

# A Study On the Documents To Justify the Korean Sovereignty Over Dokdo Islets In Light of International Law

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## I. Preface

It is the indisputable fact that Dokdo Islets are Korean territory in light of historic, geographic and effective jurisdictional aspects as well as in international law. Therefore, Koreans hardly accept any existence of territorial disputes over the Islets between the Republic of Korea and Japan.

In this article, however, I like to review only on several evidences of the major documents to justify the Korean sovereignty over the Dokdo Islets in light of international law for the readers who have interest in Dokdo Islets issue. No such clear documental evidences as shown in on Dokdo Islets were found in such major islands dispute cases as Minquiers and Ecrihos Islets Case(1953) between U.K. and France, the Island of Palmas(or Miangas) Case(1928) between the U.S.A. and Netherlands, and Clipperton Island Case(1931) between France and Mexico.

Professor V. Sandifer (University of Virginia, U.S.A.) emphasizes the importance of official documents or a public record for evidence in his work<sup>1)</sup> and particularly documents of government such as international agreements between States as the most effective in international tribunals. The Korean government officially and sternly rejected on 28 October 1954 Japanese proposal to refer the Dokdo Islets issue to the International Court of Justice. It is the stance of the Korean government that the Islets are indisputable Korean territory, historically, legally and in light of effective jurisdiction over

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1) Durward V. Sandifer, Evidence Before International Tribunals (revised Edition), Charlottesville: University of Virginia Press, 1975), p.208.

the Dokdo Islets by Korean government. Such a stance was revealed in the following statement issued at the time of rejecting the said Japanese proposal to refer the Islets issue to the ICJ:

[Unauthentic translation from Korean text<sup>2)</sup> by the author]

"The Dokdo Islets were the first sacrificed soil out of Korean territory in the course of Japanese past invasion to Korea. With the Post World War II liberation of Korea from Japanese occupation, Dokdo Islets returned back to Korea, being hugged deep into the bosom of all the Korean people. Thou, the Islets, are the very symbol of the independence of the Republic of Korea. Without anticipating a furious resistance and revenge to come from all the peoples of Korean race can any foreign state extend her greedy hand out again dare to take the Islets from the Korean bosom? Oh! the Dokdo Islets! Thou art not common several rocks at all, but a group of glorious anchors for the Korean affinity "Hankyorae", laid firmly in the East Sea. Koreans can never be proud of the independent Republic of Korea, if we could not protect the Dokdo Islets again, the symbol of Korean independence ! How can it not be construed as a glimpse of reviving Japanese will to invade to Korea again, if Japanese continue to try to deprive the Dokdo Islets again ? "

Sharing with the aforesaid Korean government's stance to the Korean sovereignty over Dokdo Islets, I would like to trace after major official documents related to legal status of the said Islets including actions taken by Occupation Authority of the Allied Powers and other public records, etc..

## II. Review of Official Documents and Public Records, etc. related to Dokdo Islets issue.

### 1. SCAPIN<sup>3)</sup> No. 677(29 January 1946)

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2) 변영태(卞榮泰) 외무부장관 성명(1954.10.28):“독도는 일본의 한국침략에 대한 최초의 희생물이다. 해방과 함께 독도는 다시 우리 품에 안겼다. 독도는 한국독립의 상징이다. 이 섬에 손을 대는 자는 모든 한민족의 완고한 저항을 각오하라. 독도는 단 몇 개의 바윗덩어리가 아니라 우리 겨레의 영예의 닻이다. 이것을 잃고서야 어찌 독립을 지킬 수가 있겠는가. 일본이 독도 탈취를 꾀하는 것은 한국 재침략을 의미하는 것이다.”

3) SCAPIN: Supreme Commander For the Allied Powers Instruction

A. Major Factors To be Reviewed in the Directive.

- (1) Memorandum For: Imperial Japanese Government
- (2) Subject: Governmental and Administrative Separation  
of Certain Outlying Areas from Japan
- (3) "...excluding (a) Liancourt Rocks(Take Island)"

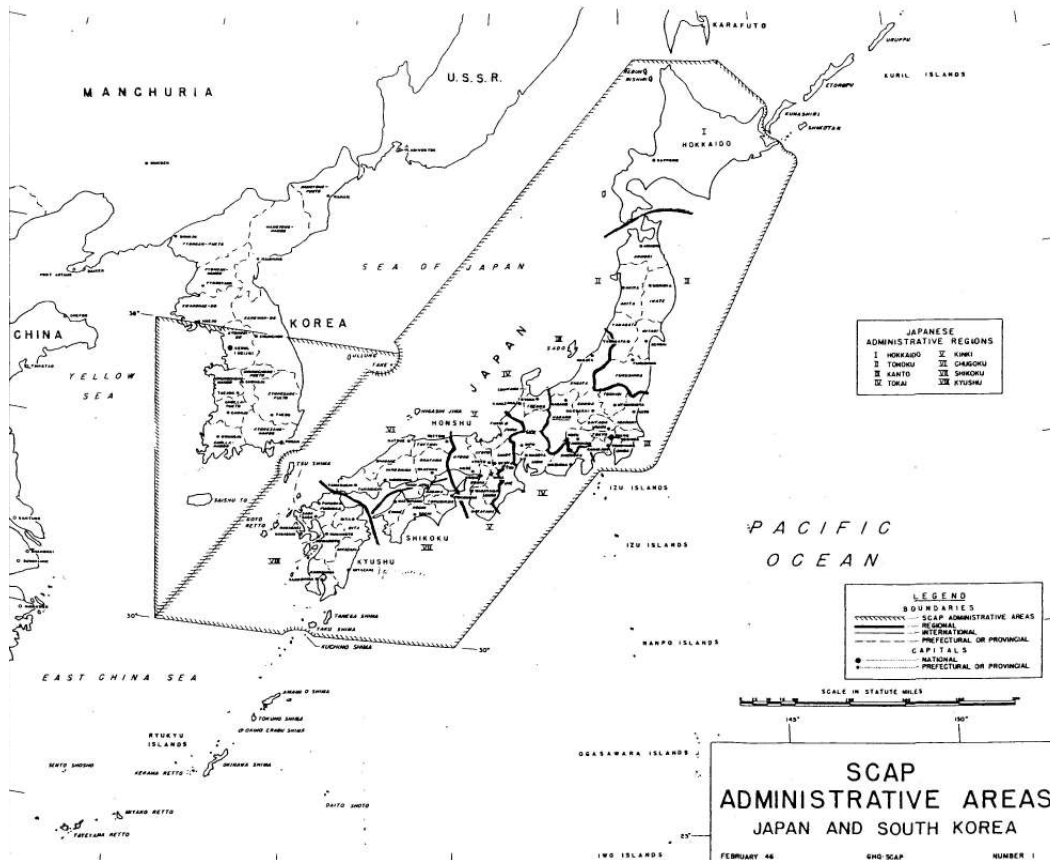
[Abstract]: "For the purpose of this directive, Japan is defined to include the four main islands of Japan...  
excluding(a) Utsryo(Ullung) Island, Liancourt Rocks (Take Island) and Quelpart(Saishu or Cheju) Island.

