-century India and thereafter, which, however, were not only for bringing an end to local wars between the British East India Company army and Indian Native States of Maharajahs or Sultans but also for establishing British ‘suzerainty’ over the latter.<sup>31)</sup> So, this new Protocol led to the enlargement of Japan’s influence on, or suzerainty or leadership over, Korea, with the result that

Korea might have already become, so to speak, a vassal State, in a sense of the word, under the suzerain State of Japan by this Protocol.

Meanwhile, Japan's Cabinet formally decided on the basic principles of Korean policy on 31 May 1904, envisaging further colonisation of Korea (but at this stage, not annexation but protection in law).<sup>32)</sup> This led to the conclusion of the following treaties.

(ii) *The first Japanese-Korean Convention of 22 August 1904*: Then, in August 1904, it was agreed, based on the above 1904 Protocol, that the Korean Government shall engage as financial adviser a Japanese subject recommended by the Japanese Government and shall take his counsel, but he was in fact empowered to hear all matters concerning finance and veto any proposal from the Korean Ministry of Treasury. Moreover, a new article was added, whereby the Korean Government shall engage as diplomatic adviser to its Department of Foreign Affairs, a foreigner recommended by the Japanese Government and shall take his counsel, but he was in fact empowered to hear all important matters concerning foreign relations and veto any proposal from the Korean Ministry of Foreign Affairs. So, the status of those Japanese or foreign advisers became more than a Korean Vice Minister or Assistant Secretary-General. In practice, Tanetaro Megata, former Assistant Secretary-General of Taxation Branch, Department of Treasury, was hired, and Durham White Stevens, former American adviser for the Japanese Ambassador Munemitsu Mutsu at Washington, was hired, Japan having acquired *de facto* veto powers in Korean Treasury and Foreign Affairs. In particular, it is worth noting that D.W. Stevens was hired in November 1904 and, in fact, took office as diplomatic adviser at the latest in December 1904. That was about a month before Japan's Cabinet Decision on the incorporation of Takeshima.<sup>33)</sup>

(iii) *The second Japanese-Korean Convention of 17 November 1905*: This second Convention still remains controversial with regard to its 'lawfulness'. The negotiation for a new convention was started after the Russo-Japanese Peace Treaty at Portsmouth. Although it mentioned such a superfluous time limit for efficacy as 'until the moment arrives when it is recognized that Corea has attained national strength', this Convention conclusively deprived Korea of the power to deal with its own external relations with all States (in theory, other than Japan). It stipulated that the Japanese Government will thereafter have control and direction of the external relations and affairs of Korea (Article I); that the Japanese Resident General could reside at Seoul; and that it represented the Japanese Government at the Court of the Emperor of Korea and have the right of access to private and personal audience of the Korean Emperor, primarily for the purpose of taking charge of diplomatic affairs, while Japanese residents were stationed at several open ports and such other places as deemed necessary (Article III). Actually, the Japanese Resident General went on to have

acquired control of the Korean internal politics as well.

In the process of negotiations on this Convention, despite the deferment of a negotiation proposed by the Korean Cabinet Meeting at the presence of the Korean Emperor, Hirobumi Ito (special Envoy to the Korean Emperor from the Japanese Emperor), Gonsuke Hayashi (Japanese representative with full powers), Sato, Provost Marshal, and Hasegawa, Japanese Military Commander in Korea, visited the Korean Palace, demanding restarting the negotiation. An informal Cabinet was held at the Court with the absence of the Korean Emperor for diplomatic illness, even Ito, Hayashi and the other Japanese officers having participated in that meeting. It was not known whether or what they said at the meeting. Although the Korean Prime Minister Han and Minister for Treasury Min refused to sign to the last, it was not considered that the other five ministers were clearly against the conclusion of a convention, and then the convention was formally signed by Foreign Minister Park and Hayashi, Japanese Representative with Full Powers, on 17 November 1905. The convention was made public on 23 November 1905 in the *Kanpo* [Japan's Government Gazette] and on 16 December 1905 also in Korea's Official Gazette.

Japan secured recognition or understandings from the then Great Powers in advance or *ex post facto*. The United Kingdom recognised that Japan had such *privileges to guide, control and protect Korea* as deemed just and necessary for protecting Japanese interests in Korea (Article III of the revised British-Japanese Alliance Treaty of 12 August 1905). Russia also promised not to interfere in Japan's measures *to guide, control and protect Korea* (Article II of the Portsmouth Treaty of Peace, 5 September 1905). And the United States, on 29 July 1905, provided with Japan the statement that it recognised Japan's status to guide Korea (Taft-Katsura memo.), and, after the Peace Conference at Portsmouth, Japanese Representatives Komura and Takadaira met President Theodore Roosevelt and talked about the plan about Korea, receiving oral assurance from him.

