

# The Debate on Island Issues at International Conferences

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## 1. Introduction

In this article I will summarize the points of the debates on a number of island issues—concerning the Senkaku Islands, Okinotorishima Island, and Takeshima—at three international conferences on the law of the sea in which I participated in my capacity as a senior fellow at the Ocean Policy Research Foundation. For convenience's sake I shall refer to them as Conference A, Conference B, and Conference C:

### Conference A

Fifth Law of the Sea Institute Conference: Institutions and Regions in Ocean Governance

This conference was held at the International Tribunal for the Law of the Sea premises in Hamburg, Germany on October 5–6, 2010. It was jointly organized by the Law of the Sea Institute, the University of California, Berkeley, and Inha University (South Korea), and cosponsored by the Ocean Policy Research Foundation (Japan) and Academia Sinica (Taiwan).

### Conference B

Law of the Sea and Asian Maritime Disputes, Dialogue and Public Conference:  
Policy Options for Developing a Common UNCLOS Strategy in Asia

This conference was held from May 9 to 11, 2011, and organized by the Maureen and Mike Mansfield Foundation (US); the public conference portion that formed the second half was organized in cooperation with the Center for Comparative and Public Law, Hong Kong University.

### **Conference C**

Sixth Law of the Sea Institute Conference: The Limits of Maritime Jurisdiction

This conference was held from November 28 to December 2, 2011, and organized jointly by the Law of the Sea Institute and the Korea Ocean Research & Development Institute.

One point that I noted at all three of these international conferences was that speakers often referred to Japan's island issues and mentioned the names of islands like the Senkakus and Okinotorishima Island even though island issues were not the topic of the conference as a whole, the subject of panel discussions or section meetings, or even part of the title of individual speakers' presentations.

In this article I attempt to examine the views expressed by the presenters and speakers who commented on Japan's island issues at these three conferences and the background of the assertions they made.

## **2. Okinotorishima Island**

Okinotorishima Island was mentioned at Conference A by Michael Sheng-ti Gau, associate professor at the Institute of the Law of the Sea, the National Taiwan Ocean University, in a presentation titled "Mechanisms for Settlement of Disputes Concerning Encroachment upon the Area by Excessive Continental Shelf Claims," which he delivered at the panel session on "Ocean Issues in the Polar Regions." It was a sudden and unexpected reference completely unrelated to the topic of the panel, namely, the polar seas. What Gau asserted was that Okinotorishima Island is

“rocks” as defined in the United Nations Convention on the Law of the Sea,<sup>1</sup> Article 121, paragraph 3, which cannot sustain “human habitation” or “economic life of their own,” and therefore cannot be the basis for claiming an exclusive economic zone or a continental shelf. However, he did not challenge Japan’s claim to territorial sovereignty over Okinotorishima Island itself. Yann-huei Song of Academia Sinica, Taiwan also expressed a similar view, echoing Gau’s assertion that Okinotorishima Island is “rocks” incapable of sustaining human habitation or economic life of their own under UNCLOS Article 121(3). These assertions were completely unrelated to the polar sea issues that were the topic of the panel; furthermore, because of time constraints, there was no discussion at the conference about the legal aspects of islands, particularly the interpretation of Article 121, whose wording is extremely inaccurate for a legal concept expressed in a legal instrument of such importance.

Okinotorishima Island was also mentioned in Conference B, which focused on maritime disputes in the South China Sea. The Senkakus, Okinotorishima Island, and Takeshima were all mentioned as cases with similarities to the disputes in the South China Sea. This conference sought to encourage a lively dialogue among a small group of participants from the littoral countries of the South China Sea—China, Taiwan, Vietnam, the Philippines, and Malaysia—and from Japan, South Korea, and the United States as countries that use this sea. Among the topics discussed was the “regime of islands” as stipulated in Article 121 of UNCLOS. One of the participants, University of Hawaii Professor Jon Van Dyke,<sup>2</sup> noted that the Spratly Islands of the South China Sea have many geographical features at issue with respect to the question of whether they are “islands” or “rocks” under Article 121, and he expressed the view that it would be advisable for the countries concerned to delimit their respective EEZs and continental shelves disregarding the existence of these features, as if they did not exist in the first place.