- (4) "4. Further areas specifically excluded from the governmental and administrative jurisdiction of the Imperial Japanese Government are the following:  
(a)...(b)...(c) Korea (d)..."
- (5) "6. Nothing in this directive shall be construed as an indication of the Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration."

\* Remark: "Memorandum For" format of SCAPIN

In accordance with the Terms of Japanese Surrender, Japan was under Occupation Authority to which the authority of Emperor and Japanese government to rule the State was subjected for a certain period of time during which "Memorandum For" method was used as a means of indirect control of Japan by SCAP.

\*The SCAP Administrative Map: Japan and Korea(Feb. 1946).



Legend: "Dokdo Islets" are shown in the half-circle of the boundary line between Republic of Korea and Japan in the East Sea(Sea of Japan).

## B. Some References for the Review.

(1) The basis of the SCAP power and authority to issue the Directive(SCAPIN No. 677).

: Basic Initial Post-Surrender Directive to the Supreme Commander for the Allied Powers for the Occupation and Control of Japan, 3 November 1945 provides as the following:

[Abstract]: "2. The Basis and Scope of Military Authority ( Part I. General and Political);

\* ... the directive signed by the President of the United States designating you as the

Supreme Commander for the Allied Powers.  
\*... the Instrument of Surrender<sup>4)</sup>...executed  
by command of the Emperor of Japan.  
\* These documents, in turn, are based upon  
the Potsdam Declaration of 26 July 1945.  
\*...Pursuant to these documents your  
authority over Japan, as the Supreme  
Commander for the Allied Powers, is  
supreme for the purposes of carrying out  
surrender.<sup>5)</sup>

## (2) Commentary

SCAPIN No.677(29 January 1946) comprises the provision to exclude the "Dokdo Islets" explicitly from the definition of Japan for the purpose of Governmental and Administrative Separation of certain outlying areas from Japan. And the provision has never been revised nor cancelled. Thus, Japan was believed to have tried hard in vain to invalidate the provision of "excluding Liancourt Rocks(Take Island) from the definition of Japan" by means of insert such a new counter provision as "Japan comprises...Liancourt Rocks(Take Island)..." into the text of Peace Treaty[DRAFT] with Japan in 1951. The provision that "Japan comprises Liancourt Rocks(Take Island)" was shown in the 6th, 8th, 9th and 14th DRAFTs of the said treaty.<sup>6)</sup> However, in the last DRAFT of the Treaty, the said DRAFT provision "Japan comprises Liancourt Rocks(Take Island)" disappeared at last. Such a "disappearance" of the DRAFT provision means that Japan failed completely to cancel the provision of "excluding Liancourt Rocks(Take Island) from the definition of Japan" in the said SCAPIN No.677(29 January 1946). Now that, will it be possible for those

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4) The Instrument of Surrender(Abstract): "The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."

5) The SCAP power to carry out the Surrender is reiterated in detail as follows in the text of the Basic Initial Post-Surrender Directive : " In addition to the conventional power of a military occupant of enemy territory, you have the power to take any steps deems advisable and proper by you to effectuate the Surrender and the provisions of Potsdam Declaration."

6) Jon M. Van Dyke, Legal Issues Related to Sovereignty over Dokdo and its Maritime Boundary, presented on 28 May 2007 at Grand Hilton Hotel, Seoul, pp.183-84.

whoever may them be, try to claim over "Dokdo" without blaming on the failed Japanese intention to establish the provision "Japan comprises Liancourt Rocks(Takeshima)" in the Peace Treaty ?

One of examples to block the Japanese intention to change the directive issued by the Occupation Authority during the period of preparatory work for the Treaty can be found in the United Kingdom Paper on the Japanese Peace Treaty issued at Colombo, Territorial Provisions. January 1950[sources: declassified paper, 27 April 2006, NARA(U.S.A.), as quoted below:

: "The Great Powers have, of course, already entered into various commitments regarding disposition of territories. Any attempt to vary these decisions would be fraught with great difficulties and need not in any case be a matter for decision at a Peace Conference."

On this occasion, let me repeat the fact that "the intention or will" of the said Directive(SCAPIN No.677) to exclude Liancourt Rocks(Take Island) from the definition of Japan has never been changed with the aforementioned Japanese failure. Before any thing else, I like to quote another preparatory work "an agreement between the Allied Powers on the disposition of former Japanese territories in 1950" as the following:

The Agreement Respecting the Disposition of Former Japanese Territories, 1950.

Article 3;

"The Allied and Associated Powers agree that there shall be transferred in full sovereignty to the Republic of Korea all rights and titles to the Korean mainland territory and all off-shore Korean islands, including Quelpart(Saishu To), the Nan How group(San To, or Komun Do which forms port Hamilton(Tonaikai), Dagelet Island(Utsryo To, or Matsshima), Liancourt Rocks(Takeshima), and all other islands and islets to which Japan had acquired..."

However, the view of professor Jon M. Van Dyke(University of Hawaii at Manoa, U.S.A.) on the said issue of Japanese failure to set up a counter provision against SCAPIN No.677 on "Dokdo Islets"

in the Peace Treaty, appears different to my view aforementioned, though his view is very persuasive. I am pleased to introduce his view as the following:

: "The Allied Powers did not indicate why they choose the third outcome, but the varying positions taken during the deliberation process indicate that the decision was made either because not enough information had been provided regarding the historical events surrounding Japan's annexation of Dokdo/Takeshima or because the Allied Powers felt themselves to be incapable or inadequate, adjudicators."<sup>7)</sup>

The reasons why I regret not to share with professor Van Dyke's views:

- ① As the U.K. paper aforementioned suggests, the Japanese DRAFT tried to vary the original intention of the directive of the Occupation Authority(SCAPIN No.677 on Dokdo) issued as a means of effectuating the terms of Japanese Surrender. But the Japanese failed to include Dokdo into her territory with the failure of the DRAFT.
- ② The Preface of Peace Treaty with Japan, San Francisco 8 September 1951(Abstract). clearly states the purpose of concluding the Peace Treaty as "settle questions still outstanding" as a result of the existence of a state of war between them. The "questions still outstanding" implies, I think, either to finalize or to variate the Allied Powers' "various commitments regarding disposition of former Japanese territories" something like "excluding Liancourt Rocks(Take Island) from the definition of Japan" in SCAPIN No.677).
- ③ Article 19(d) of the Peace Treaty (Abstract) provides as the following:

"Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the Occupation Authorities or

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7) Ibid., p184.

authorized by Japanese law at that time, and ..."