(iv) *The third Convention of 24 July 1907*: It was provided that a Japanese adviser for treasury be abolished (Article VII); and, for all that, that the Korean Government should act under the guidance of the Resident-General regarding the reform in administration (Article I); and that, for any laws, ordinances or regulations, or any important measures to be enacted, it should be necessary to have previous assent of the Japanese Resident-General (Article II). Thus, Japan formally acquired the extraordinarily prevailing right to control all internal, administrative matters in Korea.

(v) *The Treaty regarding the Annexation of Korea to the Empire of Japan of 29 August 1910*: At the final stage, Japan concluded a treaty with the Korean Government (not through Korea's no-more-existent Ministry of Foreign Affairs but its Cabinet Prime Minister Lee Wan-yong) for formalising the annexation of Korea, 'mak[ing] complete and permanent cession to [Japan] of all rights of

sovereignty over the whole of Korea' (Article I).<sup>34)</sup> All the Korean territory was annexed to Japan (Article II), and the Korean Emperor, Princes, their families and heirs, could only retain their titles, dignity and honours, with sufficient annual grants made (Articles III, IV). The Japanese Government, allowing the former Korean Emperor to use the Crown name (王号), did not ever allow Korea to use the State name (国号). As mentioned above, these wordings of the Treaty are reminiscent of those of many a 'subsidiary treaty' concluded between the British East India Company and local Maharajahs or Sultans in the period of nominal Mogul Empire of India.<sup>35)</sup>

(vi) *Legality and effectiveness of the Protocol and Conventions and the incorporation of Takeshima/Dokdo:*

That is how the Imperial State of Korea expired in 1910 from a perspective of international law. It appears that the colonisation, protection and annexation of Korean State by Japan was motivated and promoted by the Russo-Japanese War, and that, by the ostensibly lawful means of treaties, Japan brought about an illegal consequence in usurping sovereignty, in phases, from the Empire of Korea, which had already been endowed with an independent, sovereign statehood. That is because such consequence, at least, was repugnant to an obligation to mutually respect sovereignty, one of the basic obligations of a State in international law, or, as its corollary, repugnant to an obligation not to interfere in other States' internal matters.<sup>36)</sup> However, as regards the lawfulness of those conventions culminating in the annexation, the interpretation on *legality* (合法性; efficacy or value as law; effectiveness in producing law) has long been disputed.<sup>37)</sup> It is to be admitted that, by virtue of then Great Powers' prior or posterior recognition, those conventions had *effectiveness* (実効性; implementation as law; effectiveness in applying law) at least during the period of 1904 to 1945 until Japan surrendered to the Allied Powers in the Second World War.

Even if you should be in the position that all those conventions and treaties were null and void in contravention of then international law because of Japan's coercion upon State or representatives for negotiation, etc., and you might be able to deny *legality* as law to those conventions in theory, it would appear that you have to admit that they were *effective*, applied and implemented as law in Korea, so long as there had been in practice no international system or organisation (other than Great Powers) for effecting such denial in validity of the conventions, coerced treaties having been maintained, again, with international coercion. While, after the Second World War, Japan's colonial control and Great Powers' aloofness were terminated (or changed into the 180-degree direction in international policy) and you could contend that the cause for the invalidation of conventions long-claimed in academic doctrine may invalidate them, for example retroactively in accordance with the 1969 Vienna Convention on the Law of Treaties (Articles 51 and 52, stipulating on coercion), you would at the present moment be faced with such a touchy dilemma that it would be impossible to retrospectively invalidate all the facts which occurred during that period or make restitution *in*

*integrum.*

In connexion with the Takeshima issue, it is to be noted that, first, D.W. Stevens<sup>38)</sup>, diplomatic adviser, under influence from the Japanese Government, was appointed by the 1904 first Korean-Japanese Convention and took office at the Korean Ministry of Foreign Affairs in November or December, and so Japan succeeded in establishing at least a veto power against Korea lodging any *demarche* or protest to Japan before the incorporation of Takeshima. Second, while Japan's incorporation was admittedly made on the background of such colonisation process as summarised above, it remains to see why Japan annexed such tiny rocks first and why not annex larger Island Ulleungdo, more important in military value for building a watchtower over the Russian fleet. While Japan indeed wished to use both islands for national security and naval strategy, it continued to deal with Ulleungdo as *Korean territory* until its annexation of the whole of Korea in 1910, and, contrary to it, Japan might have rather continued to deal with Takeshima as *terra nullius*.