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<sup>1</sup> The United Nations Convention on the Law of the Sea, or UNCLOS, was adopted in 1982 and came into force in 1994.

<sup>2</sup> Van Dyke, a former director of the Law of the Sea Institute, passed away suddenly during Conference C. An American, he had consistently criticized his own country’s position that every island that can have territorial waters can also have its own EEZ.

### 3. Interpretation of Article 121(3) of UNCLOS

Professor Van Dyke explained the meaning of “island” during a panel discussion titled “State of Play: Assessing the Positions of Claimant States and Interested Parties in the South China Sea” at Conference B. With regard to the Senkakus, he cited reference materials to note that a *katsuobushi* (dried bonito) factory had been built and operated there from 1895 (the year when Japan formally incorporated the islands into its territory) and, in tandem with its operation, a considerable number of Japanese had moved to there and were conducting economic activities. He also introduced a 1986 book in which the Taiwanese President Ma Ying-jeou asserts that the “Diaoyutai” Islands cannot have their own EEZ or continental shelf (“Diaoyutai” and “Diaoyu” are Chinese names for the Senkakus).

Van Dyke proposed a set of standards to supplement the inaccurate and ambiguous criteria of “human habitation” and “economic life of their own” set forth in UNCLOS Article 121(3). Under Article 121, the “islands” stipulated in paragraphs 1 and 2 can serve as the basis for claims to EEZs and continental shelves, but the “rocks” stipulated in paragraph 3 cannot. Van Dyke set forth his own long-held position that an “island” should be required to meet all of the four conditions of (1) providing fresh water, (2) supporting growing vegetation, (3) producing materials for building human shelter, and (4) sustaining a human community of at least 50 people.<sup>3</sup>

The position advanced by Van Dyke and others is grounded in the idea that the high seas, seabed and ocean floor beyond the limits of national jurisdiction are known as the common heritage of mankind and that those areas should be kept as broad as possible; the concern is that allowing “rocks” without human habitation or economic life of their own to have EEZs and continental shelves will cause littoral countries to extend their exclusive areas over ever-broader areas, encroaching on the areas beyond the limits of national jurisdiction.

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<sup>3</sup> A number of other people, notably Indonesia’s Ambassador Hasjim Djalal, also favor these conditions.

Dr. Song of the Academia Sinica reported that Taiwan's Ministry of Foreign Affairs had issued a statement that Okinotorishima Island was "rocks" under Article 121(3), not entitled to an EEZ or a continental shelf. He also stated that Japan and Taiwan needed to negotiate and settle their disputes over the "island" versus "rocks" argument under Article 121. Song expressed the view that history plays the most important role in settling disputes over territorial land and waters, and he stressed that the relationship between Taiwan and China should be taken into consideration when looking at the issues in the South China Sea. He stated that Taiwan had taken over the islands in the South China Sea from Japan after World War II, and he supplied detailed materials on the record of when particular littoral countries had claimed sovereignty over particular islands. Both Van Dyke and Song expressed the view that when settling disputes careful reference to the doctrine of intertemporal law, which subjects the act creative of a right to the law in force at the time when the right arises, is advisable, inasmuch as the passage of time brings significant changes thereafter in the applicable international legal system and the question arises as to which of various different legal systems is to be applied.

Dr. Song made a similar comment at Conference C, asserting that Okinotorishima Island was "rocks" under Article 121(3) and thus could not be the basis for claiming an EEZ or a continental shelf.

