〔論　説〕

Controversy on protectorate
A case study on the practical meaning of European international law doctrines in East Asia

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Introduction

During and after the Russo-Japanese War (1904–1905), Japan strengthened its control over the Korean peninsula and subordinated the Korean Empire as a protectorate. Between the establishment of the protectorate and the annexation of Korea in 1910, the concept of "protectorate" was fiercely debated between Ariga Nagao (1860–1921), an authority in the field of public law and international law, and Tachi Sakutaro (1874–1943), a rising star in international law scholarship.

The arguments were merely theoretical on the surface. Tachi sharply criticized the outmoded eclectic approach of Ariga, while the latter, seemingly perplexed, replied to the former, who was a generation younger. Both of them heavily relied on the contemporary international law doctrines published in European countries. What was at stake was not only theoretical correctness, however, but also an urgent question concerning the future of the international order in East Asia: the status of Korea. In this sense, the controversy is an interesting phenomenon that reflects the relationship between international law theories developed in Europe and the reality of the international order in East Asia.

1　Status of Korea

The status of Korea was crucially important in Japanese diplomacy from the 1870s to its annexation in 1910. Amid the development of imperialism in Asia in the late nineteenth century, the Japanese government feared that a foreign power would control the Korean peninsula, from

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which Japanese territory could be easily invaded and perhaps colonized. To ensure its national security, Japan was initially eager to secure Korean independence; then, once Korea was free from the influence of foreign powers, Japan tried to establish its own sphere of influence over the peninsula.

The legal status of Korea was not clear in the 1870s. While Korea was traditionally included in the Sino-centric tributary system, this did not necessarily mean that Korea was politically controlled by the Qing dynasty, nor was it necessarily under Chinese sovereignty in the sense of European international law. When Frederick F. Low, US minister in China, tried to begin negotiations with the Chinese government's Office for Foreign Affairs (總理衙門) after the General Sherman incident on Korean territory, the Office refused his request, saying that Korea was indeed a dependency of China but enjoyed full autonomy in all political, religious, and diplomatic affairs. On the other hand, according to Low's claim, the Korean government took a different view, maintaining Chinese supremacy over it. Thus, even China and Korea lacked a consensus about their relationship, but they seemingly used the concepts of "dependency" and "autonomy" as pretexts for avoiding direct negotiations on difficult subjects with Western powers (Okamoto 2004, pp. 18–25).

It is against this background that Japan began to intervene using modern diplomacy. In 1875, Japan employed gunboat diplomacy similar to that of Western countries and coerced Korea into ending its isolationist policy. The treaty concluded by Japan and Korea in the following year included a clause that clearly revealed the main objective of Japanese diplomacy at that time: securing the independence of Korea from any other powers, especially from China: "Corea being an independent state enjoys the same sovereign rights as does Japan" (Article 1 of the Treaty of Peace and Friendship between the Empire of Japan and the Kingdom of Corea 1876).

Note that, although declaring "the same sovereign rights," the treaty was a typical "unequal treaty," including one-sided obligations to open ports and to accept consular jurisdiction. Twenty years earlier, Japan herself had concluded such treaties with Western powers under the pressure of the latter's superior armed forces.

After forcing Korea to open its borders, Japan pursued a policy of supporting and strengthening the pro-Japanese group in the Korean government, who wished to modernize Korea's economy and society with aid from Japan. Exercising political pressure and influence on the Korean government, Japan attempted to acquire mining, communication, and transportation privileges (Moriyama 1995, p. 3). This imperialist policy would, as a matter of course, cause serious conflicts with China, who tried to substantiate its traditional relationship of suzerainty over Korea and attempted to reinforce its influence over the nation in the 1880s. This tension led to war between China and Japan in 1894. After its victory, the Japanese government again secured the independence of Korea, and the end of Chinese suzerainty was formally declared in Article 1

of the peace treaty:

> China recognizes definitively the full and complete independence and autonomy of Corea, and in consequence, the payment of tribute and the performance of ceremonies and formalities by Corea to China in derogation of such independence and autonomy, shall wholly cease for the future. (Treaty of Peace between the Empire of Japan and the Empire of China 1895)