It is my firm belief that "excluding Liancourt Rocks(Take Island) from the definition of Japan" falls within the purview of this provision of Article 19(d).

- ④ The way of providing for Article 3, SCAPIN No.677(29 Jan.,1946) on "Dokdo Islets", I think, strongly implies the fact that "Dokdo Islets are attached to Ullung island" by enumerating "Dokdo Islets" immediately after "Ullung island before Quelpart(Saishu or Cheju), etc.. However, the Agreement Respecting the Disposition of Former Japanese Territories between the Allied and the Associated Powers(1950) which was reached in a preparatory work for Peace Treaty, enumerates Korean mainland and all the off-shore islands and islets including "Dokdo Islets" in order to clarify that all of them belong to the Republic of Korea. The Vienna Convention on the Law of Treaties provides in the Article 32(Supplementary means of interpretation) that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."

Without recourse to the preparatory work of the said Agreement Respecting the Disposition of Former Japanese Territories, the interpretation of Article 2(a)<sup>8)</sup> will be entirely impossible because the provision omitted the Korean mainland and all the off-shore islands and islets as well as "Dokdo Islets" except the only three islands enumerated as, Quelpart, Port Hamilton and Dagelet, out of a total of Four Thousand and One Hundred Ninety Eight(4,198) islands<sup>9)</sup> as well as main

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8) Article 2(a), Peace Treaty:"Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

9) Ministry of Maritime and Fisheries Affairs, Korean Government, Why the Sea is Blue?., published in Seoul, 1998, p.174: "In South Korea, 3,153 islands: In North Korea, 1,045 islands. Total: 4,198 islands."



land(Korean peninsula).

In regard to some ambiguity in the provision of Article 2(a) on the legal status of "Dokdo Islets" in Peace Treaty, professor Van Dyke also presented by means of a Beam Projector a very interesting view at a symposium "The Political, Legal and Historical Implications of the Dokdo Issue: Searching For Cooperation In Northeast Asia" held on 8-9 December 2005 at Hotel Merriot, Seoul. I am pleased to quote below some part of professor Van Dyke's presentation under the subject " The Status of Islands in International Law and Territorial Disputes in East Asia" for the readers to have an opportunity to think over the outstanding insight:

"John Foster Dulles Leaves the Status of Dokdo Ambiguous.

\* Because of a fear of a communist takeover of Korea.

\* To keep relations between Korea and Japan unstable.

\*\* and thus to encourage Japan's defence buildup, and

\*\* discourage Japanese dominion of the region."

2. Japanese Dai Jo Kan<sup>10)</sup> (at present, Prime Minister) Document  
(dated 29 March 1877) on "Dokdo Islets" and the Map

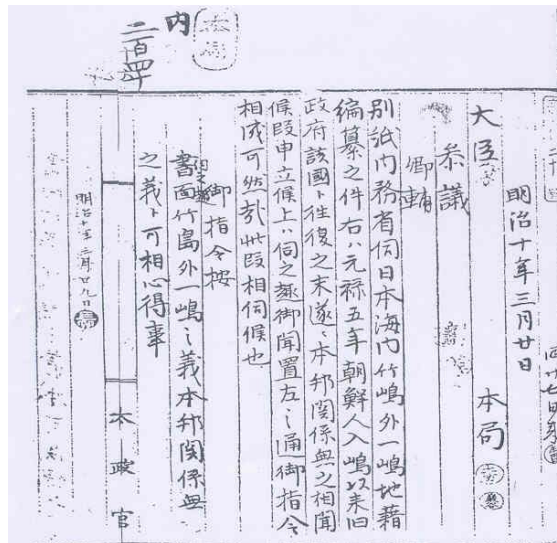
Reference #1.

The photo copy of Dai Jo Kan Document(29 March 1877)<sup>11)</sup>

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10) Dai Jo kan(太政官): The status of the Prime Minister at present time. At the time, Dai Jo kan was Iwakura Kumi(岩倉具視).

11) Source: National Japanese Government Documents Archives, Department of Home Affairs Document, Tokyo, Japan



[Abstract]: Unauthentic translation

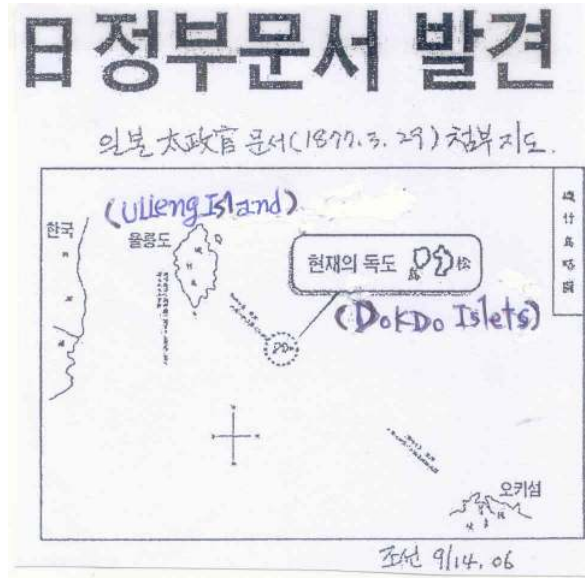
by the author.

"In relation to the inquiry from Home Affairs Ministry on title over "Takeshima and the other one island" located in the Sea of Japan, my former government had consultations on the issue with the other country concerned since one Korean arrived at my country in Genroku rein 5th year(1692), making visits to the other country concerned , and reached at last to the conclusion that my country had nothing to do with the islands. Accordingly, I(Asstt.) recommend you to respond to the inquiry from the Home Affairs Ministry as below:

"As to your inquiry on title to "Takeshima and the other one island" located in the Sea of Japan, my country (Japan) has nothing to do with the islands, and you should bear this in mind."

\*signed (by Dai Jo Kan) on 29 March 1877.

Reference #2: The map of "Dokdo Islets" attached to Dai Jo Kan Document(29 March 1877).



[Translation]: Japanese govt.

Document Has Now Been Discovered !

A photo copy of "Map of Dokdo Islets" under the title "Summary Map of Takeshima" attached to Dai Jo Kan Document(29 March 1877) was revealed for the first time in Korea recently on a Subway Paper and The Chosun Daily News Paper.