The definitions under Article 121 also came up in a group discussion session at Conference B titled "Applying UNCLOS to South China Sea Disputes: Discussion: The Role of UNCLOS, Limitations, Challenges, etc." Regarding Article 121(3) Professor Lee Seokwoo of Inha University Law School declared that the countries involved could not discuss the issues of the disputed islands in the South China Sea or Okinotorishima Island unless they used the same terminology interpreted the same way with respect to the relevant geographic features.

At this session I pointed out that the Third UN Conference on the Law of the Sea had adopted a consensus process for adopting the convention, as a result of which many provisions in which differences of opinion existed were incorporated in a package deal as a compromise that, in turn, resulted in the adoption of ambiguous phrasing, leaving the differences of opinion over specific provisions unresolved. Article 121, "Regime of islands," was one example of this ambiguity. Since Article

121 as a whole deals with “islands,” it is possible to interpret the “rocks” mentioned in paragraph 3 to be a type of “island” as mentioned in paragraph 1. Indeed, it is logical to interpret the term this way, and this interpretation has become generally accepted. I additionally noted that, as can be inferred from paragraph 2, “rocks” are being referred to as a special type of “island.” So, while paragraph 1 is a definition of the term “island,” paragraph 3 is not a definition of the term “rocks.” I observed that this is a mere ambiguous expression rather than a legal concept. Furthermore, from the wording of paragraph 3 it can be inferred that there are two types of “rocks,” namely, those that can sustain human habitation or economic life of their own and those that cannot. If we were to discuss the matter, I said, definitions of these terms would be necessary.

Also during a group discussion at Conference B, Akiyama Masahiro, chairman of Japan’s Ocean Policy Research Foundation, noted that the provisions of UNCLOS apply only to the delineation of boundaries and that issues of sovereignty should be judged on the basis of ordinary international law (including customary law), effective control, and historical evidence. In response, Professor Lee of Inha University stressed that ordinary international law should be applied to sovereignty issues.

#### **4. Takeshima**

At Conference B, Professor Lee spoke of Takeshima (now occupied by South Korea, which calls it Dokdo) during a panel discussion on “Perspectives from the Periphery: Strategic Interests of Non-Claimant States in the South China Sea.” In addition to the countries with overlapping claims in the South China Sea, namely, China, Taiwan, Vietnam, the Philippines, and Malaysia, this conference included participants from Japan, South Korea, and the United States. This was in consideration of the fact that these three countries use the South China Sea and have strong interest in freedom of navigation there, along with the fact that Japan and South Korea face similar issues in the East China Sea, which they border.

Professor Lee spoke of the Japan-China Fishery Agreement, noting that when they concluded this agreement, the two countries had overlapping maritime claims,

and so they decided to shelve the issue of delineating their claims and not to refer to the delimitation of their respective waters. He cited cases of boundary delimitation and territorial issues in the South China Sea, stating that many of the islands in this sea might be of questionable status under UNCLOS 121(3) and suggesting that it would be better to focus on the historical background and bilateral relations between the parties concerned rather than invoking strict application of the UNCLOS provisions and framework.

Lee expressed skepticism toward the idea of submitting boundary or territorial disputes to international judicial settlement procedures, suggesting that it was preferable to rely on Asian approaches to dispute settlement and not to accept the doctrine of intertemporal law cited above. He then referred to Takeshima, asserting that the territory Japan was required to surrender under the San Francisco Peace Treaty included Takeshima and all the other islands in the relevant waters—in other words, that Japan had renounced its sovereignty over these islands.

OPRF Chairman Akiyama, who was one of the panelists on the same panel as Professor Lee, noted that the issues in the South China Sea must be settled through peaceful means on the basis of the UN Charter and UNCLOS, and since it is a semi-enclosed sea, he stressed that the countries involved should cooperate with each other in exercising their rights and fulfilling their obligations. He also rebutted Lee's comment, declaring that Takeshima and the Senkakus were not among the islands surrendered by Japan under the San Francisco Treaty.