[To be continued]

#### Notes [註]

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- 1) Ha Yon-soo (河鍊洙), '“Takeshima funso” saiko' [the Takeshima dispute revisited], *Ryukoku Hogaku*, Vol.32, No.2 (September 1999); S. Naito and P. Kim, *shiteki kensho Takeshima/Dokuto*, [historical review:Takeshima and Dokdo], Iwanami Pub., 2007, pp.77-78. For the details, see E. Usuki, 'Research Material: The Takeshima/Dok-do Question', *Bulletin of Daito Bunka University (Social Science)*, No.40 (March 2002), pp.6-7.
  - 2) S. Naito and P. Kim, *shiteki kensho: Takeshima/Dokuto* [historical review: Takeshima and Dokdo], Iwanami Shoten, 2007, p.85.
  - 3) Takashi Momose, *shiryō kensho: nihon no ryōdo* [historical review: Japanese territory], (supervised by Takashi Ito), Kawade Shobo Shinsha, 2010, p.93-94.
  - 4) Japan's Cabinet Decision, 28 January 1905, in 公文類聚 (Kobunruishu) [National Archives of Japan]. [The translation is mine.]
  - 5) W. E. Hall, *A Treatise on International Law*, Oxford: Clarendon Press, 1880, p.89.
  - 6) Copy transmitted to the Village Office of Akishika, *Final Report of the Research Study on the Takeshima Issue (Third Period)*, Department of General Affairs, Shimane Prefecture, August 2015, p.233; Takashi Momose, *op.cit.* (2010), p.95. [Translation is mine.]
  - 7) Kokusaiho Jirei Kenkyukai (ed.), *Digest of Japanese Practice in International Law (3) Territory*, Keio Tsushin Co. Ltd., 1990, p.171.
  - 8) *E.g.*, P. Kim (trans. by S. Han), *meiji 38 nen Takeshima hennyū shoshi* [A Short History of 1905 annexation of Takeshima], Intah Shuppan, 2006, pp.122-146; S. Naito and P. Kim, *op.cit.* (2007), pp.251-252.
  - 9) See below, Section VI. The Japanese Navy had from the 1904 planned to establish watchtowers and submarine cables both on the islands of Takeshima and Ulleungdo, but it did not claim for forcibly annexing Ulleungdo, Korean territory, because Japan could 'occupy, when the circumstances require it, such places as may be necessary from strategical points of view' (Japanese-Korean Protocol of 23 February 1904, Article 4). And so the Japanese Navy could anytime use any place in Ulleungdo for establishing watchtowers. On the other hand, Takeshima, remaining undecided or unclear in jurisdiction, must be dealt with appropriately in law.
  - 10) The Naval General Staff (ed.), *gokuhi meiji 37/8 nen kaisen shi* [the Confidential History of the 1904-5 Sea Battles], Part 4, Vol. 4, p.20.
  - 11) *Ibid.*, p.10-11.
  - 12) Japan's Ministry of Foreign Affairs, Asian Bureau (ed.), *takeshima gyogyō no hensen* [transition of fisheries in Takeshima], 1953, p.33.
  - 13) The Naval General Staff (ed.), *gokuhi meiji 37/8 nen kaisen shi* [the Confidential History of the 1904-5 Sea Battles],

Part 4, Vol. 4, p.94.

- 14) Prefectural document (Shimane) dated 16 July 1906, various matters No.529, in *takeshima kashikudashi/ashika gyogyo shorui* [Takeshima leasehold/sea-lions fisheries documents].
- 15) Japan's Ministry of Foreign Affairs, Asian Bureau (ed.), *takeshima gyogyo no henshen* [transition of fisheries in Takeshima], 1953, p.34.
- 16) Takashi Tsukamoto, 'takeshima ryoyuken mondai no keii' [circumstances for the question of sovereignty over Takeshima], *chosa to joho -ISSUE BRIEF*, No.289, National Diet Library, Tokyo, p.7.
- 17) The 1945 Proclamation Defining Terms for Japanese Surrender
- 18) Available at Japan's MOFA website, [[http://www.mofa.go.jp/mofaj/area/takeshima/pdfs/g\\_taisengo01.pdf#search=%27scapin+677%27](http://www.mofa.go.jp/mofaj/area/takeshima/pdfs/g_taisengo01.pdf#search=%27scapin+677%27)]
- 19) Available at [<https://en.wikisource.org/wiki/SCAPIN1033>]
- 20) See below, Appraisal I, (ii), (a), p.35.
- 21) Quoted in Takashi Momose, *shiryō kensho: nihon no ryodo* [a reappraisal of modern historical material: Japan's territory], (supervising editor: Takashi Ito), Kawade Shobo Shinsha, 2010, p.219. See also *Dokdo Museum* (guidebook), August 1997.
- 22) Takashi Tsukamoto, 'takeshima ryoyuken mondai no keii' [circumstances for the question of sovereignty over Takeshima], *chosa to joho -ISSUE BRIEF*, No.289, National Diet Library, Tokyo.
- 23) Article 2 (a) 'Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet. [<http://www.taiwandocuments.org/sanfrancisco01.htm>]
- 24) However, it is true that Japan's diplomatic adviser had already been empowered with *de facto* competence to veto any important decision-making in Korea's Department of Exteriors (Gaibu) in accordance with the 1904 Agreement between Japan and Korea, Article I (22 August 1904), which reads:  