Title of the Map: Summary Map of Takeshima (At the time, Korean Ullung island)

\* The Importance of the Map:

- ① It is a corollary for Koreans to understand "the other one island" in the aforesaid Document, as Dokdo Islets', that is, an attached Islets to her Mother Island(Ullung), but some Japanese demanded to verify the one island. Now "the other one island" has been verified as "Dokdo Isles" by the Map.
- ② With the Map, Japanese cabinet decision to annex "Dokdo Islets" to Japan in 1905 can not be justified by

international law without being estopped.

- ③ It is verified with the Map that even the former Japanese government treated "Dokdo Islets" as the attached to Ullung Island as Koreans do.

#### A. Background of the Document

##### ① Map-Making Project by Japanese government

After so-called Meiji Restoration(1868)

New Japanese government was busy with its modernization Projects in various fields under the strong leadership of famous political leader and Minister of Home Affairs Ohkubo Doshimichi(大久保利通), and making a formal Map of Japan was undergone by the Ministry. In the year 1876, Japanese Home Affairs Ministry received an inquiry letter in regard to the map-making from Shimane Province, asking if it was right or not for the Province to include in its jurisdictional boundary "Ullung Island and Dokdo Islets". Having intensely studied the issue for about five months, the Ministry reached to the conclusion that both the islands belonged to the Korean Kingdom. The Ministry, however, decided to confirm the fact before reply to the Shimane Province to the office of Dai Jo Kan(太政官, at present time, prime minister) in appreciation of the importance of territory issue.<sup>12)</sup>

② Japanese Dai Jo Kan responded to the said inquiry (dated 17 March 1877) of Home Affairs Ministry on 29 March 1877, concluding that both the two islands did not belong to Japan(implying both the islands belonged to Korean Kingdom).

#### B. Major Factors To be Reviewed

##### ① Dai Jo Kan's Reply to the Ministry.

: " Takeshima island and the other one Island on which you have raised question to title, have nothing to do with

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12) Shin Yong Ha, Kingdom of Korea's title to Dokdo Islets and Imperial Japanese Invasion to Dokdo Islets (Korean Research History on the Title to Dokdo), (Seoul: Dokdo Research & Preservation Association, 2003),pp.158-59.

my country(Japan), and you should bear this fact in mind."

- ② The evidence on which Dai Jo Kan's conclusion stands in the Document;

"The result of the consultations between former Japanese government and the other State concerned' held since one Korean arrived in Japan", suggests the conclusion of Dai Jo Kan stood on the international agreement reached between former Japanese government and Korean Kingdom.

- ③ The Korean who was mentioned in Dai Jo Kan Document was Korean fisherman Ahn yong Bok(安龍福) kidnapped to Japan in 1693 by Japanese fishermen who were scolded by Ahn for illegal catching fish around Korean Dokdo Islets. Arriving in Japan he protested against Japanese government officials on Japanese fishermen's illegal fishing around Korean islands in his fluent Japanese. Japanese government ranking officials promised him to prohibit Japanese fishermen's such illegal fishing around Ullung and Dokdo Islets. However, such illegal fishing by Japanese fishermen continued after his return to Korea. He visited to Japan in 1696, and this time he feigned as a Korean government official in charge of custom duties collector arriving in Japan and met governor of Hakishu Province and renewed former protest to get same promise from Japan.<sup>13)</sup> His protest led to the consultations between Kingdom of Korea and Japan. After his return to Korea, he was punished for feigning as government official overseas, and simultaneously was applauded for his contribution to protect Korean islands including "Dokdo Islets". His prison term was commuted.

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13) Shin Yong Ha, Dokdo Islets Dispute between Republic of Korea and Japan, (Seoul: Han yang University Press,2003), p.133.

### C. Commentary

- ① The highest Japanese Government official's formal reply (the said Dai Jo Kan Document) to the inquiry from Ministry of Home Affairs clearly stated that "Takeshima and the other one island located in the Sea of Japan have nothing to do with Japan" implying that both the Island and Islets belong to the Korean Kingdom. and this formal reply provides with the most effective evidence<sup>14)</sup> for Korean title to the "Dokdo Islets". In the Map attached to the Document, Takeshima indicated at the time as "Ullung island", and the other one Island, "Dokdo Islets" respectively.
- ② The said Dai Jo Kan Document treated "Dokdo Islets" as the attached to Ullung Island since in the Document even Dai Jo Kan indicated "Take Island(Ullung Island) and the other one Island" rather than enumerating it(the other one island) as "Matsshima(Dokdo Islets)" as shown in the quoted Map attached to the Dai Jo Kan Document.
- ③ It is generally accepted in international customary law that an attached island in the remote sea takes in general her mother island's nationality.<sup>15)</sup>
- ④ The evidence on which Dai Jo Kan's decision stands demonstrates the agreement which was reached to as the result of consultations having been held between the States concerned, Japan and the Kingdom of Korea. Professor Sandifer emphasizes such an agreement between States provides with the most effective evidence in international tribunals.<sup>16)</sup>
- ⑤ The photo copy Map of title "Takeshima" including "Dokdo Islets" with the name of Matsshima"(at the time, Japanese called "Dokdo Islets" as "Matsshima") attached to

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14) Durward V. Sandifer, *op.cit.*,supra note 1), p.208.

15) Max Huber, *Arbitral Award Respecting Sovereignty over the Island of Palmas(or Miangas)*, April 4, 1928,(*American Journal of International law*), P.894:"As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit and that the fate of the principal part may involve the rest."

16) Durward V. Sandifer, *op. Cit.*, supra note 1), p.208.

Dai Jo Kan Document was revealed for the first time in the Republic of Korea by Dr. Sunwoo Young June on a subway paper and the Chosun Daily, Seoul dated 14 September 2006.

It has been a corollary for Koreans to understand "the other one island" in the said Dai Jo Kan Document as "Dokdo Islets", but some Japanese demanded to verify if "the other one Island" was the "Dokdo Islets". Now that, "the other one Island" has been verified by the very Dai Jo Kan Document. Can Japanese Government and minority Japanese people continue to claim to "Dokdo Islets" legally on the basis of Japanese cabinet's clandestine decision of annexation of "Dokdo Islets" as terra nullius in 1904 without being estopped by the said Dai Jo Kan Document dated 29 March 1877 ?

### 3. The clandestine annexation of Dokdo Islets by Japanese Government(28 January 1905)

#### A. The Photo Copy of the Decision of the Japanese Cabinet Meeting<sup>17)</sup> for Clandestine Annexation of "Dokdo Islets" (28 Jan. 1905).