I also spoke up in response to Professor Lee, noting that Takeshima is being illegally occupied by South Korea and that it is conceivable that Japan might seek judicial settlement of the matter, such as by once again submitting the case to the International Court of Justice.

I took the opportunity to offer a further rebuttal to Professor Lee: Takeshima was clearly not included among the islands Japan was required to surrender under the San Francisco Peace Treaty. I argued that the fact that Japan and the United States agreed in 1952 to designate Takeshima as a bombing range for US forces stationed in Japan under the agreement between the two countries, which was succeeded by the current Japan-US Status of Forces Agreement, showing that the United States also recognized this island as Japanese territory. Lee asked if the idea was for Japan to

submit only the case of Takeshima to the ICJ and not seek a judicial settlement from the ICJ regarding the Senkakus. I explained that the case of the Senkakus was entirely different from that of Takeshima since the Senkakus are not under occupation by another country.

Also at Conference B, in the discussions during the panel session on “Exploring Mechanisms for Dispute Resolution,” Professor Tony Carty of the University of Hong Kong<sup>4</sup> spoke about general theory as a scholar of international law, stating that the primary means of dispute settlement under international law is through peaceful resolution and that contemporary international law does not allow for aggressive claims. Citing the example of Takeshima, he noted the need for efforts for dispute resolution along with comprehensive economic cooperation so as to prevent the occurrence of fierce, sometimes emotional conflicts between China and other Asian countries over territory and the accompanying natural resources.

## 5. The Senkaku Islands

At Conference C, during a panel discussion on “Enduring Jurisdictional Disputes,” Tsinghua University Associate Professor Zhang Xinjun<sup>5</sup> delivered a presentation titled “The notion of dispute in international law and its relevance to the Diaoyu Islands dispute.” Zhang spoke about the incident in September 2010, in which a Chinese fishing vessel collided with Japanese Coast Guard patrol vessels in waters near the Senkakus. Noting that this incident has not often been examined from the perspective of the repercussions of Japan’s handling of it, Zhang talked about the Chinese view of the incident’s impact on the issue of sovereignty over the Senkakus and on the prospects for joint development by China and Japan of gas fields in the

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<sup>4</sup> Professor Carty holds the Sir Y K Pao Chair of Public Law at the Faculty of Law of the University of Hong Kong. His research focuses on international law, the theory of international law, the theory of autonomous regions within states, and human rights. He has little experience in the field of the law of the sea.

<sup>5</sup> Associate Professor Zhang is also deputy director of Tsinghua University’s Center for Law of the Sea Study; he has a doctorate from Kyoto University.

surrounding waters; he also asserted that the Japanese government's unilateral response violated the obligation under the UN Charter to resolve international disputes peacefully.

Zhang explained that the underlying issue in this case, where Japan arrested the captain of the Chinese ship and charged him with violating Japanese law, was the difference between the two countries' positions—Japan claiming that the Senkakus are an inherent part of its territory and there exists no issue of territorial sovereignty to be resolved; China asserting that a territorial dispute does exist. He further stated that the exclusion of reference to the territorial sovereignty from the joint press release of June 18, 2008, on the Sino-Japanese “principled consensus” concerning cooperation between Japan and China in the East China Sea showed that the Japanese government was taking an even more unilateral approach. And he criticized this Japanese response, asserting that, given the existence of a dispute over the Senkakus, it was unacceptable to respond unilaterally prior to reaching a final agreement.

What we see here is an argument that exists on a different level, based on different grounds. Associate Professor Zhang argued that Japan could not prove that a territorial dispute did not exist merely by denying its existence and that the matter should be judged objectively on the basis of available evidence. He also referred to Article 2(3) and Article 33 of the UN Charter, which call for the settlement of international disputes by peaceful means, claiming that Japan had violated this principle with its unilateral action against the Chinese ship captain based on domestic law.