Seeing the Chinese empire defeated, Western powers began to more actively engage in intrusion into East Asia. Russia tried to advance southward in the region and came to compete with Japan for control over the Korean peninsula. After the failed negotiations for the mutual recognition of spheres of influence, Japan successfully waged war against Russia to assume control over Korea. Just after the outbreak of war in 1904, Japan unequivocally expressed an intention to put Korea under its control in the Protocol between Japan and Korea, Article 1 of which says:

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

Note that, even at this point, Japan maintained that it would "definitively guarantee the independence and territorial integrity of the Corean Empire" (Article 3).

The successful war against Russia finally allowed Japan to take an undisguised attitude toward Korea. Excluding Russia and obtaining consent from Western powers enabled Japan to set up a protectorate. Through sequential agreements with Korea, Japan forced its government to accept Japanese advisers (1904), deprived it of the right to diplomacy (1905), and subjected it to a governor-general dispatched from Japan (1907).

This subjugation by Japan aroused bitter resentment among Koreans. Members of the dissolved Korean Army took up arms against the Japanese rulers, high-ranking officials of the Korean dynasty killed themselves in protest, and the Korean emperor secretly sent his agents to the United States and other Western powers, as well as to The Hague Peace Conference (1907), to claim that the protectorate treaty had been concluded against his will and was therefore void (Unno 1995, pp. 166–176). Facing unyielding resistance among Koreans, hardliners in Japan became convinced that immediate annexation was indispensable to the successful administration of Korea.

However, it is the generally accepted view in Japan (though not in Korea) that Ito Hirobumi,

Korea's first governor-general, wanted to develop an effective autonomous government under the auspices of Japan and was opposed to an immediate annexation of Korea because it would place an enormous financial burden on Japan (Moriyama 1995, pp. 105–112; Unno 2004, pp. 105–117; Ogawara 2010, pp. 185–190). By 1907, Japan's political class had still not arrived at a consensus about the status and future of Korea.

2 Nature of protectorate

Ariga Nagao published *On Protectorate*, a book of over 400 pages, in 1906. The author explained the intention behind the publication this way:

> Although Japan already has a sizable protectorate of Korea, they have yet to get a clear idea on what the protectorate is. They are poor in measures to look into what policy is taken by world Powers toward their protectorates. Under such circumstances, the publication of this book must be welcomed. (Ariga 1906b, p. 1)

This book collected past examples of protectorates, classified them into four categories, and addressed, in each category, important legal questions concerning relations between the protector and the protected, as well as relations with third parties. His historical survey included descriptions of the political context and historical origin of each protectorate; his categorization was based on political and factual criteria rather than legal or conceptual ones, although he offered juristic arguments to make conceptual distinctions between those categories.

For our purposes, only the first two of his four categories require attention. These were defined as follows:

> The first category of protectorate. Suppose a State, which has a complete sovereignty and is not less civilized than other countries, is located between Powers and so weak in its national power that it is presumed not to have enough power to maintain its independence. If a Power annexed it, the strength of the Power would immediately grow up and disturb the equilibrium to the detriment of neighboring countries. In such a situation, another Power has an interest in keeping the weak State independent and will take the position to protect its independence. The latter Power will assist the weak State when necessary, without interfering in its internal affairs and diplomacy. Among European scholars, this relationship is called protection, sauvegarde, or simple protection.
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> The second category of protectorate. Suppose a State, whose territory is located in an important path of international transportation and ought to be opened to trade and

> communication with other countries, either refuses to open its territory because its civilization is different from that of Western countries, or lacks the ability to assume the responsibility of international trade and communication. The Power which has the most interest in this State will exercise a part of its sovereignty on behalf of the State herself in order to lead it to go along with other countries, as well as to let it bear the responsibility on international relations. Among European scholars, this relationship is called by many different names, such as guardian protectorate, political protectorate, genuine protectorate, and international protectorate. (Ariga 1906a, pp. 1–2)