明治三十八年一月二十八日閣議決定  
 別紙内務大臣請議無人島所屬ニ關スル件ヲ審議スルニ、右  
 ハ北緯三十七度九分三十秒東經百三十一度五十五分隱岐島ヲ  
 距ル西北八十五哩ニ在ル無人島ハ他國ニ於テ之ヲ占領シタリ  
 ト認ムヘキ形迹ナク、一昨三十六年本邦人中井養三郎ナル者  
 ニ於テ漁舎ヲ構ヘ、人夫ヲ移シ獵具ヲ備ヘテ海鹽獵ニ着手シ  
 今回領土編入竝ニ貸下ヲ出願セシ所、此際所屬及島名ヲ確定  
 スルノ必要アルヲ以テ、該島ヲ竹島ト名ケ自今島根縣所屬隱  
 岐島司ノ所管ト爲サントスト謂フニ在リ、依テ審査スルニ明  
 治三十六年以來中井養三郎ナル者該島ニ移住シ漁業ニ從事セ  
 ルコトハ關係書類ニ依リ明ナル所ナルハ國際法上占領ノ事實  
 アルモノト認メ、之ヲ本邦所屬トシ島根縣所屬隱岐島司ノ所  
 管ト爲シ差支無之儀ト思考ス依テ請議ノ通閣議決定相成可然  
 ト認ム

17) Shin Yong Ha, Study of Resources On Sovereignty Over Dokdo(Vol.2,1999), p.280.

[Unauthentic translation by the Author]

"This decision of the cabinet was made on 28 January Meiji 38th year(1905). Having deliberated the application for claim over an "terra nullius island" which is located at North latitude 37°9' 30", East longitude 131°55", 85 nautical miles afar from Oki island, the Minister of Home Affairs Ministry put the application on the table for the decision by the cabinet meeting. The cabinet meeting found no trace potential to recognize any occupation of the island by foreign country. In Meiji 36th year(1903), however, one Japanese named Nakai Ryosaburo built a fishing hut and brought labourers and catching equipments to the island, and started to catch sea lions. Recently, he lodged an application with the Ministry concerned for annexation of the said island into Japan so that the government may lease the island for him to run the fishery. On this occasion, the cabinet meeting finds it necessary to decide whether to annex the island and to give a name for the island as "Takeshima", placing the island under the jurisdiction of the Chief, Oki island or not, examining the application. Having examined Nakai's application, it was confirmed that Nakai migrated to the island and engaged in the catching fishes. Thus, the fact of occupation of the island has been fulfilled a requirement by international law concerned. Thus, recognizing the said occupation of the island, the cabinet meeting finds it reasonable for the government to annex the island into Japan and to place the island under the jurisdiction of Chief, Oki island, and approve the said application as applied."

#### B. Factors To Be Reviewed.

(1) Dai Jo Kan of Meiji Government made the decision that "Takeshima and the other one island" had nothing to do with Japan, thereby implying that "the other one island" was "Dokdo Islets" belonged to the Kingdom of Korea in light of the Map attached to Dai Jo Kan Document. On what legal ground did the Japanese cabinet of the same Meiji government decided to annex the "Dokdo Islets" to Japan on 28 January 1905 as if the Islets were as terra nullius in violation of the decision made by the said Dai Jo Kan Document dated 29 March 1877 ?

(2) The Japanese cabinet's decision was made on 28 January 1905



in midst of Russo-Japanese War(1904-1905), Japanese fleet launched attack against Russian Navy ships VARYAG and KOREYETS at the port Inchon on 28 January (Gregorian February 9) <sup>18)</sup>1904.

On 28 January 1905, the first anniversary of breaking out the Russo-Japanese War, and at the time of anticipating the victory of the War before long following the occupation of Port Arthur by Japanese armed forces, Japanese cabinet made a clandestine decision to annex the "Dokdo Islets", and it might appear that the Japanese cabinet made a wrong decision in celebrating a victory in advance at an early day with a wrong trophy of War by taking mistakenly Korean "Dokdo Islets"

(3) During the Russo-Japanese War, Japanese Navy ship "Niitaka". (新高號) dropped in a port in Korean Ullung island in order to collect various informations on the Dokdo Islets from Korean fishermen who had been to the Islets in advance before the navy ship set sail for the Islets for the purpose of on-the-site investigation of general situation of the Islets. The Japanese navy ship left the Korean Ullung island on 24 September 1904 toward to "Dokdo Islets".

The log on the next day of the Japanese navy ship "Nitaka" reads:

"Koreans call Liancourt Rocks as "Dokdo Islets", while Japanese fishermen call as the Islets "Liancourt Rocks", which consist of two Rocky islands, the higher is West island with height of about 400feet, while East island, comparatively low with grass and not so steep like the West. On the top of the East island some space of land rests with soil sufficient to build two or three barracks;"<sup>19)</sup>

(4) Even Nakai Ryosaburo himself believed that "Dokdo Islets" belonged to the Kingdom of Korea, but being influenced by Hydrography Bureau, Japanese Navy, he lodged the aforesaid application to the Ministry concerned according to his personal

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18) Captain Anatoly Kipinsky, VARYAG(New), Brochure, distributed on 9 February 1997 in port Inchon.

19) Shin Yong Ha, Dokdo Islets Dispute between Republic of Korea and Japan,(Soul: Han Yang Univ. press, 2003), p.88.

history.

Nakai submitted his personal history together with "Project Management Summary" to Shimane Province in the year 1910, and some part of the Summary is quoted below for the readers to see Nakai's own stance in thinking over the "Dokdo Islets."

: "Takeshima Management,

... Bearing in my mind that this island is the attached one to the Korean island "Ullung island", I thought I might go to Korea in order to have something to do with Japanese Resident-General, Korea.

With the intention, I went to Tokyo in order to find some way to proceed to the said purpose. In the course of seeking the way, I came to meet Director-General Maku Bokumasaa(牧朴眞)of Department of Hydrography of Japanese Navy and could think in a different way that "Dokdo Islets" might not necessarily belong to the Kingdom of Korea, and at last met General Gimofu(肝付), Director-General, Department of Hydrography, Japanese Navy who made me convinced of Dokdo Islets" as a terra nullius..."<sup>20)</sup>

### C. Commentary

- ① Under the same Meiji Government, Dai Jo Kan(at present time, prime minister) made the final decision on the ground of the International agreement reached to after consultations between Japan and the Kingdom of Korea on 29 March 1877 that "Dokdo Islets" had nothing to do with Japan, implying that the Islets belonged to the Kingdom of Korea. Then, during the Russo-Japanese War on 28 January 1905, could the Japanese cabinet make legal decision to annex the Dokdo Islets", not a terra nullius, to Japanese territory without being estopped by the aforesaid Dai Jo Kan Document?