The Corean Government shall engage as diplomatic adviser to the Department of Foreign Affairs *a foreigner recommended by the Japanese Government, and all important matters concerning foreign relations shall be dealt with after his counsel being taken.* [Italics are mine.]
- 25) For the detailed explication on the drafting process, see below, Appraisal I, (ii).
- 26) According to some historians and lawyers, the Japanese-Korean Convention on Amity (27 February 1876), an unequal treaty establishing a consular (extraterritorial) jurisdiction of Japanese residents' criminal offence cases (Article 10), might be construed as the beginning of Japan's colonisation: Professor Lee, Keun-Gwan, etc., in Kenichiro Hirano, 'On the International Conference on "Re-examination of Annexation of Korea"', *kokusai mondai (International Affairs)*, No.501 (December 2001), pp.82ff, at p.88, note (1).
- 27) As mentioned in the Introduction above, more Japanese academics tend to regard the original status of Takeshima as *terra nullius* (neither Korean inherent territory nor Japanese inherent territory).
- 28) Fukuju Unno, ed., *nikkan kyoyaku to kankoku heigo* [Japanese-Korean conventions and the annexation of Korea], Akashi Shoten, Pub., 1995, p.83.
- 29) For the text, see Fukuju Unno, ed., *nikkan kyoyaku to kankoku heigo* [Japanese-Korean conventions and the annexation of Korea], Akashi Shoten Pub., 1995, pp.382-384.
- 30) Fukuju Unno, *kankoku heigo* [Annexation of Korea], Iwanami Shoten, Pub., 1995, p.122; p.142; Fukuju Unno, ed., *nikkan kyoyaku to kankoku heigo* [Japanese-Korean conventions and the annexation of Korea], Akashi Shoten, Pub., 1995, pp.83-86.
- 31) Fukuju Unno, *kankoku heigo* [Annexation of Korea], Iwanami Shoten, Pub., 1995, p.142. E.g., see Article 6, the 1799 Subsidiary Treaty with Mysore, *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, compiled by C.U. Aitchison, vol.IX [1929], reprint, Krsus-Thomson, 1973, pp.240-245, at p.243. And see also the 1861 treaty, covenant or agreement between Britain and Sikkim, with the 1890 convention between Britain and China, *ibid.*, Vol.XII, [1931], 1973, pp.61-67; the 1904 convention between Britain and Tibet, Article IX, *ibid.*, Vol. XIV, [1929], pp.22-24. The colonisation process of Korea by Japan was similar to the Native State of Oudh, see the 1856 treaty between the British East India Company and King of Oudh, *ibid.*, Vol.II, [1930], pp.21-23.
- 32) *nihon gaiko bunsho* [Japanese diplomatic documents], Vol.37, Book I, pp.351-356. See also Fukuju Unno, *nikkan kyoyaku to kankoku heigo* [Japanese-Korean Conventions and the Annexation of Korea], Akashishoten, Pub., Tokyo, 1995, at p.352.
- 33) Fukuju Unno, *kankoku heigo* [Annexation of Korea], Iwanami Shoten, Pub., 1995, p.142
- 34) Fukuju Unno, *nikkan kyoyaku to kankoku heigo* [Japanese-Korean Conventions and the Annexation of Korea], Akashishoten, Pub., Tokyo, 1995, at p.393.
- 35) E.g. see a quite similar wording in the 1856 Treaty between the British East India Company and the King of Oudh,

Articles I-III, in *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries* (compiled by C.U.Aitchison), Vol.II, [Government of India, Calcutta 1930] Reprinted, Kraus-Thomson, 1973, pp.21-22.

- 36) For a general discussion, see E.Usuki, 'Research Material: The Takeshima/Dokdo Question', *Bulletin of Daito Bunka University* (Social Science), No.40, March 2002.
- 37) For one thing, *e.g.* the 1905 second Convention was extraordinary enough to deny its legality as a treaty, partly because the Korean Ministers were, it is said, enforced to conclude it with threat either by Japanese negotiators or on the pressure of surrounding Japanese armed forces; and for another, it was promulgated without imperial sanction, such imperial approval being a necessary procedure in then Korean constitutional practice. Fukuju Unno, ed., *nikkan kyoyaku to kankoku heigo* [Japanese-Korean conventions and the annexation of Korea], Akashi Shoten, Pub., 1995, p.54; p.60.
- 38) D.W. Stevens was assassinated by a Korean nationalist later, when he was back in the United States.