Ariga maintained that the protectorate of Korea fell under the second category. Because his categorization contained analyses of political context, this classification inevitably had political implications: Japan, as protector, was obliged to help Korea to acquire the ability to "bear the responsibility of international relations" without destroying its sovereignty. Ariga did not hesitate to deduce a moral or political obligation from his definition of "protectorate":

> Korea, as a State, possesses the full sovereignty, but lacks the ability to exercise it. The sovereignty is, therefore, partly exercised by Japan on behalf of Korea, until she gets enough wealth and strength. For this reason, we should say Japan is ethically obliged to take care of the interests of Korea above all, and to endeavor to lead the country to acquire wealth and strength as quickly as possible. (Ariga 1906a, pp. 213–214)

Tachi Sakutaro scathingly criticized Ariga's eclectic methodology, saying that the legal categories were confused with those based on political facts leading to the establishment of a protectorate (Tachi 1906a). He argued that "Political facts which lead to establishing relations of protectorate are in many cases so complicated that we cannot know them from the text of relevant treaties and other official documents." He claimed that it is therefore not appropriate to create legal categories on the foundation of those facts and that any attempt to identify a legal category with a particular political origin would inevitably fail (Tachi 1906c, p. 29).

Tachi proposed more formal and conceptual categories of protectorate. According to him, the essence of the protectorate is the restriction on the ability to act (*Handlungsfähigkeit*). When a state is not only put under the protection of another State but is also restricted in its ability to act in international relations, the relationship of both countries is a protectorate in the sense provided by international law (Tachi 1906c, pp. 22–23). He argued that protectorates should be divided into two categories. In the first, "the protected State keeps direct diplomatic relations, although it is restricted in its ability to act." The protected state sends its own delegation to foreign countries and conducts direct negotiations with them under the auspices of the protector state. In the

second, “the protected State, more restricted in its ability to act, does not retain diplomatic relations and the protector State generally represents the protected in diplomacy.” Here, diplomacy is carried out by the protector state on behalf of the protected (Tachi 1906c, p. 30).

Ariga argued that the protector state has obligations to the protected state given the definition of “protectorate” based on the political context and historical origin; however, such an argument was impossible in Tachi’s formalistic and conceptual understanding of protectorate. Referring explicitly to Korea, he rejected the argument that the protector state should lead the protected state into relations with other states. Moreover, he maintained that no definition of “protectorate” should place restrictions on Japanese policy toward Korea, even on a policy of annexation:

> It might be possible that Japan will take a policy of further detaching Korea from relations with other countries than in the present situation, in case the interests of our State urgently require it. Upon such a policy, the legal understanding as to the present status of the protectorate would not impose any restrictions. (Tachi 1906c, p. 28)

Focusing on the political process leading to the establishment of the protectorate, Ariga was troubled over the contradiction in the Japanese policy on Korea: While Japan repeatedly guaranteed the independence of Korea in the early treaties, it later deprived Korea of the right to diplomacy by putting the latter under the protectorate:

> Toward other countries as well as toward Korea herself, Japan repeatedly swears that it will guarantee the independence and integrity of Korea. Is it a lie? May a State tell a lie? (Ariga 1906b, p. 2)

To avoid this contradiction, Ariga argued that Korea was independent in relation to third states but dependent on Japan in bilateral relations:

> A truly independent State possesses and exercises all of those rights which belong to every sovereign State. Although it possesses these rights, the protected State [in the second category of protectorate] does not exercise all of them of its own will, but is partly restricted by the will of the protector in exercising them. Because of this unequivocal difference, we cannot help admitting that the protected State is incompletely independent. However, the protector State supplements the incompleteness with its sovereignty, and, under its supervision, helps the protected State to exercise the rights which the latter is not able to use by itself. With such supplementation, the protected State should not be regarded, in relation to the third State, as less independent than other complete independent States.