Japanese Government, however, indicated that Shimanae provincial government Notification No.40 based upon the aforesaid clandestine and illegal Japanese cabinet decision to annex "Dokdo Islets" dated 28 January 1905 as the legal ground for Japan to claim over title to "Dokdo

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20) Ibid. pp.159-60.

Islets" by its Note Verbale No. 186/A2 dated 13 July 1953 as the following:

" In the case of Takeshima, the Japanese Government, prior to the Annexation of Korea, placed the island under the jurisdiction of the head of Okishima belonging to Shimane Prefecture by Notification No. 40 of the Prefectural Government under date of February 22nd of the 38th year Meiji(1905)"

As we have already reviewed the said Japanese cabinet decision of illegal annexation of "Dokdo Islets" in 1905 by photo copy of it, the so-called "Notification No. 40 of the Shimae Prefectural Government" mentioned in the above Note Verbale must be based upon the illegal Japanese cabinet decision<sup>21)</sup> and I do not like to refer thereon here but for the fact that local government without the capacity to engage in diplomatic or a foreign relations, has nothing to do with notification of new land acquired (because such function of notification belongs to sovereignty activities) in light of international law.

Thus, the proper understanding of the legal status of "Dokdo Islets", to my view, is that the Islets fall within the purview of the "territories" specified in the following terms of the Cairo Declaration:

"Japan will also be expelled from all other territories which she has taken by violence and greed"

Therefore, the Supreme Commander for the Allied Powers completely separated governmentally and administratively from Japan by means of excluding "Dokdo Islets" from definition of Japan in accordance with (8) of the Potsdam Declaration which explicitly provides "The terms of the Cairo Declaration shall be carried out..." by SCAPIN No.677(29 January 1946 as well as completely separating Korea. Thus Korean people established Republic of Korea on 15 August 1948 about four years earlier to coming into force of the Peace Treaty with Japan in 1952.

As "Dokdo Islets" were illegally annexed during the Russo-

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21) Rebecca M.M. Wallace, International Law,(London: Sweet & Maxwell, 19970, p.93.

Japanese War by Japanese cabinet decision in 1905, it may be necessary to look into the situations in the time of Russo-Japanese War around Korean peninsula. I think that the outstanding evaluation of the situation around Kingdom of Korea during the said War by professor Van Dyke will help the readers understand the fate of Dokdo Islets deprived illegally at the time, I am pleased to quote herewith professor Van Dyke's<sup>22)</sup>:

"Japan's increasing influence in Korea During the Russo-Japanese War. Although Korea took a neutral stance in the Russo-Japanese War, Japan sent troops into Seoul and compelled Korea to sign a protocol agreement on February 23, 1904, which reads:

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 ... [T]he Imperial government of Japan definitely guarantees the independence and territorial integrity of the Korean Empire.

... This protocol marked the moment when Korea lost its ability to act independently on world stage: "Korea was deprived of its rights to conduct diplomacy and its sovereignty and independence by this protocol signed on February 23, 1904, not by the Protectorate Treaty concluded on November 17, 1905."

② Not only Nakai Ryosaburo but also Japanese Navy ship "Nii Taka" in 1904, one year before Japanese illegal annexation of Dokdo Islets, indicated that Koreans call Liancourt Rocks as "Dokdo Islets" and the Islets belong to the Kingdom of Korea and the aforesaid Dai Jo Kan Document as well.

How could such a Japanese illegal annexation in 1905 of the Islets which were not a terra nullius, be justified?

C. The "Dokdo Islets" and "Korea" in SCAPIN No. 677 attribute to such

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22) Jon M. Van Dyke, *op. cit.*, supra note 6), p.173.

terms as "...all other territories she(Japan) has taken by violence or greed" in Cairo Declaration, I think.

My stance of the view may well be verified by following abstracts from Statements, Proclamation etc. to Korea and Her People by President of the U.S., General MacArthur and General Arnold, Military Governor, Korea, of U.S. Army issued immediately after World War II.

(1) The Statement On the Liberation of Korea by the U.S.  
President Harris S. Truman (18 Sept. 1945)

: " The surrender of the Japanese forces in Seoul, ancient Korean capital, heralds the liberation of a freedom-loving and heroic people. Despite their long and cruel subjection under the warlords of Japan, the Koreans have kept alive their devotion to national liberty and to their proud cultural heritage. This subjection has now ended. In this moment of liberation we are mindful of the difficult tasks which lie ahead. The building of a great nation has now begun with the assistance of the United States, China, Great Britain, and the Soviet Union, who are agreed that Korea shall become free and independent. The American people rejoice in the liberation of Korea as the Taegook-kee. the ancient flag of Korea, waves again in the Land of the Morning Calm.

(2) The Proclamation to the People of Korea by  
General Douglas MacArthur(7 Sept. 1945)

[Abstract]: "As Commander-in-chief, United States Army Forces, Pacific, I do hereby proclaim as follows:

By the terms of the Instrument of Surrender signed by command and in behalf of the Emperor of Japan and the Japanese Imperial General Headquarters, the victorious military forces of my command will today occupy the territory of Korea south of 38 degrees north latitude.

Having in mind the long enslavement of the people of Korea and the determination that in due course Korea shall become free and independent, the Korean people are assured that the purpose of the occupation is to enforce the instrument of Surrender and to protect them in their personal

and religious rights. In giving effect to these purposes, your active aid and compliance are required..."

(3) Ordinance No. 19(30 Oct. 1945) by General A. V. Arnold  
Office of Military Governor, U.S. Army Forces in Korea

[Abstract]: "Section 1 Declaration of National Emergency

After four long years of war. from which they emerged victorious, American Forces landed upon your shores as the friends and protectors of the Korean people. They came for the avowed purpose of requiring the complete and permanent eviction of all Japanese military forces from Korea and eliminating all Japanese militaristic and nationalistic ideology. In addition to that objective. the Military Government was instructed to take steps to effect complete political and administrative separation of Korea from Japanese social, economic, and financial control; to facilitate development of a sound Korean economy and to work towards the restoration of a free, independent and responsible Korea.

The program of Military Government included taking over all Japanese property as rapidly as possible for the benefit of the Korean people, relieving labor from the condition of absolute servitude under which it had existed for the last four years, returning to the farmers the lands which had been wrested from them by Japanese guile and treachery, and giving to the farmer a fair and just proportion of the fruits of the sweat and labor, restoring the principles of a free market, giving to every man, woman and child within the country equal opportunity to enjoy his just and fair share of the great wealth which this beautiful nation has been endowed.

Upon the arrival of the American Forces, the Americans found that to support the war Japan drained food and other living commodities from Korea until she was weak from starvation. Production of consumer goods has all but ceased. There was a wholesale embezzlement of Government funds. The currency has been, deliberately inflated.