Also at Conference C, as part of a panel session on “Maritime Security and the Limits of Maritime Jurisdiction,” Kim Suk-Kyoon, director general of the Korean Coast Guard's Planning and Coordination Bureau, delivered a presentation titled “Perspectives of maritime disputes between China and Japan in the East China Sea: Over the collision of a Chinese fishing boat with Japan Coast Guard ships.” Kim spoke about the same incident, suggesting it was a case of a “mixed dispute” and discussing it not from the perspective of Japan's exercise of jurisdiction but rather from the perspective of the historical background and the current interdependence of the two countries.

Kim expressed the view that old records of sea voyages by Chinese missions and maps showing the boundary between China and the Kingdom of Ryukyu (Okinawa) seemed to favor China's claim to the Senkakus. He went on to refer to the 1895 Treaty of Shimonoseki, the 1951 San Francisco Peace Treaty, and the 1960 Japan-US Security Treaty, suggesting that the Senkakus were included in the territory of Taiwan that China ceded to Japan under the Treaty of Shimonoseki and that Japan renounced under the San Francisco Peace Treaty. And he expressed doubt about the Senkakus being included in the territory placed under US administration as part of the Nansei Islands by the San Francisco Peace Treaty and that reverted to Japanese administration in 1971.

Kim also referred to the aforesaid 2008 Sino-Japanese "principled consensus" and explained that while the issue of sovereignty over the Senkakus has a historical background, at present it is just one of a number of issues between China and Japan in the East China Sea, along with the delimitation of the two countries' EEZs and the continental shelf between them, the development of natural resources in these waters, the securing of sea lanes, and other matters, all of which exist not in isolation with each other but as a set of intrinsically interrelated issues. He noted that, aside from the sovereignty dispute between China and Japan, the East China Sea attracted great interest from other countries, such as the United States, a country outside the region, and nearby South Korea, Taiwan, and Russia, all of which seek freedom of navigation and safe passage for their ships and for their naval forces in these waters. He further explained that while China and Japan are working to keep their rival claims in this sea from leading to an armed conflict or causing their bilateral relationship to deteriorate, the moves by various countries in the East China Sea are extremely complex, involving economic, political, and security issues, and that a quick settlement was unlikely.

OPRF Chairman Akiyama and I rebutted the contents of the presentations by Associate Professor Zhang and Director General Kim. We explained that the Senkakus were part of the Nansei Islands, which have historically been part of Japan, not part of the territory of Taiwan and the Penghu archipelago (Pescadores) that China ceded to Japan under the Treaty of Shimonoseki. Therefore, they were not included among the islands that Japan renounced under the San Francisco Peace

Treaty; they were placed under US administration as part of the Nansei Islands by that treaty and were included in the territory that reverted to Japanese administration under the 1971 Japan-US agreement on the return of Okinawa. Chairman Akiyama also pointed out that Japan had officially incorporated the Senkakus by a cabinet decision in 1895 following repeated surveys of the islands; this move fully satisfied the conditions for occupying *terra nullius* (land belonging to no one) under international law, and no country challenged Japan's sovereignty from then until the 1970s. We noted that the assertion of claims to the Senkakus occurred after it became known in the 1970s that the seabed around these islands might contain deposits of oil and gas.

Chairman Akiyama and I also spoke about the collision between the Chinese fishing boat and two Japanese Coast Guard vessels. Though the panelists had spoken about this as if it was an accident, in fact it was a deliberate collision by the Chinese boat, a very dangerous act, and since it took place within Japan's territorial waters, it was handled duly and strictly as a case of obstruction of the execution of official duty. Japan's response was not a violation of the spirit or principle of the UN Charter's call for peaceful settlement of disputes, we stressed, noting that it was the act of the Chinese boat that represented a threat to peace and safety.