(Ariga 1906a, pp. 221–222)

Tachi disagreed with this argument. He criticized Ariga for lacking a clear definition of the concept of independence. For Tachi, independence meant that "a State is not legally restricted by another State in the ability to act in international law, especially, in the right to diplomacy" (Tachi 1906b, p. 35). Adopting this definition, he could not avoid the contradiction that had worried Ariga. The 1905 Convention between Japan and Korea explicitly put restrictions upon the latter's right to diplomacy:

> ARTICLE I.
> The Government of Japan, through the Department of Foreign Affairs at Tokyo, will hereafter have control and direction of the external relations and affairs of Corea, and the diplomatic and consular representatives of Japan will have the charge of the subjects and interests of Corea in foreign countries.
> ARTICLE II.
> The Government of Japan undertakes to see to the execution of the treaties actually existing between Corea and other Powers, and the Government of Corea engages not to conclude hereafter any act or engagement having an international character except through the medium of the Government of Japan.

This clear limitation, or deprivation, of the right to diplomacy inevitably means, according to Tachi's definition, the negation of the independence of Korea. However, Tachi was not bothered by this contradiction. The 1905 Convention was not compatible with the guarantee of independence made in the earlier treaties. He coldheartedly argued that the later treaty broke the earlier ones: *Lex posterior derogat legi priori* (Tachi 1906b, pp. 40–41).

3 Doctrines in Europe

Although cases wherein one state protected another had always existed, the institution of protectorate, which developed amid the imperial expansion of the nineteenth century, was considered a new phenomenon by contemporary law scholars. A non-European country subjugated by a European power, such as Afghanistan and the Republic of South Africa by the United Kingdom or Cambodia and Annam by France, was called a "protectorate." This new international law concept seemed to be different from traditional protection, and attracted many international scholars. By the end of the century, several monographs had been published on the topic. These include Heilborn's *Das völkerrechtliche Protektorat* (Springer, 1891), Bornhak's

Einseitige Abhängigkeitsverhältnisse unter den modernen Staaten (Duncker & Humblot, 1896), Despagnet's *Essai sur les protectorats: étude de droit international* (Larose, 1896), Engelhardt's *Les protectorats anciens et modernes: étude historique et juridique* (Pedone, 1896), Gairal's *Le protectorat international* (Pedone, 1896), and Hachenburger's *De la nature juridique du protectorat et de quelques-unes de ses conséquences en matière pénale* (Pedone, 1896).

In 1895 and 1896, Ariga studied in European countries with financial support from Japan's army and navy ministries. During his stay, he was impressed by the abundance of newly published literature on the protectorate concept. In the preface of *On Protectorate*, he said:

> After coming back from the Sino-Japanese War [in 1895], I went and stayed in Europe again. At that time in France, because of its expedition into Madagascar, scholars and politicians heatedly argued over the protectorate, and a mountain of books and papers were published on the subject. I bought the important ones and planned to write a book myself, relying on these materials. (Ariga 1906a, p.i; Ariga served as legal adviser during the Sino-Japanese War.)

Ariga relied heavily on many of these monographs published in the 1890s to write his book. He owed his highly detailed description of many historical precedents for the protectorate to the European literature on the subject. As to conceptual categorization of protectorates, his argument corresponds to that of François Gairal (Gairal 1896, pp. 60–67).

By contrast, Tachi's reliance on the European literature was more selective. Tachi rarely provided historical descriptions or discussed political contexts. He apparently attached more importance to definitions of concepts and logical interpretations of legal norms. His definition of "protectorate" reveals to whom Tachi owed the most. As mentioned, he defined a protectorate in terms of a restriction on the ability to act. This concept of the "ability to act" was taken from the German theory of law, which made a conceptual distinction between the ability to act (*Handlungsfähigkeit*/行為能力) and the legal capacity as a person (*Rechtsfähigkeit*/権利能力), and it was Paul Heilborn, a well-known German international law scholar, who made an analogy between the institution of international law and guardianship (*Vormundschaft*) in private law, and defined a protectorate as a restriction of the ability to act for the sake of the weak:

> Unverkennbar ist die Stellung des Oberstaates der eines Vormundes sehr ähnlich. ...
> Die Ähnlichkeit besteht hier nicht etwa nur in der Beschränkung der Handlungsfähigkeit, sondern ... in dem Zustande der beschränkten Personen: eines Vormundes bedürftig sind die Schwachen, d. h. diejenigen, welche die volle Reife noch nicht erlangt oder die bereits wieder

verloren haben. Unter einem Protektorat stehen gleichfalls nur die schwachen Staaten, und zwar sowohl die jugendlich=schwachen, z. B. die ionischen Inseln, als auch die altersschwachen, z. B. Tunis und Annam. (Heilborn 1891, p. 43)

……..