#### 4. On Professor Sharma's View on "Dokdo Islets"

Professor Surya P. Sharma used more than three pages in

introducing "Dokdo Islets" dispute between Japan-Korea under the title "the Major Contemporary Territorial Disputes - Claims and Legal Perspectives " in his work.<sup>23)</sup>

Reading his stance in regard to "Dokdo Islets", I found several questions rising in my mind, and like to reveal herewith, showing my views thereon

- (1) As a Korean, I do not like to recognize any existence of normal territorial dispute on title to "Dokdo Islets" between Republic of Korea and Japan. Because, the Islets are Korean territory, in historic, geographic, legal and practical, effective and continuous control aspects. I wonder if he traced the aforesaid Japanese Dai Jo Kan Document dated 29 March 1877 which may provides professor Sharma with valuable sources to approach directly to this dispute issue, I believe.
- (2) Based upon the agreement after several years of consultations between former Japanese government and the other State concerned, Japanese government top official Dai Jo Kan decided on 29 March 1877 that the Islets have nothing to do with Japan, implying that the Islets belonged to Korea and were not terra nullius in view of the Map attached to Dai Jo Kan document. In this light, I do not understand on what basis professor Sharma treats this "Dokdo Islets" issue similar to Minquire and Ecrehos Islets Case because he writes "The facts of this dispute resemble, up to a degree, those in the Minquire and Ecrehos Case". Further more, SCAPIN No. 677(29 Jan. 1946) after the World War II as a means of effectuating Japanese Surrender Terms "(8) of the Potsdam Declaration", explicitly excluded "Dokdo Islets" from the definition of Japan, I can not find any such similar action as SCAPIN No. 677 taken by either domestic or international agency in the

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23) Surya P. Sharma, Territorial Acquisition, Disputes and International Law,(The Hague, Boston, London,: Martinus Nuhoff Publishers, 1997), pp. 291-94.

Minquire and Ecrehos Islets Case.

- (3) The conclusive words of professor Sharma in regard to "Dokdo Islets" issue disappointed me so seriously that I really do not like quote it here, but for the readers to have comparative views. I do below.

:"...the Resolution would require balancing the relative merits of the bodies of evidence adduced by two sides."<sup>24)</sup>

The reasons why I so disappointed with professor Sharma's conclusive words in regard to the "Dokdo Islets" issue can be said that he appears to disregard the principle of estoppel<sup>25)</sup> in regard to the illegal Japanese cabinet annexation of "Dokdo Islets" to Japanese territory in 1905, and the fact after WWII, SCAPIN No. 677 explicitly excluded "Dokdo Islets" from the definition of Japan. I wonder if professor Sharma shares with professor Kanae Daijudo's<sup>26)</sup> view of it:" the SCAPIN No.677 was expressly concerned just with administrative functions and not with sovereignty". Professor Kanae Daijudo also stated that "SCAPIN No. 677 was a temporally Allied Occupation measure, which did not have the effect of separating Takeshima from Japanese territory". Professor Kanae should have overlooked such power of SCAP as "to take any steps deems advisable and proper by you(him) to effectuate the Surrender and Provision of the Potsdam Declaration" given to him by the President of the U.S. for the Allied Powers. Then professor Sharma would be in the place to answer on what legal ground except the "separation of Korea from Japan by the SCAPIN No.677 simultaneously with "Dokdo Islets" excluded from definition of Japan, Korean people could establish the Republic of Korea on 15 August 1948 about four years earlier than the coming into force of the Peace Treaty and Japanese restoration of her full sovereignty.

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24) Ibid. p.294.

25) Ian Brownlie, Principles of Public International Law,(Fifth Ed.),(Oxford Univ. Press, 2002), p.158: "Resting on good faith and the principle of consistency in state relations, estoppel may involve holding a government to a declaration which in fact does not correspond to its real intention.

26) Kanae Daijudo, The Dispute between Japan and Korea Respecting Sovereignty over Takeshima, the Japanese Annual of International Law, No.10(1966), p.13, professor Sharma's p.263.



The newly created Republic of Korea on 15 August 1948 took over the authority to rule the State from the U.S. Army Military Government in Korea via U.S. State Department Mission on the same day, because "Dokdo Islets" and "Korea" had been completely separated legally<sup>27)</sup> from Japan by the aforesaid SCAPIN No. 677(29 January 1946). The "Evaluation Report of Head of Mission"<sup>28)</sup> by Ambassador Muccio will help brighten the nature of the Subject of SCAPIN No.677 "Governmental and Administrative Separation of Certain Outlying Areas from Japan" so far as concerned with the Republic of Korea which was promised for Koreans to create a new country by the agreement between the Three Great Heads of the Allied Powers, the U.S. President Franklin Roosevelt, Chinese Generalissimo Chiang Kai Sheik and British Prime Minister Winston Churchill in Cairo Declaration on 1 December 1943.

\* Evaluation Report of Head of Mission:

Ambassador Jon J. Muccio, Seoul, Korea(March 29, 1950)

: "Ambassador Muccio assumed his duties at Seoul in Augusts 1948 immediately following the inauguration of the newly created Republic of Korea and the simultaneously termination of U.S. Army Military Government in Korea. He was confronted at the outset with the formidable task of overseeing the dual transfer of responsibility from Military Government to the State Department mission on the one hand and to the new Korean Government on the other."

\*The Statement of the United States Government On Assignment of John J. Muccio as the Special Representative To Korea(August 12, 1948):

" In the Joint Declaration issued at Cairo on December 1, 1943, the three subscribing powers—the United States, China, and Great

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27) Although the Annexation of Korea by Japan was effectively terminated with the occupation of that country by the armed forces of the Soviet Union and the United States in August and September in 1945, Korea was legally separated from Japan by SCAPIN No. 677 dated 29 January 1946.

28) The Evaluation Report of Head of Mission: by Ambassador John J. Muccio: Declassified: on 28 March 2006, NARA(U.S.A.)

Britain—expressed their determination "that in due course Korea shall become free and independent". This determination was reaffirmed in the Potsdam Declaration of July 26, 1945, with which the Soviet Union associated itself upon its declaration of war against Japan on August 8 of that year. On December 27, 1945 On December 27, 1945, in Moscow the Foreign Ministers of the Soviet Union, the United States, and Great Britain concluded an agreement later adhered to by the Government of China, designed to re-establish Korea as an independent state.