## **6. Conclusion**

The various issues between Japan and China involving the East China Sea, which were highlighted by the September 2010 fishing boat collision incident, concern not just sovereignty over the Senkakus but also such related issues as the demarcation of EEZs and the continental shelf and the development of natural resources. Why did Kim Suk-Kyoon, a senior officer of the Korean Coast Guard, speak up on the issue of the Senkakus even though South Korea is not a party to the issue in question? It seems to me that this reflects both South Korea's interest in the peace and safety of the East China Sea as a country in the region and its special interest in the course of this issue and moves to settle it as a country that has a similar issue with Japan over the sovereignty of Takeshima—with a bilateral agreement concerning the joint

development of the southern part of the continental shelf between them that leaves the delimitation unsettled.

Attending these international conferences on the law of the sea, I was struck by the fact that China's clout as a superpower boasting constantly growing economic might and great military strength will inevitably cause paradigm shifts in every aspect of its bilateral and multilateral relations. Up to now Japan has been pursuing a course of prioritizing economic ties in its bilateral relationships not just with China but with other countries as well, keeping them separate from political affairs and putting territorial disputes on hold. But the discussions of the Senkaku issue at these conferences further strengthened my view that Sino-Japanese relations cannot fly on the single engine of economic ties; if Japan continues on the current course, we cannot achieve progress or solve the outstanding problems that Japan has with China and with other countries as well. I sensed that Japan needs to come to grips with the fact that political, economic, and security issues form a single complex web.

Before attending these conferences, I believed that as events organized by the Law of the Sea Institute and similar academic institutions, they were to be forums for debate and exchanges of views among scholars of the law of the sea and international law, along with some lawyers and others professionally concerned with the law of the sea. They are not diplomatic meetings, and the participants do not represent countries; they make presentations and express opinions in an individual capacity or as representatives of their organizations. In practice, however, I encountered a significant number of cases in which participants departed from the discussion of the law of the sea and international law to present their own countries' cases concerning land and sea territories. When the subject turns to land and sea territories, prominent scholars of the law of the sea and international law may become avid proponents of their own country's claims. One can argue the rights and wrongs of their adopting such a posture, but in any case I felt that the discussions revealed the essence of the territorial issues and the interests of the countries in question. Hearing comments of this sort, I found myself wondering whether the people of Japan have correctly understood these territorial issues or if the Japanese government has given them a proper explanation of the course of its bilateral

negotiations on these matters and how the Japanese and rival claims are positioned in terms of international law.

As I noted above, the UN Convention of the Law of the Sea was adopted in 1982 as a result of the package deal following the Third United Nations Conference on the Law of the Sea (UNCLOS III), an international conference that went on for almost 10 years. It was unmistakably a case of adopting ambiguous expressions in some of the provisions on which differences of opinion remained, including Article 121 (Regime of islands) and the provisions on archipelagos, baselines, polar seas (ice-covered areas), and the limits of the continental shelves. Normally one would strongly hope for international conferences on the law of the sea to serve as forums for examination and discussion of problems in such provisions based not on political judgments but on consideration of the law of the sea and international law. Many of the scholars, diplomats, and others who participated in the UNCLOS III negotiations and drafting of the convention's provisions are still alive and well. This year marks the thirtieth anniversary of the adoption of the convention. And there is now a real prospect that the United States will ratify it before the end of the year.<sup>6</sup> I believe that the OPRF should consider the possibility of joining with the Law of the Sea Institute and perhaps other organizations in holding a conference for discussion among members of different generations about this subject in the near future.

Finally, I would note that most of the participants in the above conferences delivered very substantive presentations accompanied by reference materials they prepared by drawing on published papers and other reference works, relevant articles from newspapers and magazines, and information from TV programs. I was deeply impressed by the way they prepared their cases extensively before the conference, putting together detailed arguments built on research based on these materials.

*(The author is no longer with the OPRF as of April 2013.)*

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<sup>6</sup> Based on information from the office of US Senator Richard Lugar (Indiana).

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