Der Protectoratsvertrag ist ein Unterwerfungsvertrag und nimmt oder beschränkt für die Dauer seiner Geltung die völkerrechtliche Handlungsfähigkeit des Unterstaates. (Heilborn 1925, p. 326)

Showing a positivist tendency, Heilborn did not rely on historical facts or political contexts (*meta-juristische* elements), but conceived of legal relations as being relations between a will and another will, or between autonomous persons. If the analogy with the guardianship under family law is to be pursued, the power of the guardian can be exercised only in the interest of the guarded; in case of abuse, the family court or other public authorities must intervene. Heilborn ignores the institutional nature of the legal guardianship supervised by the public authority, and he presents the power of a guardian as a full right that belongs to the guardian. This argument was possible because he based the guardianship concept exclusively on the consent of autonomous persons, without any control being exercised by the community.

Heilborn focused on the qualification of personality when he defined the status of the state. While the ability to act (*Handlungsfähigkeit*) is restricted as to the subordinated state in the protectorate, the relationship of so-called "suzerainty" is characterized as a restriction on legal capacity (*Rechtsfähigkeit*). In the protectorate, the subordinated state keeps its legal personality in international relations (i.e., the protector state acts in the name of the protected when it represents the protected in diplomacy). In the case of suzerainty, however, the superior state concludes international agreements in its own name, even when they primarily concern the inferior state, because the latter is not recognized as a person in international law but remains only an autonomous region of the former. In other words, this inferior "state" is not a state in the sense given in international law (Heilborn 1891, pp. 53–56).

This conceptualization could work in favor of Japanese diplomacy toward Korea in the period around the Russo-Japanese War. At that time, the Japanese government was criticized in Korea, as well as in Japan, for lacking integrity due to its failure to keep its word and guarantee the independence of Korea. However, this contradiction in Japanese diplomacy could be theoretically explained away by appealing to Heilborn's arguments. The early requirement of the Japanese government to ensure the independence of Korea would be understood, in the framework of Heilborn's argument, as an attempt to recognize it as a person in international law — that is, to get rid of the restrictions on its legal capacity (*Rechtsfähigkeit*). Only after Korea acquired a legal personality in international law was Japan able to set up the relationship of protectorate on the

basis of an agreement with it as a subject of international law, and to put restrictions on its ability to act in international relations. If we accepted this view, the guarantee given in the early treaties would be regarded as the logical prerequisite for the later establishment of the protectorate. Tachi did not present such an argument explicitly, but the rationale described above might have been one reason why he repeatedly stressed that the essence of the protectorate was a restriction on the ability to act.

Conclusion

Both Ariga and Tachi were deeply involved in Japanese imperial policy. Ariga, professor at Waseda University, served the Japanese army as legal adviser during the Sino-Japanese and Russo-Japanese wars, and published a book written in French to advocate Japanese compliance with the international law of war (Ariga 1908). Tachi, professor at the University of Tokyo, served the Foreign Ministry as legal adviser, and undertook legal defenses of Japanese policies from the beginning of the twentieth century through to the 1940s. They did not differ in their support for Japan's expansionist policy.

However, this paper has pointed out nuances in their arguments on the protectorate. Ariga took the rather traditional approach of public law, which was not clearly distinguished from politics, by considering the historical development and political context of legal institutions. He did not hesitate to argue about moral obligations in his legal doctrine. On the other hand, Tachi introduced the emerging field of legal positivism into the Japanese international law scholarship. He placed more importance on clear conceptual definitions and the logical construction of arguments, excluding non-juristic (i.e., political and moral) arguments from his doctrine. In the context of the colonization of Korea, the latter approach seemed to unsympathetically support Japan's harsh Korean policy.

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