Although the annexation of Korea by Japan was effectively terminated with the occupation of that country by the armed forces of Soviet Union and the United States in August and September 1945, the freedom and the independence of Korea so solemnly pledged by the Four Powers have proved slow of realization. After nearly two years of painstaking but unavailing effort to give effect to those pledge through negotiations with the other occupying power, the United States Government, on September 17, laid the problem of Korean independence before the General Assembly of the United Nations. The will of an overwhelming majority of that body was expressed in the resolutions adopted by it on November 14, 1947, the purpose of which was to make it possible of r the Korean people to attain their long sought freedom and independence through the holding of the free and democratic elections and the establishment, on the basis thereof, of a national government.

In pursuance of those resolutions, elections were held in Korea n May 10 of this year, under the observation of the United Nations Temporary Commission on Korea, for the purpose of electing representatives to a National Assembly which might in turn form a government. The National Assembly so elected convened on May 31 and proceeded to form a government— a government in which it is hoped that the people of north korea, who were prevented from participating in May 10 elections by the refusal of the Soviet Union to permit the implementation of the General Assembly Resolutions in its zone of occupation, will be free in due course to assume their rightful role. Notification of the formation of the new government was communicated to the United Nations Temporary Commission on Korea on August 6, 1948.

It is the view of the United States Government that Korean Government so established is entitled to be regarded as the Governmen of Korea envisaged by the General Assembly resolution of November 14, 1947. Pending consideration by the General

Assembly at its forthcoming Third Session of the report of the United Nations Temporary Commission on Korea, the United States, pursuant to its responsibility as occupying power, is sending to Seoul a special representative who will be authorized to carry on negotiations with that Government, in consultation with the United Nations Temporary Commission on Korea, concerning the implementation of the further provisions set forth in paragraph 4 of the second of the General Assembly resolutions of November 14, 1947. As such special representative the President has named John J. Muccio of Rhode Island, who will have the personal rank of Ambassador."

5. On Article 107, Charter of the UN. and SCAPIN No.677(29 January 1946)

The Article 107: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

The aforesaid SCAPIN No.677 was issued by the SCAP who was given " the power to take any steps deemed advisable and proper by you to effectuate the surrender and the provisions of the potsdam Declaration" from President of the United States for the Allied Powers, and in addition to the power aforementioned, he was directed by the President to "take appropriate steps" in Japan to effect the complete governmental and administrative separation from Japan of (1)··(3)Korea ···(5)such other territories as may be specified in future directive."

With all the powers and the aforesaid directive, SCAP issued the

said SCAPIN No.677 on 29 January 1946 as a means of effectuating Japanese surrender. In this light of view, I can firmly believe that the exclusion of "Dokdo Islets" from definition of Japan and the separation of "Korea" from Japan in the provision of SCAPIN No.677 falls within the purview of Article 107 of the Charter of UN.<sup>29)</sup> Because, the aforesaid provision, particularly, of both the "Dokdo Islets" and "Korea" attributes to the (8) of Potsdam and Cairo Declarations.

### III. Conclusion

We have reviewed a variety of official documents and records including treaties and official actions taken by the Occupation Authority after WWII in relation to "Dokdo Islets". We confirmed the legal ground that "Dokdo Islets" belong to Korean territorial sovereignty in light of International law. On the other hand, we found so-called Japanese claim over the Islets has no legal ground, and particularly the clandestine decision of the Japanese cabinet in 1905 to annex the Islets into Japanese territory breached the doctrine of estoppel in international law, violating Japanese former decision executed by Dai Jo Kan in 1877.

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29) Bruno Simma(Edited), The Charter of the United Nations (A Commentary, Second Edition, Vol.II) (Oxford Univ. Press, 2002), pp.1332-34:

"Agreements concluded by the Allies that fall within the scope of this exception of the Charter include those of Yalta and Potsdam, the reparations arrangements(including the respective waivers), and the peace treaties between enemy States and victorious powers. Article 107 exempted the responsible governments from the obligations of the Charter in the following cases: treaty arrangements concerning the results of the war; authoritative actions such as the occupation of enemy territory, the *debellatio*; the detachment of enemy territory in the sense of Art. 77(1)(b); the exercise of Occupational power, including the administration of occupation law enacted by the Allies;

Ebid., p.1332:

"III. The Continuing Effect of Pre-admission Actions.

What is necessary, however, is a clarification regarding those measures taken or authorized as a result of the Second World War before the admission of the enemy States. Article 107 remains applicable for these measures, because they continue to have effect, and their validity was not affected by the admission of the former enemy States. Because of these continuing effects, Art. 107 has retained a certain legal significance with regard to the decisions and Allied directives concerning Germany as a whole, because the UN has no jurisdiction over these earlier measures. They were not invalidated by the Charter."

It, therefore, is the author's firm belief that so-called "Dokdo Islets" issue between Republic of Korea and Japan can not be a legal issue, but may be a Japanese political issue again. In mid 19c, the most famous Japanese Samurai and scholar was Yoshida Shoin(吉田松陰). He was told with the view that so populous Japan lives in comparatively so narrow a land and stressed as a solution of the problem to move ahead to the continental Asia, stating that "Takeshima (at the time, Korean Ullung island) would be the first stepping stone for the Japanese to move ahead to Korea and Manchuria."<sup>30)</sup> The aforesaid view of Yoshida Shoin was also introduced by professor W. G. Beasley(London University) in his work "Modern History of Japan" as below:

"... there were still some, like Yoshida Shoin, who had thought survival impossible without a continental foothold. A number of the Meiji leaders, several of them Yoshida's students, shared this view. They were strengthened in it by the activities of Saigo Takamori."

But, I have a hope that the "Dokdo Islets" issue will smoothly be solved before long because it is not the 19c, but 21c, so-called global village, moving together hand in hand for peace and mutual prosperity. Furthermore, it is my understanding that not all the Japanese people but a handful of minority Japanese are still in "greed "

for the Islets in vain. Without smoothly solving the "Dokdo Islets" issue and historic issue, etc. between two countries, how can both the Republic of Korea and Japan conclude FTA, etc., for mutual prosperity in future?

We, Koreans, however, should be always careful about those greedy Japanese though they are minority in number, of particularly their activities selling something similar to condominium over the Islets until they give up completely their illegal, unreasonable and futile greed for "Dokdo Islets", the symbol of the independence of the Republic of Korea. We must also be careful too about pedantic

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30) Heincih Dummolin, Yoshida Shoin(吉田松陰), the Spiritual Origin of Meiji Restoration(明治維新の精神の起源), Translated and Compiled by Higashi Nakano shudo(Tokyo:Minami madosha, 1974),p.56.

Korean who might confuse the meaning of territorial jurisdiction which excludes that of other country, if any,

Concluding this study, let me raise a simple question:

"Can it be possible for the minority Japanese, still in "greed" for the "Dokdo Islets", to claim sovereignty over the Islets without violating the provision of Article 107 of the Charter of the United Nations?"

- the End -